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

Claim No. AC-2024-LON-002305

IN THE MATTER OF A Claim for Judicial Review

BETWEEN:

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

Claimant

and

SECRETARY OF STATE FOR TRANSPORT

Defendant

DEFENDANT'S DETAILED GROUNDS OF RESISTANCE

References to bundles are to the bundles are to the original Claim Bundle ("OCB") and the Permission Hearing Bundles: Core Bundle ("CB") and Supplemental Bundles Vol. 1 and 2 ("SB").

A. Introduction

1. By this claim, the Claimant challenges the Defendant's decision to designate the National Networks National Policy Statement (**"NNNPS 2024"**), taken on 24 May 2024 ("**the Decision**"), following a review of the then extant National Policy Statement for National Networks (laid before Parliament in December 2014 and designated in January 2015) (the "**NPSNN 2015**") pursuant to s.6 of the Planning Act 2008 (**"PA 2008"**). Permission was refused on the papers by order of the Hon. Sir Peter Lane on 24 September 2024. The Claimant renewed its application for permission on grounds 1-3 only and permission was granted in respect of those grounds by the Hon. Mrs Justice Lieven on 3 December 2024.

2. The NNNPS 2024 sets out 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"**)

under the PA 2008. NSIP road development affects the strategic road network (**"SRN"**), which comprises motorways and some A roads (where National Highways is the relevant highway authority). NSIP road development includes: building new roads and carrying out improvements to existing roads on the SRN.

3. The NNNPS 2024 is a planning policy document for such projects. It does not address, nor does it purport to address, transport policy and strategy more widely (which include matters outside of the scope of the PA 2008, which only concerns NSIP development).[1] Nor does it set out, or purport to set out, all of the Government's policies for achieving decarbonisation of the transport sector and meeting statutory carbon budgets (which are covered by, among other things, the Defendant's Transport Decarbonisation Plan (**"TDP"**) and the Secretary of State for Energy Security and Net Zero's policies in the Carbon Budget Delivery Plan (**"CBDP"**)).

4. The Claimant's grounds 1 and 2 are based on a fundamental misunderstanding of that basic point, and in reality amount to nothing more than disagreements with the merits of the policies contained in the NNNPS 2024 and (along with ground 3) the judgments made by the Defendant in formulating those policies which do not found any proper basis for quashing the Decision on a judicial review claim.

5. Each of the three grounds should be dismissed. In summary:

    a. Ground 1: Under this ground the Claimant contends that there was an unlawful failure conscientiously to consider consultation responses advocating for modal shift and demand management. This ground is misconceived in principle and on the facts. In relation to principle, as set out above, wider transport policy (in particular those matters upon which the Claimant seeks to rely) is addressed in other government policies. The Defendant properly differentiated between points raised by the Claimant that were within the scope of NSIP development policy and those which were not. As explained in Dr Catherine Miller's second statement, points raised by the Claimant relevant to the statement of need were taken into account and, in some cases, the NNNPS 2024 was updated to account for them. Otherwise, the Defendant, having considered the consultation responses, was entitled to regard

[1] The Claimant acknowledges this in the Reply to the Summary Grounds of Resistance at paragraph 4, but nonetheless continues to allege a failure conscientiously to consider those wider transport strategy matters.

the Claimant's desires about wider transport policy as outside the scope of the proposed NNNPS 2024.

b. Ground 2: this ground is based on a basic misunderstanding and/or mischaracterisation of the judgment of Sheldon J in *R (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. But in any event, in designating the NNNPS 2024, the Defendant 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 one in respect of which no sound basis for challenging it is identified. Further, there is also no basis for alleging 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. That is what the Secretary of State has done. There is no requirement to give reasons about other wider transport policy or strategy addressed elsewhere. Proper, adequate, and intelligible reasons were given in the Government Response and other decision-making documents in any event.

c. Ground 3: the minor changes to policies on the assessment of carbon emissions to which reference is made were 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. There was no obligation to re-consult under the either the PA 2008 and/or the Environmental Assessment of Plans and Programmes Regulations dealing with Strategic Environmental Assessment ("**the SEA Regulations**") and the Defendant was entitled to designate the NNNPS 2024 without carrying out further consultation. The Claimant is wrong to allege that the changes were not brought to the Minister's attention: they were identified in the briefing material and were in any event there to be seen as between the draft and final versions of the NNNPS (the Secretary of State saw both).

B. Factual Background

6. The relevant factual background is set out in the first statement of Dr Catherine Miller (see, in particular, section A of her statement at [9]-[43] **[CB/358-361]** (**"CM/WS1"**)).

7. The Defendant has also filed a second statement from Dr Miller. This provides further factual detail relevant to the grounds of challenge with permission following the service of the Claimant's Reply (**"CM/WS2"**). The draft NNNPS 2024, including the statement of need and its overall policy objectives, were prepared with input from Ministers and subject to an Appraisal of Sustainability incorporating the SEA requirements[2], a Habitats Regulations Assessment (**"HRA"**), public consultation, and Parliamentary scrutiny, including an inquiry by the Transport Select Committee ("**TSC**") and a debate and vote in the House of Commons.

8. By way of a summary chronology only:

    a. On 22 July 2021 the Defendant published a written ministerial statement announcing a review of the NPSNN 2015 **[CB/224]**. 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."*

    b. 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.[3]

[2] Pursuant to the Environmental Assessment of Plans and Programmes Regulations 2004
[3] CM/WS at [25] – [36] **[CB/362-364].**

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

d. A draft revised NNNPS, draft AoS and draft HRA were published and consulted on between 14 March 2023 and 6 June 2023.

e. The draft NNNPS was then updated in light of consultation responses and the report from Parliament's TSC dated 20 October 2023. That revised NNNPS was published on 6 March 2024 and a debate in the House of Commons was held on 26 March 2024 and the House of Commons approved the revised NNNPS. The AoS was also updated and published on 6 March 2024.

f. 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.[4]

g. 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 February 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 draft Third Road Investment Strategy ("**RIS3**"), which sets the funding for improvements to the strategic road network, including NSIP development (see CM/WS1 [60]-[63] **[CB/371-372]**). The RIS3 assessment carried out in October 2023 concluded 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

[4] CM/WS at [41-43] **[CB/365]** and Post-Adoption Statement at section 5 [**CB/322]**.

tailpipe carbon emissions, and the existing (and future predicted) baseline traffic forms the vast majority of emissions now and in future years.

h. Ministers were briefed again on 23 April 2024 and officials recommended that Ministers decide to designate the NNNPS 2024 (see CM/WS1 [64] **[CB/372]**).

i. Following the judgment in *R (Friends of the Earth) v SSENZ* [2024] EWHC 995, Ministers were briefed again on 13 May 2024 (updating the earlier submission on 23 April 2024) and advised that there remained high confidence in delivery of the TDP, the Zero Emission Vehicle Mandate (which delivers significant reductions in carbon emissions) had come into force on 3 January 2024, that carbon emissions from the construction and operation of the strategic road network represented a small proportion of overall UK domestic emissions[5], 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 (CM/WS1 at [64] **[CB/372]**).

j. The NNNPS 2024 was designated as a National Policy Statement on 24 May 2024.

9. Further detail is set out below in response to the three grounds of challenge advanced by the Claimant.

C. Legal Framework

Planning Act 2008

10. The PA 2008 sets out 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 Defendant the power to designate a statement as an NPS for the purposes of the PA 2008. The background to the Act and the process of designating NPSs was set out in *R (Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52 at [19]-[38].

11. Section 5(3) of the Act 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

[5] See further detail at CM/WS1 [44-48] [**CB/366**].

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.

12. 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 (Spurrier) v Secretary of State for Transport* [2019] EWHC 1070 at [115]-[123].

13. 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.

14. 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.

15. 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 proposals as set out in the earlier proposal."*

16. 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).

Challenges to policy

17. 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*": *Newsmith Stainless Steel Ltd v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC 74 (Admin) at [8]; the principles in *Newsmith* were held to apply to challenges in NPSs in *Spurrier* at [172].

18. In *R v Ministry of Defence, ex p Smith* [1996] QB 517 at p.556B Sir 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."*

19. The standard of review that courts 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 (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)."* [6]

20. An enhanced margin of appreciation applies 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 [149] and [176]-[179].

21. It is also now very well-established that it is insufficient for a claimant simply to say that a decision maker failed to take into account a material consideration. A material

[6] See also *R (Fighting Dirty) v EA & SSEFRA* [2024] EWHC 2029 (Admin) where the Court identified factors such as political or policy judgment as suggesting that a low intensity of review was justified.

consideration is only something which is not irrelevant and which a decision maker is empowered to take into account. But a decision maker does not need to advert at all to a particular consideration which could be material, unless the material consideration is so obviously material that the decision maker was under an obligation to refer to it. Alternatively, a decision-maker may turn their mind to such a consideration, but decide to give it no weight: (see eg *Tesco Stores v Secretary of State for the Environment* [1995] 1 WLR 759 at 780. The claimant must show that the decision maker was expressly or impliedly required by the legislation to take the particular consideration into account, or that, in the circumstances of the case, the matter was so obviously material that it was irrational for the decision maker not to have taken it into account: see e.g. *R(Friends of the Earth Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841 (Admin)" at [116]-[121]. As also identified by the Supreme Court, a decision-maker will not generally commit an error of law if it fails to take into account a potentially material consideration unless obliged to do so by legislation or policy or because that consideration is so obviously material that not to take it into account would be irrational: see *R(Samuel Smith Old Brewery (Tadcaster) v North Yorkshire County Council* [2020] UKSC 3; [2020] [30]-[32].

Consultation

22. As set out above, section 6A PA 2008 only requires re-consultation on amendments to a draft national policy statement where the Secretary of State considers "*the modifications do not materially affect the proposals as set out in the earlier proposal."* It is clear from the statutory language that the question of what is and is not material is a matter of judgment for the decision maker. The test in 6A PA 2008 reflects and codifies well-established principles in common law, namely that there is no general duty to re-consult on policies that have previously been consulted on absent material changes in circumstances, particularly where changes are made in response to consultation responses (see *R (on the application of Smith) v East Kent Hospital NHS Trust* [2002] EWHC 2640 (Admin) and *R v London Borough of Islington, ex p East* [1996] ELR 74).

23. The principles applicable to a lawful consultation are well-established (see *R (Moseley) v Haringey LBC* [2014] UKSC 56 at [25]-[26]). Those principles apply to consultation responses that are within the scope of the consultation carried out, applying the standard of

what a reasonable reading considering the consultation document would have understood (see *R (Stephenson) v SSCLG* [2019] EWHC 519 (Admin) at [43]).

D. Response to Grounds of Challenge

Ground 1: Alleged unlawful consultation on the draft NNNPS 2024

Scope of the Consultation

24. The Claimant is simply wrong in its assertion that, interpreted objectively, the scope of the consultation on the draft NNNPS 2024 extended to transport policy matters of demand management and modal shift. The Claimant is also wrong to allege, in any event, that consultation responses advocating for these matters were not conscientiously considered and that the Government Response to Consultation (**"the Government Response"**) incorrectly rejected calls for such policies on the basis that they were outside of the scope of the consultation. The Claimant's allegations are based on an unfair reading of the documents and a basic misapplication of the law.

25. First, the Claimant fails to appreciate the nature of the NNNPS 2024: it is a planning policy document setting the framework for decision-making on NSIP development, rather than being a document for setting out other transport policies or strategies of a more general scope. This basic point would necessarily be at the forefront in the mind of the putative reasonable reader interpreting the scope of the consultation on the draft in light of the relevant statutory scheme (applying the principles in *Stephenson*). The scope of the consultation was made clear from the outset:

> *"The principle purpose of this consultation is to identify whether the draft revised national policy statement presented is fit for purpose. This means whether it provides a suitable framework to support decision making for nationally significant infrastructure road, rail and strategic rail freight interchange projects."* **[CB/317]**

26. It is plain on the face of these words, but also by reference to the purpose of any NPS made under the PA 2008, that the purpose of the consultation was to seek views on the fitness of the NNNPS 2024 as a planning policy framework document for NSIPs. That is whether the NNNPS 2024 supports "*decision making for nationally significant infrastructure*"; it did not invite responses on general transport policy.

27. It is clear to any reasonable reader that the scope of the consultation was rightly on the fitness for purpose of the NNNPS 2024 as a planning policy document setting the

framework for decision-making on NSIP development (see *Stephenson* (above)) rather than other policies or strategies of a more general scope. This is a point that appears to be acknowledged by the Claimant (see C's Reply/4), but nonetheless it has failed clearly to distinguish between wider transport strategy matters and matters which properly fell within scope of the consultation (see below).

The Claimant's Consultation Response

28. It is wholly unclear from the Claimant's pleaded case which particular aspects of its consultation response it alleges were (a) in scope and (b) wrongly dismissed as being outside of the scope of the NNNPS 2024. The Statement of Facts and Grounds refers generally to "modal shift" and "demand management" (see SFG/19 and 32-40) but does not identify parts of its consultation response it alleges were not lawfully considered. The Claimant's Reply places emphasis on the aspects of its consultation response which advocated for changes to the statement of need and submissions as to a perceived inconsistency between the NNNPS and the TDP (see C's Reply/4-6).

Consideration of modal shift and demand management

29. As explained in Dr Miller's second witness statement, consultation responses advocating for different approaches to the statement of need were considered to be within the scope of the draft NNNPS consultation and were conscientiously considered, with updates made to the final NNNPS 2024 in certain respects. Officials within DfT were entitled to reach a judgment as to matters which were considered within scope of the NNNPS 2024 as a planning policy document and matters which related to wider transport strategy.

30. The Claimant now places particular emphasis on aspects of its consultation response which criticised the statement of need (see above). In those aspects of the response, the Claimant advocated for modelling a wider range of scenarios to reflect current environmental commitments and sought to propose modal shift as a solution to congestion problems on the network. The Claimant also advocated against further road building. As explained by Dr Miller, the statement of need seeks to address a range of problems on the SRN, not limited to congestion and does not seek to cater for any particular level of traffic growth. The points raised by the Claimant relevant to the statement of need were taken into account, conscientiously considered and responded to in the Government Response at 2.22 **[CB/312]**:

"*Following consultation, the government remains confident that the revised NNNPS sets out an appropriate needs case for development strategic road and rail infrastructure and that development may be needed to respond to a wide variety of challenges which national networks may face. While other interventions will support effective use of the SRN (and local roads), these may not be sufficient in addressing specific issues at particular locations. In light of consultation remarks relating to predict and provide, the revised NNNPS has been updated to refer to the Common Analytical Scenarios used in the National Road Traffic Projections other than the core scenario, focusing on scenarios which have forecast lower levels of traffic growth than the core scenario. This is not intended to provide a "prediction" of traffic growth; instead the inclusion of these scenarios suggest that traffic will continue to grow to some extent even under lower growth scenarios. The government is clear that the draft NNNPS is not based on a predict and provide model - it has not identified a specific level of traffic growth nor has it identified a volume of development necessary to meet that growth. The NNPS has been updated to make that position more explicit…*"

(see also CM/WS2 at [28]-[35])

31. The Government's position that modal shift and wider transport strategy policies cannot address all issues on the SRN is also set out in terms in the NNNPS 2024 itself at 3.42-3.45 **[CB/130]**. In particular, it is made clear that policies to improve the local road network (such as active travel and public transport use) may impact on demand for the SRN but these interventions: "*may not be sufficient to address all the challenges of the SRN and may require specific interventions brought forward under the NSIP regime in specific locations in order to address those challenges.*"

32. However, other aspects of the Claimant's consultation response related to wider transport policy matters which the Defendant was entitled to reach as such when dealing with NNNPS 2024 as an NSIP planning policy document. For example:

    a. Throughout the Claimant's consultation response there are calls for policy measures to improve public transport and promote active travel **[SB2/85]** (albeit without specifics as to what these might be) and submissions relating to a perceived failure to reflect policies in the TDP in the draft NNNPS (see e.g. p.3, p.5 and 7 [CM2/21, 23, 25]). As Dr Miller explains, commitments to active travel in the TDP relate to short urban journeys and not travel on the strategic road network (see CM/WS2 at [26]). These polices in respect of active travel and bus use are dealt with through other government policy (see CM/WS1 at [75] and CM/WS2 at [40] and as acknowledged in the NNNPS 2024 itself at e.g. 3.42). In any event, the NNNPS 2024 clearly explains that implementing these types of policy on the local road

network are insufficient to address specific issues on the SRN (at 3.42-3.45, see above).

b. The Claimant's consultation response included calls for demand management, which relates to measures seeking to discourage car use which are principally fiscal in nature such as road user charging (see p.17 **[SB2/85]**). Fiscal matters are ultimately for the Treasury as made clear in DfT's evidence to the Transport Select Committee (CM/WS2 at [26]). At the relevant time, demand management did not form part of Government Policy (see CM/WS2 at [41]).

33. The Defendant was entitled to the view matters of general transport strategy were outside of the scope of the NNNPS 2024 that the Defendant was proposing. The Claimant's challenge in this respect boils down to a challenge to a rationality of such judgments on how to deal with potential considerations and the challenge has not merit. But in any event, such responses were conscientiously considered (cf the issues raised in *Stephenson* where responses were not considered at all) and reasons for rejecting them set out in the Government Response at 2.9-2.12 **[CB/311]**, 2.21 **[CB/312]**, 2.50 **[CB/313]** and reasons why NSIP development is still needed, notwithstanding existing wider transport measures, are given in the NNNPS 2024 itself at 3.42-3.45 **[CB/130]**. The Government Response should be read fairly and as a whole. It is clear from the Government Response that entirely legitimate reasons were given for treating such issues of modal shift and demand management as matters of general transport strategy in circumstances where the NNNPS 2024 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."* [7]

[7] Further, as explained by Dr Catherine Miller CM/WS1 at [31] **[CB/363]**, road charging is a taxation matter for HM Treasury.

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…*"

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.*"

34. The Defendant therefore was entitled to distinguish between those matters which he considered to be for the NNNPS and those matters which he considered which were not, being matters of judgment for the Defendant. This is clear from a fair reading of the Government Response to the Consultation, bearing in mind the general nature of the response made by the Claimant and its own failure to distinguish between planning policy and other general transport policy.

35. The Claimant attempts to rely on references to modal shift in the NNNPS in support of an argument that modal shift policies generally must be within scope of the draft NNNPS consultation. Such references need to be read in their proper context. They are references to wider government policy (e.g. to encourage a shift from road to rail in the freight sector) expressed elsewhere which reflects a perfectly rational approach for the Defendant to adopt in the circumstances. Identification of places where such matters are dealt with in other policy is clearly not unlawful. Nor does it have the effect of making such considerations mandatory ones to include within the NNNPS itself, nor requiring the scope of the Consultation to be expanded so as to require the Defendant to treat considerations of wider transport policy matters such as road user charging or demand management measures (where covered by other Government policy or not) as ones that have to be addressed in the NNNPS. It obviously cannot be the case that any time an established policy position is

referenced in a draft policy document dealing with something more specific (here policy NSIPs), that any consultation on that draft document must include consultation on that established policy position.

36. It is therefore incorrect to assert that the Defendant did not give proper and conscientious consideration to responses received. For all of the above reasons, it is submitted that ground 1 should be dismissed.

S.31(2A) Senior Courts Act 1981

37. Further, and in any event, even if notwithstanding the above the Court considers that there has been a failure conscientiously to consider the Claimant's consultation response (which is emphatically denied), it is submitted that this is a clear case where it is highly likely that the decision would not have been substantially different ((see *R (Police Superintendents' Association) v HM Treasury* [2021] EWHC 3389 at 199-206). The Defendant relies on or all of the following matters:

    a. The themes raised in the Claimant's consultation response were set out for the Minister in a variety of documents and formed part of the briefing material provided in advance of the decision to designate the NNNPS 2024. First, the TSC's Recommendation 5 sought modelling of a wider range of scenarios and this was specifically addressed in the Government's Response to the TSC (a draft of which was provided to the Minister in advance of the decision being taken, see CM/WS2 at [30] and submission dated 6 February 2024 **[CM1/17]**). Second, the Claimant's call for policies to reduce demand for car transport was specifically drawn to the Minister's attention in the EPPS assessment and further advice and information was provided to the effect that officials considered the policies in the NNNPS were consistent with Government's net zero obligations.

    b. There was already a policy position in Government as to demand management (CM/WS2 [26] and [41]).

    c. The NNNPS 2024 is consistent with and expressly refers to measures to encourage modal shift on the local network and reasons were given as to why, notwithstanding these policies, there remained a need for development on the SRN.

d. The Claimants themselves did not advocate for any specific policy wording to be adopted in the NNNPS 2024 anyway.

38. It is therefore submitted that relief should be refused in any event even if any error of law could be established.

Ground 2: Alleged failure to provide lawful reasons for adopting a policy approach in the NNNPS 2024 that relies on the effective delivery of non-planning transport decarbonisation policies set out in the TDP notwithstanding the judgment in R (Friends of the Earth)

39. 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 *R (Friends of the Earth) v Secretary of State for Energy Security and Net Zero* [2024] EWHC 995. This ground is unfounded. Again, it appears to be nothing more than a rationality challenge to matters of judgment where nothing like the very high threshold of irrationality can realistically be advanced. Further or alternatively, it is premised on a basic misreading and/or misapplication of the conclusions of Sheldon J in the *Friends of the Earth* judgment. This ground was reformulated in the Claimants' renewal skeleton argument, where the Claimant sought to focus its submissions on an argument that the NNNPS relied upon effective delivery of the TDP in full, and an assertion that some species of legal error arises in light of the decision of Sheldon J in *Friends of the Earth.* These contentions have no merit.

40. As to (a), the Claimant is simply incorrect and misconceived to assert at SFG/46 that the Defendant has "*no evidential basis for concluding that the TDP policies would be delivered in full*".

41. First, his 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 the whole package of policies and proposals set out Carbon Budget

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

42. Second, and in any event, 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 **[SB1/101]**). 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.

43. Third, and also 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 **[SB1/217]**:

> *"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."*

44. This point was also made at para 2.11 of the Consultation Response in respect of consultees calling for demand management and modal shift **[CB/311]**.

45. 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* rationality grounds. There is simply no basis for asserting that such an evaluative judgment is in any way irrational.

46. As to the allegation that proper reasons were not delivered in respect of rejecting DDM and modal shift to become 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. In its renewal skeleton, the Claimant sought to advance an (unpleaded) argument that the *Friends of the Earth* itself should have been addressed in the reasons for the NNNPS, on the basis of an assertion that it was a 'principal important controversial issue' and officials considered the need to brief the Minister about it (see paragraph 58). This is unsustainable. There are specific policies directed at carbon emissions, consideration of national carbon budgets and the Paris Agreement in the NNNPS (see paragraphs 5.26ff **[CB/165]**) (and reasons for those policies). Delivery risk of wider government decarbonisation policies did not need to be addressed in the NNNPS as a matter of principle, and particularly in circumstances where the Defendant concluded that the decision in *Friends of the Earth* should not alter his policy approach. No proper basis is identifying any error of law. In any event, delivery risk was addressed at paragraph 2.11 of the Consultation Response in respect of consultees calling for demand management and modal shift **[CB/311]**.

47. The reality is the Claimant simply disagrees with the policy approach in the NNNPS, and the quintessentially evaluative judgment made on the delivery risk of those policies. Such disagreements do not form the basis of sustainable or legitimate grounds of judicial review.

48. Finally, as to the suggestion that the Defendant did not comply with the requirement to have regard to the desirability of mitigating and adapting to climate change in s.10(3)(a) PA 2008 in this respect, this is patently wrong. That is clear from NNNPS 2024 itself, the

Government Response and Government Response to the Transport Select Committee. 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)).

49. For these reasons, the Defendant submits that Ground 2 should be dismissed.

Ground 3: Alleged failure to re-consult on the revised draft NNNPS following material changes as a matter of fairness and the Defendant failed to decide for himself whether re-consultation was required

50. Under this ground 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 PA 2008. Those changes relate 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.

51. The changes were plainly not material, as is clear from the facts and the proper application of the relevant legal principles. As to each aspect of the policy:

    a. The Materiality Test: The Defendant 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 **[SB1/174]**). A draft of the Government Response to the Transport Select Committee was considered by the Defendant before the NNNPS 2024 was adopted and therefore formed part of his consideration as to the materiality of the changes. The reintroduction of the 'materiality test' test was also outlined in a summary of the changes to the NNNPS presented to the Minister in Annex G of the 6 February 2024 submission **[SB1/373]**. Even if there were any requirement for the decision-maker to consider changes for the purposes of s.6A PA 2008 for themselves (which is not accepted in principle), they were personally considered by the Secretary of State in this case anyway. 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 Holgate J (as he then was) in *R (Save Stonehenge World Heritage Site Ltd) v Secretary of State for Transport* [2024] EWHC 339 at 255, in circumstances where the interpretation of policy is 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 **[CB/322]**.[8] Given all of the above, there was no need to re-consult and the Secretary of State, advised by officials, was lawfully entitled to conclude that the changes were not material (see also paragraph 16 of the EPPS **[SB1/253])**.

b. Regional and 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*"

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 (Boswell) v Secretary of State for Transport* [2024] EWCA Civ 145). It was not

[8] Contrary to the Claimant's submission in its renewal skeleton argument at paragraph 76, officials did not conflate the conclusions of the AoS with the question of whether changes were or were not material. They reached a separate conclusion on materiality, which is supported by the findings of the AoS that the changes make no difference to the AoS assessments.

judged to be material, nor was it material. Should there be relevant and applicable statutory regional targets in the future, the NNNPS 2024 caters for that scenario.

52. Second, and in any event, these were changes made in light of responses to the consultation and process of Parliamentary scrutiny (see *Smith* at 65 and *East* above), and were merely clarificatory of the position that always existed in the draft policy or at law. Contrary to the Claimant's submissions, the differences between the draft and final versions were seen by the Defendant and the briefing material drew the relevant changes to the Defendant's attention (see CM/WS2 at [50]).

53. The Claimant does not now appear to rely on the SEA Regulations as adding anything over any requirement to re-consult in the PA 2008. That is correct for the reasons maintained by the Defendant in its Summary Grounds of Resistance (see [SGR/40-41]).

54. For the above reasons, the Defendant submits that Ground 3 should be dismissed.

E. Conclusion

55. For the reasons set out above, the Court is invited to dismiss this claim for judicial review on all grounds.

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Rose Grogan

Daniel Kozelko

39 ESSEX CHAMBERS

4 February 2025