



Briefing on:

TAN's challenge to roads policy

3 December, 2024

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Introduction

On Tuesday 3 December 2024, Transport Action Network (TAN) will be at the High Court seeking permission for a judicial review of the National Networks National Policy Statement (NNNPS), which primarily sets policy for road schemes. This briefing sets out the context for the court hearing, then summarises the key issues in the case. A simple explanation can be found on our crowd funder page: [Avoid the road to climate breakdown!](#)

The key legal issues include:

1. Whether ministers could ignore consultation responses that referred to modal shift and demand management, despite modal shift being the Transport Decarbonisation Plan's (TDP) first strategic priority.
2. Whether in approving the road-building policy ministers could rely on effective delivery of the TDP, "primarily" the Zero Emissions Mandate, despite the High Court ruling the Carbon Budget Delivery Plan unlawful due to its delivery risks, as well as ministers cancelling, cutting back and delaying many other key TDP policies since it was published.
3. Whether ministers were required to reconsult after having made material amendments to the consultation draft, specifically restoring the 2015 test on carbon emissions and removing the references to local and regional carbon budgets, without providing any opportunity for comment.

TAN first wrote to the Secretary of State for Transport (SoSfT) in March 2020 to ask for a review of the 2015 NNNPS in light of net zero being written into law. After over a year of campaigning and [two judicial reviews](#), finally [a review of the NNNPS was announced in July 2021](#), alongside publication of the Transport Decarbonisation Plan (TDP). The review was justified on the basis of stricter climate targets and "most directly the new, more ambitious policies outlined" in the TDP.

Consultation on a new draft NNNPS did not however start [until March 2023](#). That June, [the Climate Change Committee's annual report](#) called for a systematic review of road projects, to ensure they were only "taken forward only if they meaningfully support cost-effective delivery of Net Zero and climate adaptation". The House of Commons' Transport Committee held an inquiry, [concluding that October that the draft required amendments to bring it in line with net zero](#).

Yet [Conservative ministers rejected recommendations by experts and MPs](#), deciding to do the opposite by writing back in the previous, pre net zero climate policy into [the final NNNPS](#). This said that carbon impacts of a road scheme should be ignored by decision-makers unless the emissions it causes are so significant that they risk breaching the UK's

entire carbon budget. As this is impossible in practice, it is effectively a fake safeguard. The Conservatives' climate chicanery continued right to the end: Ministers held a cursory debate minutes before Easter recess, which only 11 MPs were able to attend, before designating the NNNPS on the afternoon when Parliament broke up for the election.

TAN had no choice but to bring a legal challenge within the strict six week time limit, filing a claim on the day of the general election. After that deadline, the NNNPS is unchallengeable in the courts and unquestionable in planning inquiries and examinations. This campaign is not simply about climate policy, however important that is. [TAN's consultation response](#) highlighted how flawed the NNNPS is for a range of issues, from road safety, congestion, air quality, nature recovery, sustainable transport and devolution.

What is the NNNPS and why is it important?

In order to accelerate approvals of major infrastructure projects, the Planning Act 2008 created a new type of policy, called a National Policy Statement. By setting out relevant government policy in one place, and then making it unquestionable, it was intended to make planning inquiries, known in this context as examinations, faster and easier to engage with. The NNNPS covers the "national networks" of road, rail and rail freight interchange schemes above certain thresholds, which are as a result deemed Nationally Significant Infrastructure Projects (NSIPs).

The NNNPS includes a planning presumption in favour of road-building, effectively [the opposite of the Welsh approach](#), which requires road proposals to meet a series of strict tests. By contrast, the NNNPS stacks the scales of justice against communities seeking to challenge questionable road projects. It also, as explained above, instructs decision-makers in the planning system to ignore carbon impacts of road schemes, in particular user emissions, on the basis that the government supposedly has a credible plan to tackle emissions on an economy-wide basis. Despite the planning system having huge potential to cut emissions, this is an ideological decision to rely on technology instead in the face of advice that this would not be enough. With transport already the biggest sector and set to increase (if including aviation and maritime) to over 40% of UK emissions by 2040, this is a reckless approach to all our futures.

According to the [DfT's response to its consultation](#), 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". It argues that many of those responding to its consultation did not understand that the NNNPS is not a transport strategy, and therefore their comments can be disregarded. This is doubly disingenuous as first, the lead official on roads policy told MPs' inquiry that "We are struggling with the broader strategy, which I think is out there." If the lead official is struggling, how are wider

participants in the planning process supposed to fare? Second, in the DfT's own words the TDP outlined policies with the NNNPS providing further guidance and clarity".

One crucial aspect is how the NNNPS refers to the [National Road Traffic Projections](#) (N RTP), a set of seven scenarios about how traffic levels might change far into the future. Because motor traffic increases in all scenarios, bodies like National Highways claim such increases are inevitable such that road-building must continue. Yet none of the scenarios assume public transport or active travel improvements, any changes to planning policy (such as densifying cities) or reducing the gap between the cost of driving and public transport. This is especially strange since these are TDP commitments, yet these projections effectively write them out of the planning system so that they are never considered.

Why is a Labour government in court defending its Tory predecessor?

A good question. Officials asked for extra time to respond on behalf of the new government, before issuing a defence at the end of August.

Before the general election, Labour had promised to publish new National Policy Statements (NPSs) within a year. That was a particularly ambitious pledge for transport, given it had taken the DfT two years and ten months to update this NNNPS. With Labour promising major changes across planning and infrastructure, rail, bus, road safety not to mention devolution, alongside both a spending and carbon plan review, it would be even harder to crystallise new policy in a moment of flux. The spending review has now been delayed from March 2025 to June, it being more complex than was appreciated in opposition, so it appears ever more likely the NPS reviews may be delayed too.

As part of its growth mission, Labour has championed "Getting Britain Building" by cutting back the planning system. Road schemes have been mentioned as examples of what needs to be built, so its fighting this case may be seen as an easy example of taking action. Yet the productivity benefits of road schemes are at best minimal, in fact they typically reduce agglomeration benefits by increasing sprawl and congestion. By contrast, the NNNPS is light on (heavy) rail policy and completely silent on intermediate modes like trams and bus rapid transit. The most recent proposal to provide Leeds with a transit system was rejected at a 2016 public inquiry due to a lack of supportive national policy, something this NNNPS remains silent on.

As the road schemes that would benefit from the policy are publicly funded, unlike other sectors like energy, there are questions why, at a time when DfT is facing some of the biggest cuts as an unprotected department, ministers are not simply pressing pause until after the spending review is completed.

Another huge issue is the legal deadline to update the Carbon Budget Delivery Plan by May 2025. With surface transport the largest sector for emissions, 29% in 2023, big cuts are needed, all the more so to make up for slow progress in other areas such as delivering heat pumps and now challenges in the electric vehicle market. Labour's clean energy plans at best would make a marginal difference in closing the shortfall of the previous government's plans. By contrast, airport expansion would blow a major hole in climate targets. With decisions on major expansions at Gatwick and Luton imminent and Heathrow considering resuscitating its bid for a third runway in 2025 this is a major threat and some suspect that Labour wants to use this NNNPS as a dry run for an updated airports NPS.

With the new government focusing on improving bus and rail while promising world climate leadership, its defence of previous ministers' policies comes as a big surprise. All the more so as this policy came from a Tory administration where ministers championed culture wars and chased conspiracy theories about 15 minute cities.

What are the key issues in the case?

In a judicial review, arguments are typically set out in legal grounds and in this case there are currently three.

Ground 1 - demand side policies

TAN's first argument is that the consultation on the draft NNNPS was unlawful because the DfT decided consultation responses relying on modal shift and demand management were out of scope, so were not considered. In fact the DfT tries to have it both ways, on the one hand saying that although these consultation responses were out of scope so were excluded, ministers still conscientiously considered them.

Although the TDP relies a lot on electrification of vehicles, it makes clear from the start that this alone is not enough to meet carbon targets, especially in the medium term. So modal shift is the TDP's first strategic priority, while it also stresses the importance of making public transport cost competitive with driving, another demand side policy, in other words one that manages demand for roads.

The other DfT response here frames TAN and its supporters as trying to re-open the TDP policies as well as trying to turn it into an overarching transport strategy. This is wrong since the NNNPS is simply a set of planning policies. TAN says it was simply seeking to ensure coherence between the TDP and the NNNPS. There is an obvious link between the NNNPS's "statement of need" for schemes on the road network and TDP policies that affect demand for road transport. The DfT said the TDP "outlined" policies while the NNNPS provided "guidance and clarity" on how those should be applied to major roads. In its consultation

response, TAN said this should mean policies schemes to provide for bus and coach priority or enabling lift sharing.

Ground 2 - decarbonisation delivery risk

Ministers failed to provide any rational explanation as to how they could exclude modal shift or demand management. After all, the TDP included policies for modal shift (including affordable electric coaches for long distance journeys) and rebalancing costs of driving versus public transport. In addition, “Net Zero II”, the judgment in May 2024 that ministers could not simply assume all the policies and proposals in 2023 Carbon Budget Delivery Plan would be delivered in full had implications for the transport sector. Both because many of the transport policies themselves had significant delivery risks but also since transport, as the biggest contributor to emissions, would need to step up in response to delays in decarbonising heating, agriculture etc.

Indeed, its consultation response, TAN relied on *Reverse Gear*, a report which found that 72 percent of the potential ambition set out in the 2021 TDP has been lost in the 2023 CBDP¹. But by May 2024, even that figure was an underestimate. The final year of the Conservative government included reversal on net zero policies, in particular the “Plan for Drivers”. Ministers cut funding for active travel and rail schemes, dropped or delayed other key commitments such as for electric vehicles and car sharing, as well as changed guidance to make it harder for local authorities to deliver healthy, sustainable travel options.

This meant that the DfT’s argument that it could rely on an economy-wide package of policies to meet net zero was untenable. It was not enough to rely on non-planning policies to decarbonise, instead some planning policies in the NNNPS were needed too.

Ground 3 - climate test and regional carbon budgets

In a planning process for a development, if there is a substantial change in what is proposed, it needs to be re-consulted upon. The same applies to formulating an NPS. All the more so as an NPS can apply to dozens of schemes over a decade, without being open to question in inquiries or court.

Many changes were made to the NNNPS after consultation but the two major changes were that the previous carbon test from 2015 was reinserted into the new NNNPS without warning let alone any opportunity to comment, while references to local carbon budgets were similarly removed.

¹ [Reverse gear: The reality and implications of national transport emission reduction policies](#) CREDS (2023)

The 2015 test was that “where the increase in carbon emissions resulting from the proposed scheme are so significant that it would have a material impact on the ability of government to achieve its statutory carbon budgets, the Secretary of State should refuse consent”.

The DfT argues that this text was reinserted into the final NNNPS, despite having been removed in the consultation draft, simply in response to a Transport Committee recommendation that the NNNPS define “residual emissions”. This was needed ‘to provide a definition of, and clear and comprehensive guidance on, “residual” greenhouse gas emissions’ in order to make it clear what would be “unacceptable increases in emissions”. Yet this did nothing to guide decisions on what residual emissions were. Meanwhile it did signal that increases in emissions from a project were acceptable, unless they were so large to risk breaching climate targets. As even the largest individual schemes will only impact on these budgets by a fraction of a percent, that is impossible in practice. So the DfT is in effect making clear that no conceivable increase should be treated as “unacceptable”.

On the other hand references to regional and also sectoral carbon targets were removed, on the basis that these currently have no backing in national legislation. Many local authorities have declared climate emergencies, while sub-national transport bodies like Transport for the North are aiming for net zero by 2045, well before the UK’s target of 2050. This change undermines these local and regional ambitions at a time when politicians of all colours are talking up devolution and local leadership. It seems all the more strange given a key policy in the TDP was driving place-based decarbonisation through making “quantitative carbon reductions a fundamental part of local transport planning”. Confidential ministerial advice obtained by Friends of the Earth showed unease that this could present “delivery risk” to major road schemes, however, no doubt the reason behind this backtracking.

The SoSfT was advised that the changes would not make a material difference to the Appraisal of Sustainability (AoS), which includes but is broader than the legally required Strategic Environmental Assessment. It was therefore argued that this meant the changes were not material, so did not need to be reconsulted upon. Except TAN and many others argued that the AoS was greenwash, not least for claiming that the NNNPS’s climate impact was “uncertain”, rather than “significant adverse”. In any event, what should matter is whether the changes could be material to individual schemes.

Additional grounds

There were two additional grounds in our original case, which we decided not to take forward at this time for technical reasons. Ground 4 alleged that the DfT failed to set out reasonable alternatives to the policy in the NNNPS. That is because all the “alternatives” it considered assumed the same high level of spending on road-building, with any shift in funding to sustainable transport being inconceivable. With the new government

acknowledging its financial constraints and cutting some road spending, it is clear the DfT's position is now untenable.

Ground 5 alleged that the DfT had failed to align the policy to wider environmental targets set in 2023 via the Environment Act 2021 covering air quality and nature recovery. In its 2023 departmental report, the National Audit Office had assessed the risk of DfT not meeting environmental targets with its highest risk rating, while the Office for Environmental Protection in 2024 said delivery was off-track. Labour committed to a [rapid review of delivery of the Environmental Improvement Plan](#), which is due to report in spring 2025. So likewise, we dropped this ground to focus on the first three.

What next?

The hearing is to decide whether the case should proceed to a full hearing, which would be unlikely to happen until late spring. The judge may make a decision on the day or reserve judgment until a later date, in any event due to the complexity of the case they are unlikely to give full reasons if they do decide on the day. If there is a refusal, TAN could request the Court of Appeal to reconsider, though this would not be at a formal hearing.

The timing is fortuitous as it puts the problems of roads policy at the top of the in-tray of Heidi Alexander, the new Secretary of State for Transport. TAN is hugely grateful for those who have donated towards its legal costs in these cases, as well as its own costs. As a tiny NGO tackling flagship government policies that relate to the largest carbon emissions sector, we literally would not be able to have come this far without your help. Perhaps due to its mouthful of a name, the NNNPS has received minimal wider interest. But, as we hope this briefing explains, it has huge significance for all our futures.

Key dates

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| November 2008 | Planning Act 2008 receives Royal Assent |
| January 2015 | First NNNPS designated - before then decisions were made in policy gap. NB It was published in 2014, so sometimes referred to with that date. |
| March 2020 | TAN first asks SoS to review NNNPS, on basis of net zero, then brings two judicial reviews seeking to secure this. |
| July 2021 | SoS announces review of NNNPS on basis of net zero and “ambitious policies” in TDP but refuses to suspend NNNPS’s effects in interim |
| 14 March to 6 June 2023 | DfT consults on draft NNNPS |
| 29 June | Climate Change Committee in its annual report to Parliament recommends a roads review |
| 20 October | Transport Committee calls for changes to NNNPS |
| 26 October | Government rejects CCC review recommendation |
| 6 March 2024 | Final NNNPS published, rejecting most Transport Committee recommendations |
| 3 May | Judgment against Carbon Budget Delivery Plan |
| 24 May | New NNNPS designated, minutes before Parliament dissolved |
| 4 July | TAN files judicial review, also general election |
| 29 August | After seeking extra time, DfT decides to defend case |
| 3 December | High Court hearing |

Transport Action Network

Transport Action Network provides free support to people and groups pressing for more sustainable transport in their area and opposing cuts to bus and rail services, damaging road schemes and large unsustainable developments

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