

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT IN THE ADMINISTRATIVE COURT
BETWEEN:-

Claim No.

THE QUEEN
on the application of
TRANSPORT ACTION NETWORK LIMITED

Claimant

- and -

THE SECRETARY OF STATE
FOR TRANSPORT

Defendant

STATEMENT OF FACTS AND GROUNDS

Page references below are to the pages of the claim bundle. These are expressed as [CB/x/y] where x is the page number and y is the paragraph number, where relevant.

Essential Reading

- *National Policy Statement for National Networks (extracts) [CB/88-193]*
- *Ministerial Submission and recommendation to review the NPS, dated 8 July 2021 [CB/234-244]*
- *Ministerial Submission and recommendation not to suspend the NPS, dated 15 July 2021 [CB/228-232]*
- *Decarbonising Transport: a Better, Greener Britain (DfT July 2021) pages 102-105 [CB/224-227]*

A. Introduction and summary of claim

1. As explained in the witness statement of Chris Todd [CB/38-46] which the court is asked to read in full, the Claimant is an NGO which is concerned with the environmental impacts of the transport sector, including the impacts of the road transport sector on climate change.

2. Since March 2020, the Claimant has been pressing the Defendant to exercise the statutory power to review the National Networks National Policy Statement (“**the NPS**”), and to suspend the NPS pending any review [**CB/47-53**]. The Claimant filed two previous claims [*CO/4575/2020* and *CO/1482/2021*] for judicial review of decisions of the Defendant not to conduct a review. Both of those claims became academic as a result of decisions taken by the Defendant after they were filed: respectively, a fresh decision not to conduct a review taken in February 2021, and a further decision, announced on 14 July 2021, that it was appropriate to conduct a review of the NPS (“**the Review**”; “**the Review Decision**”). The reasons given for the Review Decision included the increased stringency of climate change targets and policy, that had not been foreseen when the NPS was designated in 2014. These were matters that, in its previous claims, the Claimant had alleged the Defendant had failed to take lawfully into account in his previous decisions not to review.

3. It follows that the Claimant welcomes the Review Decision. However, the Claimant is very concerned that, even though the Defendant has decided that the NPS requires updating, he nonetheless proposes that it should remain in force during the period of the review, which is expected to take around 18 months¹. Some 20 major road schemes supported by the NPS could potentially receive development consent during the period of the review [**CB/245**], on the basis of a policy statement that the Defendant has decided is out of date. If approved, these road schemes would lock in high-carbon infrastructure for decades, threatening the achievement of the very climate change targets that have triggered the Review.

4. Accordingly, the Claimant is now seeking permission to bring judicial review of the legality of decision of the Defendant, taken (the Claimant understands) on 21 July 2021 (as communicated to the Claimant by letter dated 22 July 2021 [**CB/58-59**]), not to exercise the statutory power to suspend all or part of the NPS pending the Review (“**the Suspension Decision**”).

¹ The Defendant has stated that the review is expected to be completed ‘no later than Spring 2023’ [**CB/247**]

5. In summary, the Suspension Decision was unlawful for any or all of the following reasons:

5.a. The Defendant had predetermined that he would not suspend the NPS, by 14 July at the latest (“**Ground 1**”);

5.b. The Defendant misunderstood his statutory powers and unlawfully took the Suspension Decision without concluding whether the conditions in s.11(2) and (3) were met (“**Ground 2**”);

5.c. In deciding that suspension was not required, the Defendant misdirected himself in law as to the basis on which planning inspectors could proceed to determine DCO applications if the NPS remained in force, and/or created a risk of unlawful decision-making by inspectors (“**Ground 3**”);

5.d. The Defendant proceeded on the basis of a material mis-statement of (or misunderstanding of) his own policy commitments on climate change, namely that road transport emissions had to remain stable in the medium term, when in fact they need to be reduced by well over 50% (“**Ground 4**”);

5.e. The Defendant’s assessment of whether to suspend part of the NPS, namely the climate change test and statement of need, was irrational (“**Ground 5**”); and

5.f. The Defendant took into account an irrelevant consideration – the impact on ‘private sector developers’ of a suspension, when in fact there are no private sector road developers (“**Ground 6**”).

Claim being filed protectively

6. The Defendant has power to suspend an NPS pending review by virtue of s.11 Planning Act 2008 (“**PA 2008**”). By s.13(6) PA 2008, proceedings challenging a decision whether

or not to suspend an NPS must be brought by way of judicial review, within six weeks of the date of the decision under challenge.

7. The Defendant announced the Review Decision on 14 July 2021, as part of the Transport Decarbonisation Plan (“**TDP**”) – a major policy programme intended to place the transport sector on a path to net zero emission by 2050. The explanation of the Review Decision in the TDP said that the Defendant had also decided not to suspend the NPS in the meantime (**[CB/255]**, underlining added):

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 this document. 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.

8. The Defendant wrote to the Claimant on the 15 July 2021 in relation to its previous claim (*CO/1482/2021*) informing it of the Review Decision and stating that the Secretary of State had not yet made a decision whether to suspend the NPS pending review **[CB/54-55]**. In response, the Claimant wrote to the Defendant on 16 July 2021 expressing a wish to be updated once a decision had been made **[CB/56-57]**. On 22 July 2021 the Defendant confirmed in a letter to the Claimant that the Secretary of State decided “yesterday” that it was not appropriate to suspend the NPS **[CB/58-59]**. On the same day, the Defendant published a Written Ministerial Statement (“**the WMS**”) setting out both the Review Decision and the Suspension Decision **[CB/246-247]**. The WMS repeated text from the TDP, but added a clarification that made it explicit that the NPS would remain effective for the purposes of the PA 2008:

While the NPS continues to remain in force, it is right that we review it in the light of these developments [...]

While the review is undertaken, the NPS remains relevant government policy and has effect for the purposes of the Planning Act 2008. The NPS will, therefore, continue to provide a proper basis on which the Planning Inspectorate can examine, and the Secretary of State for Transport can make decisions on, applications for development consent.

9. The Claimant wrote to the Defendant on 23 July requesting that he provide all documentation that he had taken into account when making the Suspension Decision and in particular any Ministerial Submission presented to the Secretary of State in the process [CB/60]. The Claimant wrote again on the 30 July, 6 August and 9 August 2021, pressing the Defendant to provide any explanatory documents as soon as possible, in light of the statutory six-week timetable for issuing proceedings challenging the Suspension Decision [CB/61-65]. On Tuesday 17 August 2021, three and a half weeks after it was requested, the Defendant provided the Claimant with a ministerial submission dated 15 July 2021 (“**the 15 July Briefing**”), in which the Defendant was advised by his officials not to suspend the NPS pending review [CB/228-232].
10. The Claimant took legal advice as quickly as possible (given that the majority of its legal team were on holiday). It sent a pre-action protocol letter (“**the PAP letter**”) to the Defendant on 23 August 2021, giving reasons why the Suspension Decision appeared to be unlawful [CB/72-83]. The Claimant requested a response by 27 August, to give it time to file any claim form by the deadline of 1 September 2021.
11. On 26 August 2021, the Defendant replied to the Claimant [CB/86-87], stating that it would not be able to respond substantively to the PAP Letter by 27 August 2021 and proposing that the Claimant file a claim form and apply for an immediate stay on the following terms:
 - 11.a. The claim is stayed until 24 September 2021 to allow the Pre-Action Protocol for Judicial Review to be completed;

11.b. The Defendant shall respond to the Claimant's pre-action letter by 10 September 2021;

11.c. If so advised, the Claimant shall amend and serve, or withdraw, its claim by 24 September 2021;

11.d. If the Claimant proceeds with the claim, amended or otherwise, the Defendant must file an Acknowledgement of Service and Summary Grounds of Resistance within 21 days of the stay being lifted (i.e. by 15 October 2021).

12. The present claim is filed on that basis. The Claimant asks the Court to grant the stay on the terms set out above, which are agreed by the Parties.

13. Below, the Claimant sets out its proposed grounds of claim as best it can at the moment (and subject to amendment, as above), on the basis of the documents provided to date.

B. Legal Framework

Planning Act 2008

14. The Planning Act 2008 establishes a planning regime for Nationally Significant Infrastructure Projects ("NSIPs") (as defined in Part 3 of PA 2008). The Secretary of State has a broad power to designate an NPS under s.5 PA 2008 [CB/248], establishing national policy for different types of development. Part 4 PA 2008 establishes that 'development consent' is required for NSIPs and Part 5 establishes a regime for the granting of development consent. By s.104(3) PA 2008 [CB/256], within Part 5, where an NPS has effect, the Secretary of State must determine an application for development consent in accordance with the NPS, unless one of the exceptions listed in s.104(4) to (8) applies. Accordingly, any NPS has a very significant influence on the planning process in respect of the developments to which it applies.

15. By s. 6(1) of the PA 2008, the relevant Secretary of State must review the NPS whenever he thinks it appropriate to do so. A review may relate to all or part of a national policy statement (s. 6(2)) **[CB/250]**.
16. In deciding when to review all, or any relevant part of, the NPS, the Secretary of State must consider whether the conditions in s.6(3) or s.6(4) respectively are met.
17. The Secretary of State has a further power, by s.11 PA 2008, to suspend all or part of an NPS pending review **[CB/253]**. However, he may only do so where the conditions in either s.11(2) (relating to the whole of the NPS) or s.11(3) (relating to part of the NPS) are met. Those conditions are in identical terms to the mandatory considerations in s.6(3) and (4). In other words, the same matters that are mandatory considerations when deciding whether to review, are trigger conditions for the exercise of the Secretary of State's power to suspend. If the trigger conditions are met, the Secretary of State then has a discretion whether to review.
18. The condition in s.11(3) (relating to review of part of the NPS) is as follows:
 - (1.a) *since the time when the relevant part was first published or (if later) last reviewed, there has been a significant change in any circumstances on the basis of which any of the policy set out in the relevant part was decided;*
 - (1.b) *the change was not anticipated at that time; and*
 - (1.c) *if the change had been anticipated at that time, any of the policy set out in the relevant part would have been materially different.*

C. Factual Background

The NPS

19. The NPS was designated in December 2014. It 'sets out the need for, and Government's policies to deliver, development of nationally significant infrastructure projects (NSIPs) on the national road and rail networks in England.' **[CB/94/1.1]**. It was intended to be used by the Defendant as 'the primary basis for making decisions on development consent applications' for road and rail NSIPs in England.

20. Section 2 of the NPS set out the Defendant’s assessment of need for capacity enhancements of national networks. Paragraphs 2.12 - 2.27 in particular stated a need for development of the Strategic Road Network (“**SRN**”), which was said to arise in order to ease congestion that was forecast to increase significantly to 2040 **[CB/100-104]**. Paragraph 2.21 **[CB/102]** considered three options for meeting this need – maintaining the existing network, managing demand through non-fiscal measures (ruling out fiscal measures such as national road pricing), and modal shift – but concluded that these options were insufficient to meet the identified need. Accordingly, paragraph 2.23 **[CB/104]** set out ‘wider Government policy’ of supporting enhancements to the SRN, including ‘implementing “smart motorways”² to increase capacity’, and ‘dualling of single carriageway strategic trunk roads and additional lanes on existing dual carriageways to increase capacity’.
21. Section 3 of the NPS set out Government policy on the environmental impacts of road development. It acknowledged that ‘Transport will play an important part in meeting the Government’s legally binding carbon targets and other environmental targets’ **[CB/114/3.6]** but went on to assert that ‘The impact of road development on aggregate levels of emissions is likely to be very small’, when set against projected reductions from other climate change policies **[CB/114/3.8]**.
22. Section 5 **[CB/136]**, although titled ‘Generic Impacts’, set out specific tests for the grant or refusal of development consent for individual schemes by reference to various environmental factors. In respect of climate change, the NPS referred to the out of date (since June 2019) statutory target of only an 80% reduction in carbon emissions by 2050 (now set at 100%) **[CB/138/5.16]** and carbon budgets (i.e. the steps to be secured on the way to 2050) set in line with that 80% target.
23. Paragraph 5.17 said that it is ‘very unlikely that the impact of a road project will, in isolation, affect the ability of Government to meet its carbon reduction plan targets’,

² Where the hard shoulder is transformed into a permanent additional running lane and traffic flow is moderated by the use of variable speed limits.

and paragraph 5.18 went on to set out the decision-making test by reference to this ‘very unlikely event’:

“any increase in carbon emissions is not a reason to refuse development consent, unless the increase in carbon emissions resulting from the proposed scheme are so significant that it would have a material impact on the ability of Government to meet its carbon reduction targets.” [CB/139]

The Climate Change Act 2008

24. Section 1 of the Climate Change Act 2008 (“**the CCA**”) requires the UK Government to reduce net emissions of ‘targeted greenhouse gases’ to zero by 2050 (“**the Net Zero Target**”) [CB/259]. The Net Zero Target was adopted in 2019, following the advice of the Committee on Climate Change (“**CCC**”) that the s.1 target should be increased from an 80% reduction to a 100% reduction.
25. Sections 4 to 10 of the CCA 2008 create a scheme of five-yearly carbon budgets [CB/260-264]. On 23 June 2021, the UK Government legislated to set the Sixth Carbon Budget, covering the period 2033-2038, at a level that was in line with the advice of the CCC.
26. Although carbon budgets cover five-year periods and do not set targets for individual years, it is possible to derive from them the approximate maximum level of Greenhouse Gas (“**GHG**”) emissions in a given year that is compatible with achieving them. In this way, the sixth carbon budget implies a ‘target’ for 2035 of approximately a 78% reduction on 1990 levels of GHG emissions.

D. Grounds of challenge

27. The Claimant assumes that the Suspension Decision was taken on the basis that the Defendant accepted the recommendation made to him in the 15 July Briefing (including its Annexes), for the reasons set out in that briefing; and that, for the

purposes of that decision he took into account, and only took into account, the matters provided with that briefing.

28. The Annexes included (at Annex B) a briefing dated 8 July 2021 (“**the 8 July Briefing**”) [CB/234-244], which recommended a review of the NPS, and to which the 15 July Briefing referred extensively. If the Defendant provides any further or different explanation of the Suspension Decision, the Claimant will amend its Grounds accordingly.

Ground 1: Predetermination

29. The terms of the TDP made clear that the Defendant had already decided that the NPS would ‘continue to remain in force’ pending review; that is, it would not be suspended. This text was repeated verbatim in the WMS on 22 July 2021, indicating that the Defendant’s position had not changed since that date.

30. The 8 July Briefing (paragraph 8) identified ‘ a risk of disruption in the short term due to uncertainty while the review takes place’ and went on to state (underlining added):

The main means of mitigating this is to provide as much certainty to industry as possible on the timescales and process for the review, as well as the status of the NPS namely that it remains extant and fully effective in decision making. We recommend you do this by laying a Written Ministerial Statement at or shortly after the point of publication of the TDP. [CB/235]

31. The ‘Summary Note to Private Secretary’ appended to the 8 July Briefing repeated this theme, stressing the need ‘to clarify the status of the current NPS and the timeframe for a review, to the industry and public at large to effectively de-risk pipeline schemes’ [CB/236/3]. It proposed that a Written Ministerial Statement be published on 14 July 2021, alongside the TDP, which would have stated ‘The statement continues to provide an appropriate framework for the Planning Inspectorate to make planning decisions in relation to national road and rail infrastructure development and it is

important to ensure the Statement continues to execute this function effectively.’ [CB/239]. This text was partially reproduced in the WMS on 22 July 2021.

32. Accordingly, it is plain from the unequivocal advice given to the Defendant on 8 July 2021, and the statement in the TDP that the NPS would remain in force, that a decision not to suspend had already been taken by the Defendant prior to the date of the Suspension Decision. Although, on 8 July 2021 officials urged the Defendant not to ‘hav[e] a view on suspension or not of the NPS’ (Note to Private Secretary [CB/236/4]), that was simply to pay lip service to the correct legal principle and cannot disguise the fact that, in reality, such a decision was taken by the Defendant, on advice, on or before 14 July 2021. Tellingly, the subsequent 15 July Briefing did not give any reasons in favour of suspension. This is because it was not weighing the pros and cons of the possible courses of action, rather it was justifying a decision that had already been made.

33. It follows that the Suspension Decision relied on by the Defendant as being the operative decision was not reached on the basis of an open-minded exercise of the review discretion. Rather, that decision had been unlawfully pre-determined.

Ground 2: misunderstanding of statutory powers

34. The 15 July Briefing did not state whether officials were advising the Defendant to proceed on the basis that the conditions in s.11(2) and/or 11(3) had or had not been met, and therefore the basis on which he then proceeded is unclear. That matters because those conditions are key to the exercise of the section 11 power.

35. At paragraph 6 [CB/228], the 15 July Briefing referred back to the assessment against the conditions in s.6(3) and (4) that was set out in the 8 July Briefing. While the 8 July Briefing stated that ‘we now believe that parts of the NNNPS now trigger the three considerations set out in the Planning Act’, it is unclear what is meant by this statement and, in particular, whether officials considered that policy would have been materially different had the relevant changes been anticipated.

36. At Annex B of the 8 July Briefing ('Summary analysis of changes since 2014 against Sections 6 & 11 of Planning Act 2008' [CB/240]), in the fourth column of the table, the question 'would policy have been materially different' was only answered 'Potentially YES' (underlining added), in respect of (i) changes in forecasts, (ii) setting of the Sixth Carbon Budget and (iii) TDP.
37. An analysis only that the policy might potentially have been different may be adequate for the purposes of a s.6 review decision, but it was not legally adequate for the purposes of a s.11 suspension decision, because the Defendant's suspension power only arises if he thinks that the s.11(2) or (3) condition is met. That in turn requires him to determine that policy would have been materially different.
38. Accordingly, the Defendant took the Suspension Decision on the basis of an erroneous understanding of the power he was exercising. Clearly, if he did not know (or had not reached a view on) whether or not the NPS policy would have been materially different, but went on to exercise his discretion anyway, he cannot have exercised that discretion lawfully – because he will have underestimated (or at least not properly understood) the importance of the three unanticipated changes in circumstance on which he was being asked to base his decision. Plainly, those matters were necessary to the Suspension Decision.

Ground 3: Misdirection of law as to the basis on which DCO inspectors could proceed and/or risk of unlawful decision-making by DCO inspectors

39. The 15 July Briefing recapped the Defendant's earlier decision to review the NPS (paragraph 6): 'in the light of updated traffic forecasts and the policy framework provided by the TDP, which could potentially impact on the statement of need or section on carbon emission in particular' [CB/228]. These are crucial elements of the NPS that affect the fundamental desirability of proceeding with individual schemes.
40. Paragraph 7 went on to consider how planning inspectors could continue to apply the NPS during the period of review, as follows:

Whilst it is considered appropriate to undertake a review of the NNNPS, the statement continues to provide an appropriate framework for the Planning Inspectorate (PINS) in determining applications for development consent in relation to national road and rail infrastructure development. In particular, where traffic volumes have been reforecast (as was the case in 2018), or policy has evolved - including climate change / emissions considerations, Planning Inspectors have already been considering these changed elements when making individual Development Consent Order (DCO) decisions and could continue to do so in the light of the TDP through guidance to Planning Inspectors during the period of the review. However, there hasn't been an opportunity for the Planning Inspectorate to consider the TDP in decisions yet.

[CB/228-229]

It is wholly unclear (to be generous) how planning inspectors could both (i) continue to decide DCOs in accordance with the (admittedly out-of-date) NPS, as they are required to do by s.104 PA 2008 and (ii) make an updated assessment of these matters. The Claimant does not understand how, in the absence of guidance which effectively suspends the relevant part of the NPS and supplants it with a new policy test on carbon budgets and net zero, inspectors could consistently (and therefore lawfully) apply any of the provisions listed in s.104(4) to (8) PA 2008 in order to allow them to depart from the policy in the NPS.

41. Moreover, inspectors have in practice struggled to apply both updated forecasts and carbon budgets in the context of the policy in the existing NPS when determining DCO applications. In the instance of the A38, the resulting decision was withdrawn by the Defendant when challenged. This has also led to delays in extant DCOs, such as M25 J10/A3 Wisley, where the Defendant has had to ask for further information. Failing to suspend the NPS, or relevant part of it, pending review, therefore gives rise to an unacceptable risk of unlawful decision-making by inspectors as well as delay, uncertainty and unnecessary costs being incurred by scheme promoters.

42. Furthermore, paragraph 7 goes on to note that there have been no instances yet of inspectors considering the implications of the TDP [CB/229]. It is the TDP, in particular, with its emphasis on emissions reductions for the transport sector specifically, which is identified as game-changing in the 8 July Briefing (even though these are materially mis-stated – see Ground 4 below). As the summary table recognises, the impact of TDP’s emissions commitments ‘invites a reconsideration of the assumption in paragraph 5.17 of the NPS that “it is very unlikely that the impact of a road project will, in isolation, affect the ability of government to meet its carbon reduction targets.”’ [CB/242] Quite simply, if paragraph 5.17 is now unsafe (and the Claimant agrees with the Defendant’s officials that it is), then leaving it in force greatly exacerbates the risk of unlawful decision-making by inspectors, since it gives strong, but wrong, guidance on the application of the test set out in paragraph 5.18 of the NPS.

43. Although this was not noted in the 15 July Briefing, there have also been no instances to date of inspectors considering the sixth carbon budget (which was set only three weeks before the 15 July Briefing). It is clear from the Defendant’s own explanation of the significance of the sixth carbon budget in the 8 July Briefing (Annex B), that it will force a radical shift in the approach to tackling road emissions, compared with the position in 2014, because the road sector will be allocated a specific budget in the forthcoming Government plan to deliver the sixth carbon budget:

The sixth carbon budget requires Government to publish a delivery plan, and the agreed approach is that it will contain sector shares for emissions reductions. This is clearly a significant change of circumstances. The level of the budget and targets for each sector of the economy was unforeseen at the time of designation in 2014. [CB/241]

44. Given the (acknowledged) significance of this shift in approach, it is wholly unclear how inspectors could lawfully apply both the ‘2014 approach’ to road emissions set out in the NPS and the ‘2021 approach’ to road emissions demanded by the sixth carbon budget.

45. Finally, inspectors could not lawfully depart from the NPS (as the Defendant's reasoning assumes) in the absence of adequate guidance. By proceeding on the basis that they could, the Defendant misdirected himself in law.

46. Accordingly, the Decision was based on an error of law by the Defendant and/or gave rise to an unacceptable risk of unlawful decision-making by inspectors, by leaving in force binding policy that was recognised to be out of date. The Decision itself was unlawful for that reason. The risk cannot be mitigated by guidance, because guidance would need to direct inspectors to ignore the out-dated parts of the NPS – which it cannot lawfully do.

Ground 4: Decision based on a misunderstanding of policy

47. The 8 July Briefing stated that TDP 'specifically commits to keeping road emissions stable in the medium term.' (Annex B, comment against 'Transport Decarbonisation Plan – no increase in emissions' [CB/241-242])

48. The Claimant is unable to locate the 'commitment' referred to in Annex B within the TDP, which refers instead to 'the opportunity for a reduction, or at least a stabilisation, in traffic more widely' [CB/219, 212], underlining added] – rather than stabilisation of emissions.

49. The supposed commitment referred to in the 8 July briefing is in stark contrast to figures 9 and 10 on pages 104 and 105 of TDP [CB/226-227], which give projected trajectories of car and van emissions respectively on a path to Net Zero, and are said to be based on 'a Decarbonising Transport policy scenario including the ambitious set of car and van policies listed above, alongside savings from mode shift and low carbon fuels policy.' It is clear from these figures that such emissions will need to do much more than stabilise – they will need to decline by well over 50% by 2035.³

³ 2035 and/or the Sixth Carbon Budget period is identified with the 'medium term' on pages 6 [CB/219] and 29 [CB/222] of TDP.

50. It therefore appears that the 8 July Briefing proceeded on the basis of a material misstatement of the medium-term emissions trajectory identified in the TDP – and in any event on a ‘specific commitment’ that is not (as far as the Claimant is aware) actually contained in the TDP. In this way, the 8 July Briefing failed to appreciate (or at the very least significantly understated) the urgency of reducing road transport emissions, and accordingly the 15 July Briefing (which referred to and relied on the 8 July Briefing) proceeded on an erroneous understanding of the Defendant’s own policy, and was unlawful for that further reason.

Ground 5: irrational assessment of whether to suspend part of the NPS

51. The Defendant has a power to suspend ‘all or any part’ of an NPS (s.11(4)). While he was not obliged to consider part-suspension (as opposed to suspension of the whole), having decided to consider both possibilities (as he did), he was required to do so rationally.

52. The final sentence of paragraph 7 considered whether to suspend (i) the Statement of Need and/or (ii) the ‘sections on carbon emissions aspects of wider Government policy’ and appears to contain the whole of the material before the Defendant on the question of part-suspension **[CB/229]**.

53. Suspension of the Statement of Need is then rejected in paragraph 7 because ‘the Statement of Need cuts across much of the policy the NPS contains’. This reasoning is circular and merely recognises that the aspects of the NPS in relation to road schemes that are out of date are fundamental ones. If anything, it is an argument in favour of suspending the whole NPS (or at least those parts of it that deal with roads), not of refusing to suspend part of it.

54. By contrast, no reasoning whatsoever is given in support of the decision not to suspend the carbon emissions sections of the NPS. As set out above under Ground 3, these sections will cause particular difficulty for planning inspectors if they remain in

force. It would be straightforward to suspend them, but not suspend other parts of the NPS, and no explanation was given to the Defendant about why that could not be done.

55. Accordingly, the Defendant's decision not to suspend parts of the NPS – namely (i) the Statement of Need and/or (ii) the 'sections on carbon emissions aspects of wider Government policy' – was irrational.

Ground 6: taking account of irrelevant consideration – no 'private sector developers'

56. Paragraph 8 of the 15 July briefing set out a positive case for not suspending the NPS, which is said to be avoiding 'market chilling':

Scheme sponsors and private sector developers value long-term certainty within the planning regime and NPSs supports this. Keeping the current NNNPS in place during the review period will mitigate market chilling as a result of developer hesitancy. [CB/229]

57. However, there are no 'private sector developers' in the road sector. In the majority of cases, the sole scheme sponsor and developer in relation to road schemes brought forward under the NPS is National Highways (formerly Highways England), a company wholly owned by the Department for Transport, of which the Defendant himself is the sole shareholder. There is therefore no risk of market chilling in relation to road development, since there is no market to chill. Annex C to the 15 July briefing appears to recognise as much, where it contrasts the position in the rail sector, and states that as rail schemes 'are private sector led may be more susceptible to delay' [CB/245].

58. Accordingly, in placing reliance on this factor in relation to potential suspension of the parts of the NPS that related to roads, the Defendant misdirected himself in law and/or took into account an irrelevant consideration and/or proceeded on the basis of a material error of fact.

E. Relief Sought

59. For the reasons set out above, the Suspension Decision was unlawful. The Claimant seeks permission for a judicial review challenge to the Suspension Decision.

60. In that challenge, the Claimant seeks:

60.a. A declaration that the Decision was unlawful; and

60.b. An order requiring the Defendant to give lawful consideration to whether to suspend the NPS for the period of the Review;

60.c. Such other or further relief as the Court considers appropriate; and

60.d. Costs.

DAVID WOLFE QC

PETER LOCKLEY

1 September 2021