



Neutral Citation Number: [2025] EWHC 1273 (Admin)

Case No: AC-2024-LON-002305

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/05/2025

Before :

MRS JUSTICE LIEVEN

Between :

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

Claimant

and

SECRETARY OF STATE FOR TRANSPORT

Defendant

Dr David Wolfe KC, Mr Peter Lockley and Ms Stephanie David (instructed by Leigh Day)
for the Claimant

Mr James Strachan KC, Miss Rose Grogan and Mr Daniel Kozelko (instructed by
Government Legal Department) for the Defendant

Hearing dates: 9 & 10 April 2025

Approved Judgment

This judgment was handed down remotely at 10.30am on 22 May 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....
MRS JUSTICE LIEVEN

Mrs Justice Lieven DBE :

1. By this claim, Transport Action Network (“the Claimant”) challenges the Secretary of State for Transport’s (“the SoS”) decision to designate the National Networks National Policy Statement (“NNNPS”), taken on 24 May 2024 (“the Decision”), following a review of the then extant National Policy Statement for National Networks (“2015 NPSNN”) pursuant to s.6 of the Planning Act 2008 (“PA 2008”).
2. The NNNPS sets out a 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 (“NSIPs”) under the PA 2008. NSIP road development affects the Strategic Road Network (“SRN”) which comprises motorways and some A roads. NSIP road development includes building new roads and carrying out improvements on existing roads on the SRN.
3. The Claimant was represented by Dr David Wolfe KC, Peter Lockley and Stephanie David and the Defendant was represented by James Strachan KC, Rose Grogan and Daniel Kozelko.
4. There are three Grounds of Challenge:
 - a. Ground One: The consultation on the draft NNNPS (defined below) was unlawful because the SoS did not conscientiously consider the substance of the Claimant’s responses on modal shift and demand management.
 - b. Ground Two: The SoS failed to provide lawful reasons as to how the NNNPS could maintain reliance on the policies in the Transport Decarbonisation Plan (“TDP”), notwithstanding the judgment in *Friends of the Earth v Secretary of State for the Department for Energy and National Security* [2024] PTSR 1293.
 - c. Ground Three: The SoS unlawfully failed to re-consult on the Revised NNNPS following post-consultation amendments. Neither the SoS nor the Minister decided for themselves (as they were required to do) whether the amendments materially affected the NNNPS policy, so that they could rely on s.6A PA 2008 to avoid further consultation.

Chronology

5. The original NNNPS was designated by the SoS in January 2015. Ground Three turns on comparing one part of the text in the 2015 NPSNN with the draft NNNPS which was the subject of consultation and the final NNNPS. The relevant paragraphs of the 2015 NPSNN for this comparative exercise are:

“Applicant’s assessment

5.17 Carbon impacts will be considered as part of the appraisal of scheme options (in the business case), prior to the submission of an application for DCO. Where the development is subject to EIA, any Environmental

Statement will need to describe an assessment of any likely significant climate factors in accordance with the requirements in the EIA Directive. 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. However, for road projects applicants should provide evidence of the carbon impact of the project and an assessment against Government's carbon budgets.

Decision making

5.18 The Government has an overarching national carbon reduction strategy (as set out in the Carbon Plan 2011) which is a credible plan for meeting carbon budgets. It includes a range of non-planning policies which will, subject to the occurrence of the very unlikely event described above, ensure that any carbon increases from road development do not compromise its overall carbon reduction commitments. The Government is legally required to meet this plan. Therefore, any 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.

[emphasis added]

6. This is described below as the “Material Impact Test”.
7. The decision to review the NNNPS was made in July 2021. Dr Wolfe points to the important changes in respect of climate change law and policy that had taken place between the 2015 NPSNN and the decision to review. In November 2016 the UK Government ratified the Paris Agreement. On 27 June 2019 section 1 of the Climate Change Act 2008 was amended to include the “net zero” requirement, by which the UK carbon account in 2050 is to be at least 100% below the 1990 baseline.
8. On 24 June 2021 the Government adopted the Sixth Carbon Budget, that was intended to meet the net zero requirement.
9. On 14 July 2021 the Transport Decarbonisation Plan (“TDP”) was published. The TDP sets out a wide range of policies to help achieve net zero. Both parties placed reliance on this document and, as is often the case, slightly different messages can be taken from different parts. There is a lengthy foreword from the SoS in which he says, inter alia:

“It’s not about stopping people doing things: it’s about doing the same things differently. We will still fly on holiday, but in more efficient aircraft, using sustainable fuel. We will still drive on improved roads, but increasingly in zero emission cars. We will still have new development, but it won’t force us into high-carbon lifestyles.”
10. Mr Strachan relies on this passage to submit that overarching Government policy is not about constraining journeys, or stopping people driving.
11. Dr Wolfe relies on the following passage in the TDP, under “Strategic Priorities”, to show that modal shift was a central part of overall Government transport policy:

“Accelerating modal shift to public and active transport

Public transport and active travel will be the natural first choice for our daily activities.”

12. On 22 July 2021 the SoS published a Written Ministerial Statement announcing the review of the 2015 NPSNN. That announcement included the following:

“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. ...

This review will include a thorough examination of the modelling and forecasts that support the statement of need for development ... that planning decisions must take into account.”

13. There was then a process of stakeholder engagement and a scoping exercise. The Claimant attended one of the stakeholder engagement workshops. There was a strategic environmental assessment process (“SEA”), which the Claimant also engaged with. The Claimant raised a concern at this point about the alleged lack of connection with modal shift policy.
14. The draft NNNPS was published in March 2023 with consultation up to 6 June 2023. It was accompanied by a draft Appraisal of Sustainability (“AoS”) and a draft Habitats Regulation Assessment. The draft NNNPS was then updated in light of the consultation responses and the report from Parliament’s TSC dated 20 October 2023. That revised draft was published on 6 March 2024 and a debate in the House of Commons was held on 26 March 2024, with the House of Commons approving it. The draft AoS was also updated and the AoS was published on 6 March 2024.

Draft NNNPS

15. It is important to understand the scope and the statutory role of NPSs generally, and this one in particular. Its scope is set out at para 1.3:

“1.3 The Secretary of State will use this NPS as the primary basis for making decisions on development consent applications for NSIPs on the national road and rail networks in England.”

16. I agree with Mr Strachan that it is entirely clear, both from the document itself and the power it is made under, that the NNNPS is not intended to set out overall transport policy. It has an important but specific statutory function, pursuant to PA 2008. That function is specifically in relation to decision making for relevant NSIP development, but not in relation to other transport issues such as road pricing, or the advantages and disadvantages of modal shift.
17. The most important part of the draft NNNPS for present purposes is Chapter 3 “Statement of Need”. The conclusion on “need” at para 3.22 and 3.23 is:

“3.22 The government has, therefore, concluded that at a strategic level there is a compelling need for development of the national networks – both as individual networks and as a fully integrated system. The Examining Authority and the Secretary of State should, therefore, start their consideration of applications for development consent for the types of infrastructure covered by this National Policy Statement (NPS) on this basis. The Secretary of State should give substantial weight to those considerations of need where these align with those set out in this NPS.

3.23 The following sections set out more detail on some of the specific drivers of the need for development across the modes.”

18. These “drivers of need for development of the national networks” include maintaining network performance; supporting economic growth; ensuring resilience in networks; supporting the Government’s environment and net zero priorities and maintaining and enhancing the safety of the networks. I note that there is a good deal of overlap between these “drivers”. It is also necessarily the case that these drivers will inter-relate to other transport and non-transport policies outside the scope of the NNPNS.
19. Reference is made to National Road Traffic Projections (“NRTP”) and the various different scenarios which were modelled. At para 3.31 the outcome of these projections is summarised:

“3.31 These projections are not definitive predictions of what will happen in the future and are not a predictor of the level of expansion required on the national road network. They also do not reflect how transport demands may vary by mode or how road space may need to be distributed to better facilitate mass transit options (such as guided buses, trams, light rail and coaches), pressures on our road and give greater modal choice for journeys. They do, however, demonstrate that continued absolute traffic growth is likely under all scenarios, and therefore enhancements on the national road network will be necessary in order to ensure the national road network operates effectively in the face of growing demand. Infrastructure interventions can include measures such as addressing pinch points and improving flow aimed at addressing localised issues to help address reliability, predictability and capacity issues at specific locations, which can in turn improve overall performance of the wider network of local roads and the SRN in that location. Equally interventions could include measures to reallocate road space to systems for journeys addressing traffic growth via a vision-led approach to that plans (sic) for modal shift.”

20. At para 3.42 there is reference to a range of measures to achieve the outcomes set by the TDP, including enabling more public transport in urban areas and providing genuine choice in transport modes.
21. Chapter 5 deals with environmental issues and at para 5.25 onwards there is a section on Greenhouse Gas Emissions. For the purposes of Ground Three the critical paragraphs are:

“Applicant’s assessment

...

5.31 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.”*

...

5.37 Operational greenhouse gas emissions from some types of national network infrastructure cannot be totally avoided. Given the range of non-planning policies aimed at decarbonising the transport system, government has determined that a net increase in operational greenhouse gas emissions is not, of itself, reason to prohibit the consenting of national network projects or to impose more restrictions on them in the planning policy framework. Any carbon assessment will include an assessment of operational greenhouse gas emissions, but the policies set out in chapter 2 of the NPS, apply to these emissions. Operational emissions will be addressed in a managed, economy-wide manner, to ensure consistency with carbon budgets, net zero and our international climate commitments. Therefore, approval of schemes with residual carbon emissions is allowable and can be consistent with meeting carbon budgets, net zero and the UK’s Nationally Determined Contribution.”

[emphasis added]

22. Ground Three rests on an argument that the draft NNNPS removed the Material Impact Test replacing it with what the Claimant describes as a “more open statement” in para 5.37. However, as set out below, the final version of the NNNPS reinstated the Material Impact Test.
23. The Claimant submitted a very detailed consultation response. It would be fair to say that the Claimant was very unimpressed by the draft NNNPS, saying that Chapter 3, the Statement of Need “is utterly unfit for purpose”. The fundamental concern, although this is a very broad paraphrase, was that the draft NNNPS assumes road transport growth and does not properly address the way that car use could be significantly reduced leading to a very significant reduction in demand and thus less, or even no, need for new road networks.
24. On 6 February 2024 there was a Ministerial Submission asking the Ministers and SoS to agree to amend the NNNPS in the light of the consultation and the Transport Select

Committee (“TSC”) scrutiny. The Submission itself is short, but it includes 15 annexes including as follows:

| | |
|---------|--|
| Annex A | Revised NNNPS |
| Annex B | Government response to the Transport Select Committee |
| Annex C | Government response to consultation |
| Annex D | Appraisal of Sustainability and appendices |
| Annex E | Habitats Regulations Assessment |
| Annex F | [Redacted] letter |
| Annex G | Summary of key changes from NNNPS |
| Annex H | Annex providing a summary of the HRA and explaining more about IROPI and the decision the minister needs to take |
| Annex I | DEFRA IROPI opinion |
| Annex J | Legal annex |
| Annex K | Equalities Impact Assessment |
| Annex L | Environmental principles policy statement assessment |
| Annex M | Analytical assurance statement |
| Annex N | Transport Select Committee report into the NNNPS review |
| Annex O | Written Ministerial Statement announcing NNNPS review |

25. Annex C to the Ministerial Submission is the Government Response to the consultation, divided into sections on the questions that had been asked in the consultation. Question 4 asked:

“In your view does the draft NNNPS provide suitable information to those engaged in the process of submitting, examining and determining applications for development consent for nationally significant infrastructure projects on the: a. strategic road network, b. strategic rail network, and c. strategic rail freight interchanges?”

26. At para 2.7 reference is made to some consultees calling for an increased focus on modal shift and at para 2.9 the Government responded:

“Government response

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.

2.10 The government notes the concerns raised about building more roads. The government is determined to maintain a top-quality strategic road network because of the vital role it plays in growing our economy and delivering long-term prosperity. The revised NNNPS recognises that there may be a range of interventions beyond building new capacity that would be suitable in addressing the challenges that have been identified and, at paragraph 3.42, it sets out some examples of what these other interventions might be. However, it is often not possible to identify viable technology solutions, public transport or other local alternatives because the strategic road network (SRN) is used for driving long distances. The revised NNNPS concludes that other interventions may not be sufficient and therefore infrastructure development may still be required.

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. The Carbon Budget Delivery Plan sets out how the sixth carbon budget (2033-37) will be delivered across the whole economy. ...”

27. At para 2.52 reference is made to amendments made to respond to comments made during the consultations. Relevant to Ground Three is:

“... We have reinstated the material impact test from the current NNNPS to enable the decision maker to appropriately consider NSIPs which cause an increase in emissions. The text now states 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.”

28. Annex B to the Ministerial Submission is the Response to the Transport Select Committee (TSC) Report on the NNNPS. Recommendation 4 of the TSC Report directly relates to the issues under Ground Three. The recommendation and response are as follows:

“Recommendation 4

Transport Select Committee recommendation

“The draft revised NNNPS should be amended to explicitly state the Government’s understanding of the legal precedent for permitting major

infrastructure schemes which result in an increase in emissions, where that increase is judged as not likely to harm the achievement of a national target.” (Paragraph 35)

Government response

Any residual emissions that cannot be avoided in a way that is efficient and cost-effective are managed within the government’s overall strategy for meeting carbon budgets and the net zero target, as part an economy-wide transition. This is acknowledged in paragraph 5.30 of the revised NNNPS to explain why emissions from national network infrastructure is allowable.

However, for added clarity, we have reinstated text from the current NNNPS (para 5.42 of the revised NNNPS) which states that “where the increase in carbon emissions resulting from the proposed scheme are so significant that would have a material impact on the ability of government to achieve its statutory carbon budgets, the Secretary of State should refuse consent”. This approach has been approved in caselaw, which accepts that a decision-maker may use carbon budgets as a benchmark in order to help arrive at a judgment on the significance of carbon emissions from a particular scheme, by looking at the scale of its emissions relative to the carbon budgets before reaching a judgment about the likelihood of the scheme harming the achievement of that budget.”

29. In Recommendation Five the TSC had raised issues around the transparency of the assessment process and in particular the modelling and prediction tools. In the Response the Government referred to the different scenarios in the NRTP. The document was very clear on the policy basis behind the scenarios that had been modelled:

“Regarding the committee’s recommendation to model a wider range of scenarios where traffic levels on the SRN are reduced or maintained at current levels, our current analysis shows that it is likely that demand management policies would be necessary for this to be realised. Otherwise, projected changes in the three main drivers of traffic growth (GDP, population and motoring costs) lead to a projected increase in road demand (although the low economy scenario projects reducing trips for the last 15 years of the series, and if the trend continued would lead to reduced traffic levels). The government’s policy is not to stop people travelling but to enable people to do the same things differently and more sustainably while still realising transport’s social and economic benefits. For this reason, the Department for Transport does not model scenarios which incorporate policies designed to reduce demand.”

30. Annex L of the Ministerial Submission was the Environmental Principles Policy Statement (“EPPS”), produced pursuant to the Environment Act 2021 (“EA 2021”). Under the heading of Carbon emissions from roads, reference is made to the Transport Action Network consultation response and it is said:

“9. ... Greenpeace and Transport Action Network, who disputed the Statement of Need set out in the draft NNNPS and challenged the

government's approach to achieving net zero. Both organisations stated that the government should put in place policies to reduce demand for car transport and that this should have been considered as one of the alternatives under the AoS. Given the high profile of this subject, additional information is provided below in addition to the AoS which covers all the environmental impacts."

31. The EPPS then goes on to say at para 13:

"13. The government is addressing carbon emissions from road transport through the measures announced in the Transport Decarbonisation Plan 2021 (TDP), primarily the transition to electric vehicles (EVs), which has now been taken forward by the enactment of the Zero Emission Vehicle mandate. The Carbon Budget Delivery Plan (CBDP) sets out how the sixth carbon budget (2033-37) will be delivered across the whole economy. Annex D paragraph 37 states: "Despite the intrinsic uncertainties of long-term sectoral emissions projections, we still have 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." As a result the policy choices set out in the TDP are considered defensible, subject to the proviso set out that the government will keep them under review. The CBDP itself is subject to a current legal challenge due to be heard in the High Court on 22-24 February. Should this legal challenge be successful we would need to review the implications for the NNNPS, but it is not a reason to delay completion of the NNNPS review."

[emphasis added]

32. In respect of the issue relevant to Ground Three, para 16 stated:

"16. The revised draft NNNPS includes a number of changes with respect to the treatment of carbon emissions compared to the current NNNPS. Chapter five includes a requirement for scheme promoters to carry out a Whole Life Carbon Assessment in line with the new PAS 2080 standard, and to demonstrate that they have made efforts to mitigate carbon impacts, using nature-based solutions where appropriate. This is explicitly to be taken into account by the SoS when coming to a decision on an individual scheme. The overall policy test on carbon is based on the need to weigh up the benefits of NSIP schemes on national networks against the environmental damage they may cause. This policy test is similar to that in the existing NNNPS, namely that schemes can still be consented if they lead to an increase in carbon emission, but that the SoS should refuse consent if the carbon emissions would have a material impact on the ability of the government to meet carbon budgets. This reflects the fact that carbon budgets are still the main mechanism for delivery of the UK's climate change objectives, so ensuring that a scheme does not materially impact the government's ability to meet carbon budgets is the correct test for the decision maker to apply."

33. Ministers were briefed again on 23 April 2024 with a recommendation to designate the NNNPS. Following the judgment in R (Friends of the Earth) v Secretary of State for

Energy Security and Net Zero [2024] EWHC 955 (“FoE2”), Ministers were briefed again on 13 May 2024 and advised that there remained high confidence in the delivery of the TDP.

34. The NNNPS was designated under the PA 2008 on 24 May 2024. I will refer to relevant paragraphs of the 2024 NNNPS below under the individual Grounds.

The Planning Act 2008

35. The PA 2008 sets out the statutory scheme for the creation and application of NPSs. Section 5(1) states that the SoS may designate an NPS “*in relation to one or more specified descriptions of development*”. Section 5(5) sets out the scope of what can be covered in an NPS, and s.5(7) the duty to give reasons:

“5 National policy statements

...

(5) The policy set out in a national policy statement may in particular—

(a) set out, in relation to a specified description of development, the amount, type or size of development of that description which is appropriate nationally or for a specified area; ...

...

(7) A national policy statement must give reasons for the policy set out in the statement.

...”

36. Section 6 gives the duty on the SoS to review an NPS:

“6 Review

(1) The Secretary of State must review each national policy statement whenever the Secretary of State thinks it appropriate to do so.

(2) A review may relate to all or part of a national policy statement.

(3) In deciding when to review a national policy statement the Secretary of State must consider whether—

(a) since the time when the statement was first published or (if later) last reviewed, there has been a significant change in any circumstances on the basis of which any of the policy set out in the statement was decided,

(b) the change was not anticipated at that time, and

(c) if the change had been anticipated at that time, any of the policy set out in the statement would have been materially different.

(4) In deciding when to review part of a national policy statement (“the relevant part”) the Secretary of State must consider whether—

(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,

(b) the change was not anticipated at that time, and

(c) if the change had been anticipated at that time, any of the policy set out in the relevant part would have been materially different.

(5) After completing a review of all or part of a national policy statement the Secretary of State must do one of the following—

(a) amend the statement;

(b) withdraw the statement's designation as a national policy statement;

(c) leave the statement as it is.

(6) Before amending a national policy statement the Secretary of State must carry out an appraisal of the sustainability of the policy set out in the proposed amendment.

(7) The Secretary of State may amend a national policy statement only if the consultation and publicity requirements set out in section 7, and the parliamentary requirements set out in section 9, have been complied with in relation to the proposed amendment and -

(a) the consideration period for the amendment has expired without the House of Commons resolving during that period that the amendment should not be proceeded with, or

(b) the amendment has been approved by resolution of the House of Commons—

(i) after being laid before Parliament under section 9(8), and

(ii) before the end of the consideration period.”

37. Section 6A as relevant states:

“6A Interpretation of sections 5(4) and 6(7)

(1) This section applies for the purposes of section 5(4) and 6(7).

(2) The consultation and publicity requirements set out in section 7 are to be treated as having been complied with in relation to a statement or proposed amendment (“the final proposal”) if—

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

38. Section 7 deals with consultation:

“7 Consultation and publicity

- (1) This section sets out the consultation and publicity requirements referred to in sections 5(4) and 6(7).
- (2) The Secretary of State must carry out such consultation, and arrange for such publicity, as the Secretary of State thinks appropriate in relation to the proposal. This is subject to subsections (4) and (5).
- (3) In this section “the proposal” means—
 - (a) the statement that the Secretary of State proposes to designate as a national policy statement for the purposes of this Act, or
 - (b) (as the case may be) the proposed amendment.
- (4) The Secretary of State must consult such persons, and such descriptions of persons, as may be prescribed.
- (5) If the policy set out in the proposal identifies one or more locations as suitable (or potentially suitable) for a specified description of development, the Secretary of State must ensure that appropriate steps are taken to publicise the proposal.
- (6) The Secretary of State must have regard to the responses to the consultation and publicity in deciding whether to proceed with the proposal.”

39. Section 10:

“10 Sustainable development

- (1) This section applies to the Secretary of State's functions under sections 5 and 6.
- (2) The Secretary of State must, in exercising those functions, do so with the objective of contributing to the achievement of sustainable development.
- (3) For the purposes of subsection (2) the Secretary of State must (in particular) have regard to the desirability of—

- (a) mitigating, and adapting to, climate change;
- (b) achieving good design.”

40. Section 104 sets out the legal effect of an NPS, and states as relevant:

“104 Decisions in cases where national policy statement has effect

(1) This section applies in relation to an application for an order granting development consent if a national policy statement has effect in relation to development of the description to which the application relates.

(2) In deciding the application the Secretary of State must have regard to—

(a) any national policy statement which has effect in relation to development of the description to which the application relates (a “relevant national policy statement”)...

(3) The Secretary of State must decide the application in accordance with any relevant national policy statement, except to the extent that one or more of subsections (4) to (8) applies.

...

(7) This subsection applies if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits.”

41. Section 106 provides that the SoS when deciding an application for a Development Consent Order (“DCO”) may disregard representations that relate to the merits of a policy in the NPS.

Ground One

42. Ground One is a consultation challenge that the SoS failed to “conscientiously consider” the substance of the Claimant’s consultation responses on modal shift and demand management. It is central to this Ground to consider the scope and the content of the consultation duty and the degree to which the substance of that duty may vary depending on the circumstances of the case.

43. The broad substance of the duty, as famously set out in the “Sedley principles” in “*Gunning*” (*R v Brent London Borough Council ex p Gunning* (1985) 84 LGR 168), is extremely well known and was authoritatively reiterated by the Supreme Court in *R (Moseley) v Haringey LBC* [2014] 1 WLR 3947. Two of the principles are in issue in the present case – consultation at a “formative stage” and the need for “conscientious consideration”. At [24] Lord Wilson addressed the purposes of consultation:

“Fairness is a protean concept, not susceptible of much generalised enlargement. But its requirements in this context must be linked to the purposes of consultation. In R (Osborn) v Parole Board [2013] UKSC 61, [2013] 3 WLR 1020, this court addressed the common law duty of

procedural fairness in the determination of a person's legal rights. Nevertheless the first two of the purposes of procedural fairness in that somewhat different context, identified by Lord Reed in paras 67 and 68 of his judgment, equally underlie the requirement that a consultation should be fair. First, the requirement “is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested” (para 67). Second, it avoids “the sense of injustice which the person who is the subject of the decision will otherwise feel” (para 68). Such are two valuable practical consequences of fair consultation. But underlying it is also a third purpose, reflective of the democratic principle at the heart of our society. This third purpose is particularly relevant in a case like the present, in which the question was not “Yes or no, should we close this particular care home, this particular school etc?” It was “Required, as we are, to make a taxation-related scheme for application to all the inhabitants of our Borough, should we make one in the terms which we here propose?”

44. At [26] he made clear that the legal requirements of consultation would depend on the nature of the decision and the potential impact on those being consulted:

“... Second, in the words of Simon Brown LJ in Ex p Baker [1995] 1 All ER 73, 91, “the demands of fairness are likely to be somewhat higher when an authority contemplates depriving someone of an existing benefit or advantage than when the claimant is a bare applicant for a future benefit.””
45. Lord Reed at [35] explained that the content of the duty would vary *“almost infinitely depending on the circumstances”*.
46. There is a helpful summary of the law on consultation in *R (Electronic Collar Manufacturers) v SSEFRA* [2019] EWHC 2813 (Admin) by Morris J at [27]. The test is whether there is “clear unfairness” and something has gone clearly and radically wrong, see [27(6)].
47. Mr Strachan submits, in my view correctly, that in applying these principles it is necessary to take into account the nature of the issue being consulted upon, including both the specificity of the issue and the impact on third parties. It is in my view inevitable that where the consultation concerns issues of high policy, with very wide ranging impacts across the economy and the population, that the Government, or whoever the consultor is, is likely to have clear views in advance. It is unrealistic to apply the “formative stage” requirement without having this clearly in mind when seeking to apply statements from cases in very different factual contexts.
48. In *R (Stephenson) v Secretary of State for Housing Communities and Local Government* [2019] PTSR 2209 Dove J was considering a challenge to the NPPF. The issue was that a revision to the NPPF had incorporated the policy position set out in an earlier Written Ministerial Statement (“WMS”) on fracking. The Claimant had responded to the consultation by raising objections to the fracking policy. However, the Minister was told that the response was “out of scope” because the policy merely replicated policy in the WMS.

49. Dove J at [43]-[44] applied a test of whether the reasonable reader would think the matter was within the scope of the consultation, i.e. an objective test, rather than a subjective test as to what was the SoS's intention in the consultation:

“43. Having considered the various submissions made across Grounds 1, 2 and 4 of the Claimant's case, in my view it is convenient to commence an examination of the merits of the case with an enquiry into Ground 4. The reason for taking this approach is that at the heart of the dispute between the parties is the question of what the Defendant was doing when incorporating paragraph 209(a) into the Framework or, more particularly in relation to Ground 4, what a member of the public engaging in the consultation process and reading the publicly available material as a reasonable reader, would have concluded the Defendant was doing.

*44. Whilst the Court's attention was not drawn to any authority bearing specifically on the correct approach to examining the meaning of documents produced within a decision-making process related to the creation of policy (and in particular the consultation process accompanying it), it appears to me to be obvious that the documentation must be read and examined in the spirit of the purpose for which it is produced. It must be read and considered from the standpoint of a reasonable member of the public or reasonable reader. Mr Warren drew attention to the observation of Lord Carnwath in his judgment in the case of *Trump International Golf Club Limited v Scottish Ministers* [2015] UKSC 74 where at paragraph 34, when considering the words of a condition on a planning permission, he indicated that the court would ask itself "what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole." He described that as an objective exercise in which the court would have regard to the natural and ordinary meaning of the words involved alongside the overall purpose of the consent and any other conditions, and that in doing so would apply common sense. Whilst the content of a condition on the planning consent is not the same as the content of material produced in the process of making a policy by some margin, in my view the same kind of approach is necessary bearing in mind the nature and purpose of the exercise which is taking place. In relation to a consultation process the purpose of the documentation is to secure the engagement of the public and their contribution to the decision-making process on the issues which they are to be led to consider are the subject matter of the decision-making process, that is to say the issues within the scope of the decision-making process.”*

50. At [52] Dove J concluded that a reasonable reader would not have understood that the fracking policy was outside the scope of the consultation.
51. Mr Strachan distinguishes *Stephenson* on the basis that in the present case the SoS did consider the broad thrust of the consultation responses, including from the Claimant, and that the distinction between the specific scope of the NNNPS as opposed to much wider issues around transport policy was not a distinction which arose in *Stephenson*. I

accept that the scope of consultation is an objective test, but what the reasonable observer would consider that scope to be is highly fact and context specific.

52. In respect of whether consultation responses are considered at a “formative stage” and are “conscientiously considered”, there is necessarily considerable overlap. The degree to which the decision maker can have a clear view in advance of the consultation was considered by Morris J in *Electronic Collar Manufacturers v SSEFRA* at [139]:

“139. The requirement that the consultation takes place at a “formative stage” means that at the relevant time the decision-maker must have an “open mind on the issue of principle involved”: Montpelier §21 (ii). The question is whether the decision-maker had already made up its mind to adopt the proposal or whether it was willing to reconsider its proposal in the light of the consultation process if a case to do so was made out. There must be no actual pre-determination on the part of the decision-maker. Where the decision-maker is consulting on a particular proposal, the consultation must include consultation on whether the proposal should be adopted, and not just on how. However I accept the Secretary of State’s submission that there is a legitimate distinction to be drawn between actual pre-determination on the part of the decision-maker and the decision-maker having a “pre-disposition” towards the proposal. The latter is permissible, and necessarily so in circumstances where the decision-maker is, as entitled to do, to determine the particular proposal upon which he wishes to consult, see Lewis v Redcar §§63, 95, 99, 106-107; Langton §§106, 107; Spurrier §§503-535, especially at §§ 509-511, 524, 531.”

53. Morris J considered the fourth *Gunning* principle “conscientious consideration” at [151]-[154]:

“Coughlan (4): Conscientious consideration

151. This requirement does not amount to an obligation to adopt the submission by any particular respondent, nor to adopt the majority view. The decision-maker is entitled to consider the whole range of responses and then to form his own view, independently of the views of any particular consultees. Further there is no obligation to consider each and every specific item of detail: West Berkshire CC §§62-63. There is an obligation to take account of the majority view, but no obligation to adopt that view: R (Assisted Reproduction and Gynaecology Centre) v The Human Fertilisation and Embryology Authority [2017] EWHC 659 (Admin) §117.

152. As to the information placed before the decision-maker, the decision-maker must know enough to ensure that nothing that is necessary, because legally relevant, for him to know is left out of account. But there is no requirement that he must know everything that is relevant. The claimant must establish that a matter was such that no reasonable decision-maker would have failed in the circumstances to take it into account as a relevant consideration: Langton §115 citing R (National Association of Health Stores) v Department of Health [2005] EWCA Civ 154 at §§60-63. To this extent, the Coughlan (4) requirement is based on a Wednesbury approach.

153. *The scope of any obligation to give reasons, as part of the duty to give conscientious consideration, was addressed in Spurrier at §§131 to 137. After citing West Berkshire above, the Court went on to approve the approach of Ouseley J in R (Buckinghamshire CC) v Secretary of State for Transport [2013] EWHC 481 (Admin) at §549 and 624. Where there is a large number of consultation responses, conscientious consideration does not require a fully reasoned decision letter as following a public inquiry. The real question is whether the response to the problems is rational. Nevertheless there should be evidence of consideration of important points made by consultees: R (Morris) v Newport City Council [2009] EWHC 3051 (Admin) §38.*

(2) Discussion

Pre-determination: Coughlan (1), and Ground 2

154. *The starting point is to consider the particular duty of consultation in s.12(6) of the 2006 Act, both its wording and its statutory context. In my judgment, as a matter of construction, the subject matter of the consultation required by s.12(6) is "regulations" which the appropriate authority is considering making i.e. the proposed regulations. Thus, in the present case, where the Secretary of State was proposing to make regulations banning the use of e-collars, it was that proposed ban upon which he was required to consult."*

54. *R (Spurrier) v Secretary of State for Transport* [2020] PTSR 240 was a challenge to the Airports National Policy Statement. Two of the Grounds in that case are directly relevant in the present case, consultation and reasons. However, there are also a number of comments which apply to any challenge to an NPS:

a. The nature and content of an NPS may differ considerably from the very specific, i.e. identifying particular locations for development to a general, criteria based policy [99];

b. National need would be identified in an NPS but the weight to be given to that need would be a matter for the decision maker at the DCO stage [101]. Mr Strachan submits this is particularly relevant here, where the NNNPS gives general support to there being a need for new networks, but does not given any locational specific policy;

c. S.104(7) does not as a general proposition rule out the consideration of alternatives to the development proposed in the DCO [104].

55. In respect of consultation, at [134] of *Spurrier* the Court referred to *R (West Berkshire DC) v SSCLG* [2016] PTSR 982 and said:

"134. Giving the judgment of the court, Laws and Treacy LJ held that the Secretary of State had been entitled to consider the whole range of responses made to him and then to form his own conclusions independently of the views of any section of consultees. In particular, he had not been obliged to explain why he had set the threshold at one level

(ten units) rather than another in response to the representations received (three units). It was unnecessary for him to descend to that level of particularity or to conduct detailed analysis of alternative options before him. He was under no obligation to consult on every item of detail – or to consider and respond to every item of detail in the consultation responses (see [49] and [62]-[63]). It seems to us that that approach chimes with objectives identified in Moseley for a broad consultation exercise, for example with the public or a large section of the public, to ensure participation in the Minister's decision-making process and to promote better decision-making, here the formulation of a national policy.”

56. In respect of the first Gunning principle, consultation at a “formative stage”, the Divisional Court referred to the reality of policy making in this field at [518] and said:

“518. The statutory context of the PA 2008 bears some similarities to the legislation considered in CREEDNZ . It is concerned with projects of national significance. The decisions which the statute requires a Secretary of State to make may well concern policies or projects which have evolved over lengthy periods of time and which give rise to controversy. It is unrealistic to expect a Secretary of State not to have formed views on many issues, perhaps even strongly held views, by the time he comes to initiate consultation on a proposal to designate a new NPS under section 7, a fortiori by the time he comes to lay the proposal before Parliament under section 9. The Secretary of State may not designate a proposed NPS unless either the House of Commons votes to approve it, or a certain period of time elapses without the House voting that "it should not be proceeded with" (section 5(4)). Consequently, the statutory scheme expects the Secretary of State to be prepared to promote his proposed policy in Parliament, an exercise involving political judgment. Furthermore, a policy dealing with the need for new infrastructure may be closely linked to the identification of areas or sites where that need can properly be met and so a proposed NPS may also address that aspect (section 5(5)(d)). Thus, the views which a Secretary of State forms on a proposal to designate an NPS may also address locational issues and the merits of rival schemes.”

57. Dr Wolfe submits that the reasonable reader would have considered that the Claimant’s objection, and in particular the parts on modal shift, were within the scope of the consultation. The SoS was not told that the policies in the TDP applied to the NNNPS and therefore did not consider that inter-relationship with modal shift. The consultation had deliberately set a wide brief, “*to identify whether the revised draft national policy statement presented is fit for purpose*”, therefore responses that go to that question, including relating to modal shift, must, he submits, fall within the scope of the consultation.
58. Further, he submits that the need case in Chapter 3 of the draft NNNPS, which refers to there being a compelling need for new networks, necessarily brings into scope matters which show that there is no such compelling need. The TDP supports modal shift and therefore the inconsistency between that Policy and the draft NNNPS is a matter that the SoS needed to be informed about and take into account. The Questions posed in the consultation, including Q16, whether the consultee agreed with the AoS,

would lead any reasonable reader to believe that modal shift was a matter within the consultation.

59. I agree with Mr Strachan that the SoS's approach was lawful. It is obvious that there is a link or relationship between modal shift and the need for new road networks. Modal shift goes to the demand for such networks. Similarly new road networks have a potential impact on climate change, and there is therefore a relationship to policies on net zero. However in order for Government policy to be brought forward in an ordered and sensible manner policy documents have to have a focus, and certain issues dealt with in certain documents. Here the NNNPS is focusing on the need, or otherwise, for new networks, including road networks. The focus of the document is therefore not on policies that relate to modal shift, but rather the consequences of demand modelling for the need for new networks.
60. In my view it would have been clear to a reasonable reader that the draft NNNPS was not a document setting modal shift policy, that was dealt with in the TDP. The sentence that Dr Wolfe relies upon above is followed by: "*This means whether it provides a suitable framework to support decision making for nationally significant road, rail and strategic rail freight interchange projects*". This makes it clear that this is not a broad ranging transport policy, including setting policies on modal shift, but rather a narrowly framed document on a specific form of development. Therefore, in my view the reasonable reader would not have thought that this consultation was the correct forum for a debate on broad policy choices on modal shift.
61. Further and in any event, I accept that the SoS did consider modal shift, in the sense that a range of demand forecasts were taken into account in the formulation of the policy. The potential for modal shift to reduce the need for new networks was factored into the scenario modelling that formed the basis of Chapter 3.
62. I do not think there is any inconsistency here. The policy on modal shift was not the subject of the draft NNNPS and was not within the scope of the consultation. However, the impact of modal shift choices on the need case was taken into account and conscientiously considered, because it went to the level of need. Therefore in the Government Response to consultation at, for example paras 2.9 and para 2.22, there is reference to arguments around modal shift and decreasing demand by encouraging people not to travel, or not use their cars.
63. It is, in my view, clear from this that the Government did take these issues into account, but did not agree with the policy position being advanced by the Claimant in the consultation responses. That was a matter for the SoS.
64. The Government had to make a decision as to what scenarios to model. That does not mean that the consultation responses were not properly considered. Rather, a legitimate decision making process was undertaken, including determining what variables to take into account. Again, that is a matter for the decision maker.
65. For these reasons Ground One fails.

Ground Two

66. Ground Two is founded upon the duty in s.5(7) PA 2008 to give reasons. The Claimant's case turns on the finding of Sheldon J in FoE2 and the alleged failure in the NNNPS to deal with the consequences of that decision. That case concerned a challenge to the Carbon Budget Delivery Plan ("CBDP"). Sheldon J found that the SoS had made his decision on the basis of a mistaken assumption that each of the Government proposals would be delivered in full, and he was not advised on the degree to which individual proposals were likely to miss their targets.
67. This Ground is framed as a reasons challenge, but I agree with Mr Strachan that in reality it is a challenge to the rationality of the SoS's continued reliance on the TDP to deliver the requisite carbon reductions in the light of the FoE2 judgment.
68. The background to this issue is that in July 2021 the SoS published the TDP, as referred to above. In October 2021 the Net Zero Strategy ("NZS") was laid before Parliament. In July 2022 Holgate J in *R (Friends of the Earth) v Secretary of State for Business Energy and Industrial Strategy* [2022] EWHC 1841 declared the NZS unlawful and he ordered the SoS to lay before Parliament a report which complied with s.14 of the Climate Change Act 2008 ("CCA 2008"). In March 2023 the CBDP was published to supplement the NZS and to seek to remedy the defects identified by Holgate J. Both the NZS and the CBDP relied upon policies in the TDP for carbon reductions in the transport sector.
69. The NNNPS relied upon the TDP for the delivery of emissions reductions in the transport sector in order to deliver the net zero commitment, see para 2.24 of the NNNPS:
- "2.24 Government's Transport Decarbonisation Plan demonstrates how we will deliver transport's contribution to emissions reductions in line with net zero, much of which has already been delivered or is in progress."*
70. Dr Wolfe submits that the NNNPS assumed the effective management of operational emissions through the TDP, which it assumed would be delivered effectively. He submits it must also have assumed effective policy delivery in all other sectors, or the reductions in the transport sector would have had to be greater to make up for potential shortfalls elsewhere. However, that assumption had been undermined by the decision in FoE2. The SoS failed to explain in his reasons how the NNNPS could be upheld given the judgment in FoE2.
71. Mr Strachan points out that FoE2 was not a challenge to the TDP or any of its policies. Sheldon J expressed no view on delivery risks in respect of TDP, the case was about whether the SoS had sufficient information to ascertain delivery risk for the whole package of policies in the CBDP.
72. In any event, the CBDP identifies the TDP as one of the policies where *"there is 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 delivered"*, see CBDP Appendix D para 37.

73. He also submits that the SoS had specific regard to the effect of the FoE2 judgment as he was provided with a summary as one of the annexes to the Ministerial Submission. Therefore it was taken into account.
74. The starting point on this Ground is the scope of the duty to give reasons for an NPS. In respect of the duty to give reasons in s.5(7), the Court in *Spurrier* made clear that the duty is to give reasons for making a policy, not for the outcome of the consultation process nor for any specific decision, [115]-[118]. In [116] and [119] it was made clear that the reasons can be set out in other documents and not just the NPS itself:

“116. In our view, although section 5(7) requires an NPS to contain the rationale for the policy, it does not require every reason and consideration the policy-maker had in mind when promoting or designating the NPS to be set out in the statement, for the following reasons.

117. Section 5(7) is not concerned with reasons for making a decision, but rather reasons for making a policy. However, even in the former case, the duty to give reasons does not require the decision-maker to refer to every relevant consideration which he has taken into account. ...

...

119. We consider section 5(7) , properly construed, requires a similar approach: the Secretary of State's obligation is to give reasons (i.e. rationale) for his policy. The inclusion of the policy-maker's rationale for his policy in a draft NPS contributes to the provision of adequate information to enable consultees to make intelligent responses in the consultation exercise. But that rationale should not be taken to represent the totality of the policy-maker's reasons for putting forward the policy. It is for the Secretary of State to make judgments about what matters to include in the NPS itself, and to what level of detail; and what material used to support those policies should be set out in other documents accompanying the draft NPS published for consultation (e.g. the AoS and any HRA). In such a complex area as aviation infrastructure policy, plainly it would be impractical to include in the NPS, whether a draft or as finally designated, every matter relied upon by the policy-maker as a reason for his policy; and for the reasons we have given, it is unnecessary for the Secretary of State to give reasons for rejecting every point made in response to consultation.”

75. In my view it follows from this that the reasons challenge fails, because the SoS was under no duty to give reasons for the policy choice as to reliance on the TDP. He decided that he could continue to place reliance on the delivery of non-planning transport decarbonisation policies to be delivered. There was no reasons duty to expressly explain that choice.
76. In respect of the underlying issue, whether the SoS could rationally continue to rely on the TDP in the light of the FoE2 judgment, I start by noting that any rationality challenge in a field such as this must pass a high hurdle. This is both a field of national Government policy, with intense political choices to be made, and also a highly

technical field where there are complex interactions between different policy choices, see as but one example, *Spurrier* at [168].

77. The SoS was aware of the FoE2 judgment because he had been given a note of it. He was under no legal duty to carry out his own assessment of delivery risk of the non-planning policies. The duty to consider delivery risk in s.13 CCA 2008 is confined to decisions under that provision, i.e. carbon budgets, and is not a broad duty to consider delivery risks of other policies that may impact on net zero targets.
78. Dr Wolfe's argument that because of FoE2 the SoS for Transport had to conduct an assessment of the delivery risk of all the other policies that fed into the CBDP in order to determine what deficiencies might arise in the NNNPS is in my view both unrealistic and confuses roles within Government. I agree with Mr Strachan that it is not the place of planning policies in the NNNPS to rewrite or review the TDP or the CBDP.
79. Given that the FoE2 judgment did not relate to the TDP, and that the SoS was told that there was a reasonable to high level of confidence that the TDP would deliver in line with carbon budgets, there was in my view nothing unreasonable about the SoS continuing to rely upon the TDP. Certainly this decision fell well within the boundaries of a rational decision in law.
80. I dismiss this Ground.

Ground Three

81. Dr Wolfe submits that there was a duty to reconsult on the NNNPS under s.6A(2)(c) because the document had been materially changed between the consultation draft and the final version. This focuses on the changes in original paragraphs in the draft NNNPS at 5.31 and 5.37, to the final version equivalents, paras 5.35, 5.41 and 5.42. The key changes were the reintroduction of the Material Impact Test and the removal of the reference to sectoral targets. The final NNNPS states:

“5.41 Operational carbon emissions from some types of national network infrastructure cannot be totally avoided. Given the range of non-planning policies aimed at decarbonising the transport system, government has determined that a net increase in operational carbon emissions is not, of itself, more reason to prohibit the consenting of national network projects or to impose more restrictions on them in the planning policy framework.

5.42 Any carbon assessment will include an assessment of operational carbon emissions, but the policies set out in chapter 2 of this NPS, apply to these emissions. Operational emissions will be addressed in a managed, economy-wide manner, to ensure consistency with carbon budgets, net zero and our international climate commitments. Therefore, approval of schemes with residual carbon emissions is allowable and can be consistent with meeting international obligations arising from the Paris Agreement. However, 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.”

82. Dr Wolfe submits that one part of the trigger for reviewing the NNNPS in July 2021, was whether the Material Impact Test could continue to apply. In *R (Transport Action Network) v Secretary of State for Transport* [2022] EWHC 503 at [21] the Court had said:

“In an Annex to the ministerial submission, there was a table which asked whether certain “events” gave rise to a “significant change in circumstances” and were “unanticipated at time of publication [of the NNNPS]” and whether the policy would have been materially different (i.e. the three considerations referred to in ss. 6 and 11 of the 2008 Act). For each of “change in road traffic & congestion forecasts”, “setting of carbon budget” and the TDP, the answer was “YES”, “YES” and “Potentially YES”. There was no event for which the answer was “YES” to each of the three questions. In the case of the TDP, there was this comment:

“The Transport Decarbonisation Plan recognises significant developments that have affected road demand and will impact of future traffic growth, and specifically commits to keeping road emissions stable in the medium term. This is a substantial policy change unanticipated at the time of designation, and invites a reconsideration of the assumption in para 5.17 of the NNNPS 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’.”

83. This passage highlights the importance of the Test and whether it remained or not. The draft NNNPS had removed the Material Impact Test that had been set in 5.31 and 5.37 of the original NPS. However, the final NNNPS reinstated the test. Further, the final NNNPS removed the references to assessment against regional and sectoral targets at para 5.31 of the draft.
84. Dr Wolfe submits that s.6A(2)(c) PA 2008 requires the SoS (or Minister) himself to consider whether the amendments were material and therefore required re-consultation. The wording of s.6A(2)(c) and (3)(c) focus on whether “the Secretary of State thinks” that the modifications materially affect the policy.
85. The SoS here did not consider that question and was not specifically briefed upon it. He was not told on either 6 February or 13 May 2024 that he needed to decide whether the changes were materially different from the draft consulted upon. The February briefing focused on the difference between the 2015 and final NNNPS, rather than the difference between the consultation draft and the final version.
86. Although there was reference to the Material Impact Test being re-inserted, it did not explain the significance of that change, or that the SoS needed to assess the materiality of the change. Dr Wolfe submits that there is no evidence that the SoS addressed his mind to that issue, as the statute required him to do.
87. Miss Grogan submits the changes were not material. The Government Response to the TSC had explained that the materiality test from the 2015 NNNPS was to be reinstated for added clarity. That was included in the Ministerial Submission, so the SoS had

expressly considered it. The change was also identified in the Government Response to consultation at para 2.52 and the changes set out in Annex G of the submission.

88. In terms of the reasons for the change, these are set out in the witness statement of Dr Catherine Miller, Deputy Director for Roads Planning at the Department of Transport. She explains that the change in the draft NNNPS was not intended to be a significant change, but was there simply because it was felt unnecessary to repeat the test given the requirement to assess schemes against carbon budgets. However in the light of consultation responses, and what I perceive to be something of a lack of clarity, it was decided to reinstate the words about the Material Impact Test.

89. In respect of sectoral targets Dr Miller states:

“Regarding sectoral targets, paragraph 5.31 of the consultation version of the NNNPS 2024 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 sector targets are developed and come into force.””

90. I accept Miss Grogan’s submission that the SoS did consider the materiality of the changes and therefore whether re-consultation was required because they were referred to him in the material that went to him with the Ministerial Submission. He can therefore be assumed to have been aware of the issue around the change of the draft to the final version of the NNNPS in respect of removing the Material Impact Test.

91. I also accept that the change was not in fact sufficiently material to give a legal requirement to reconsult. Although on a first reading the introduction of the Material Impact Test at the end of para 5.42 of the final NNNPS appears to be imposing a very high bar for refusal, I accept, having looked at the material in detail, that it does not substantively change what was in the draft at para 5.37. There are new words, but the effect on any decision making would be no different. I agree with what Dr Miller says, that the change was clarificatory rather than actually a material change. Without the reintroduction of those words there were likely to be arguments about whether the SoS had lessened the test (as is in fact proven by this case), where it was not the intention of the SoS to introduce such a change.

92. In relation to the removal of reference to sectoral targets from para 5.31 of the draft into the final version, I accept that this was again simply clarificatory given that there are no statutory sectoral targets. The only statutory targets (or actually obligations) are in the national carbon budgets, see *Bristol Action Network v Secretary of State for Levelling up, Housing and communities* [2023] EWHC 171. If statutory sectoral targets are introduced then they will have statutory effect and therefore any lack of reference

to them in the NNNPS does not diminish their impact. I accept that it was potentially confusing to have reference to sectoral targets when there are none with legal effect.

93. I therefore agree with Miss Grogan that there were no changes between the draft and final version of the NNNPS that create a duty to reconsult. This Ground therefore fails.
94. For these reasons I dismiss this challenge.