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# England and Wales High Court (Administrative Court) Decisions

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Case No: CO/3011/2021

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

09/03/2022

Before:

MR JUSTICE CHAMBERLAIN

Between:

THE QUEEN on the application of TRANSPORT ACTION  
NETWORK LIMITED

Claimant

- and -

SECRETARY OF STATE FOR TRANSPORT

Defendant

David Wolfe QC and Peter Lockley (instructed by Leigh Day Solicitors) for the Claimant  
Richard Moules (instructed by the Government Legal Department) for the Defendant  
Hearing date: 24 February 2022

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## **Mr Justice Chamberlain :**

### **Introduction**

1. On 14 July 2021, the Secretary of State for Transport (the Rt Hon. Grant Shapps MP) announced his decision, pursuant to s. 6 of the Planning Act 2008 ("the 2008 Act"), to initiate a review of the National Networks National Policy Statement ("the NNNPS"). I shall refer to this as the "review decision".
2. On 21 July 2021, the Secretary of State decided not to suspend the NNNPS in whole or in part pending the review. The power to suspend arises under s. 11 of the 2008 Act. I shall refer to this as the "suspension decision".
3. Transport Action Network Limited welcomes the review decision, but brings these judicial review proceedings to challenge the suspension decision. There were originally six grounds of challenge. Lang J refused permission on the papers on all of them. The application was renewed orally on grounds 1-5 only.
4. In my judgment, none of the grounds is arguable. I therefore refuse the renewed application for permission to apply for judicial review. Because of the importance of the issues, however, I have set out my reasons in writing in some detail.

### **Statutory framework**

5. The 2008 Act contains a procedure for formulating policy in relation to nationally significant infrastructure projects. The procedure involves appraisal, consultation and publicity, Parliamentary scrutiny and designation by the Secretary of State. Once a statement has been designated as an NNNPS, certain consequences flow.
6. By s. 104(3), the Secretary of State must decide any application for development consent "in accordance with any relevant national policy statement, except to the extent that one of more of subsections (4)-(8) applies". Subsections (4)-(8) are not said to be relevant here.
7. Section 6 of the 2008 Act provides in material part as follows:
  - "(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."

8. Section 11 provides as follows:

"(1) This section applies if the Secretary of State thinks that the condition in subsection (2) or (3) is met.

(2) The condition is that—

(a) since the time when a national policy 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.

(3) The condition is that—

(a) since the time when part of a national policy statement ("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.

(4) The Secretary of State may suspend the operation of all or any part of the national policy statement until a review of the statement or the relevant part has been completed.

(5) If the Secretary of State does so, the designation as a national policy statement of the statement or (as the case may be) the part of the statement that has been suspended is treated as having been withdrawn until the day on which the Secretary of State complies with section 6(5) in relation to the review."

### **Factual background**

9. The NNNPS was designated in 2014. It sets out the need for, and the Government's policies to deliver, nationally significant infrastructure projects ("NSIPs") on the road and rail networks. It makes clear at para. 1.14 that its purpose is to set "high level policy rather than specifying locations for enhanced or new infrastructure".
10. Chapter 2 deals with the need for development of the national networks and Government's policy. The "Summary of need" is as follows:

## **"Government's vision and strategic objectives for the national networks**

The Government will deliver national networks that meet the country's long-term needs; supporting a prosperous and competitive economy and improving overall quality of life, as part of a wider transport system. This means:

- Networks with the capacity and connectivity and resilience to support national and local economic activity and facilitate growth and create jobs.
- Networks which support and improve journey quality, reliability and safety.
- Networks which support the delivery of environmental goals and the move to a low carbon economy.
- Networks which join up our communities and link effectively to each other."

11. Chapter 4 is headed "Assessment principles". At para. 4.2, it is said that "there is a presumption in favour of granting development consent for national networks NSIPs that fall within the need for infrastructure established in this NPS".
12. Chapter 5 deals with "Generic impacts", including carbon emissions. It includes this:

### **"Introduction**

5.16 The Government has a legally binding framework to cut greenhouse gas emissions by at least 80% by 2050. As stated above, the impact of road development on aggregate levels of emissions is likely to be very small. Emission reductions will be delivered through a system of five year carbon budgets that set a trajectory to 2050. Carbon budgets and plans will include policies to reduce transport emissions, taking into account the impact of the Government's overall programme of new infrastructure as part of that.

### **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 the 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 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."

13. The first sentence of para. 5.16 refers to the legal obligation to cut greenhouse gas emissions by 80% by 2050. That was the obligation in force in 2014: see s. 1 of the Climate Change Act 2008 ("CCA 2008"). In 2019, however, following advice from the Committee on Climate Change, the Government decided to adopt the "Net

Zero Target" and s. 1 of the CCA 2008 was amended by statutory instrument to require the Secretary of State to ensure that the net carbon account for the year 2050 is at least 100% lower than the 1990 baseline. This in turn required the "carbon budgets" provided for by ss. 4-10 of the CCA 2008 to be aligned to this new target. The sixth carbon budget, for the year 2033-2037, was set on 23 June 2021 with a view to ensuring compliance with the Net Zero Target.

14. The adoption of the Net Zero Target led to pressure on the Government, including from the claimant, to review the NNNPS. Officials made submissions to the Secretary of State recommending a review in October 2020 and again in February 2021. On both occasions, officials said that they had *not* identified any ground for review which meets all three considerations set out in paragraphs (a)-(c) of s. 6(3) and (4), but nonetheless, policy issues had emerged, and would further crystallise in the next few years, which made a review advisable. Because the three considerations were not met, officials advised that there was no power to suspend under s. 11.
15. The Secretary of State did not accept the recommendations in October 2020 and February 2021 to begin a review. On both occasions his reasons included that no part of the NNNPS met the three considerations for a review in s. 6 of the 2008 Act.
16. In the spring and summer of 2021, work was underway on the Transport Decarbonising Plan ("TDP"), which announced policies with the aim of encouraging transport with lower carbon emissions. On 8 July 2021, shortly before the publication of the TDP on 14 July 2021, officials made another submission to the Secretary of State. This submission contained another recommendation to announce a review of the NNNPS.
17. In the summary of recommendations in para. 2, officials said this: "**Note** that further advice will follow on whether to suspend or not suspend the NNNPS while a review is taking place, we are not seeking your views on that now." In para. 6, officials said that they had reassessed and identified "two areas where we now believe that parts of the NNNPS now trigger the three considerations set out in the Planning Act, which you are required to consider when deciding whether to review a national policy statement". The submission added this:

"The main stated rationale for including a commitment to review in the TDP is that the traffic and congestion forecasts underlying the Statement of Need are now out of date. In our previous advice, we judged that changes in forecasts equated to a significant and unanticipated change of circumstances since designation of the statement in 2015, but it was unclear whether this was significant enough that, if it had been known, there would have been a change of policy. We believe that, on balance, a number of factors including emerging clarity as to significant and potentially permanent changes to road demand post-Covid and the policies within the TDP itself now mean that the Statement of Need for road construction now meets all three tests.

The TDP also provides a new policy framework for stable road emissions in the medium term, which is underpinned by the sixth carbon budget. This new and unanticipated change in circumstances since 2014 potentially requires a review of the section on carbon emissions."

18. At para. 7, the Secretary of State was advised: "You could choose to suspend some or all the NNNPS while the review is conducted. We are finalising legal and policy advice on this and will submit that in due course." At para. 8, this was said:

"While reviewing the NNNPS will reduce risk from the planning system in the longer term, there is a risk of disruption in the short term due to uncertainty while the review takes place. 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."

19. A draft written ministerial statement was prepared to announce the review. It contained the following passage:

"The National Networks National Policy Statement (NNNPS) was designated in 2015. 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."

20. In a summary cover note, the Private Secretary to the Secretary of State was asked to "Note the importance of not having a view on suspension or not of the NPS, as this will be the subject of further advice."
21. 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'."

22. The decision to review the NNNPS was announced in the DTP on 14 July 2021 in these terms:

"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 Ten 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."

23. On 15 July 2021, officials sent the promised submission on whether to suspend the NNNPS pending review. They recommended that the Secretary of State not suspend part or all of the NNNPS and that he should agree to a revised written ministerial statement. The submission provided materially as follows:

"6. Under Section 11 of the Planning Act 2008 you have the power to suspend some or all the NNNPS while the review is conducted, but only if you think the three considerations set out in Section 11 are met. The three considerations under ss. 11(2) and (3) are: (a) since the time when the NPS, or part of it, was published, there has been a significant change in any circumstances on the basis of which any of the policy set out in the NPS, or part of it, 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 NPS, or part of it, would have been materially different. These tests overlap with the considerations to review the NPS set out in Section 6 of the Planning Act 2008. In the advice to review the NNNPS provided on 8 July, we assessed the current NPS against the three tests considering recent policy developments, including the contents of the TDP. The decision to review was required to have regard to the objective of contributing to the achievement of sustainable development (although that requirement does not apply to deciding whether to suspend). The recommendation was that the NNNPS should be reviewed 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.

7. 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. The Statement of Need and the sections on carbon emissions aspects of wider Government policy could be suspended (without suspending the entire NNNPS), however the Statement of Need cuts across much of the policy the NPS contains.

8. 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 (or conscious desire to fall under the new NPS) and supports a steady flow of DCO applications."

24. A revised draft ministerial statement was appended to the submission.

25. The Secretary of State accepted the recommendation on 21 July 2021 and the written ministerial statement was laid before Parliament on 22 July 2021. It included these passages:

"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.

...

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."

## Ground 1

26. Under ground 1, David Wolfe QC for the claimant submits that, to be lawful, the suspension decision had to be made on an open-minded basis and not be vitiated by pre-determination. However, at the time when the suspension decision was made, the Secretary of State had already announced in the TDP that the NNNPS would continue to remain in force pending review. The same wording ("While the NPS continues to remain in force") appears in the written ministerial statement laid on 22 July 2021. Mr Wolfe relies also on para. 8 of the submission of 8 July 2021 and on the absence of any reasons militating against suspension in the submission of 15 July 2021.
27. For the Secretary of State, Richard Moules submits that the terms of the submission of 8 July 2021 and the private office cover note make clear that the Secretary of State was not at that stage being invited to reach a decision on suspension. On the contrary, the submission of 8 July 2021 makes clear that there is to be separate briefing on the question of suspension, which there was.
28. An allegation that a decision was pre-determined is a serious one. It is agreed that the test is objective. In the context of individual planning decisions, the question is whether there is "positive evidence to show that there was indeed a closed mind", i.e. "such evidence as would suggest to the fair-minded and informed observer the real possibility that the [decision-maker] had abandoned his obligations": *R (Lewis) v Redcar and Cleveland Borough Council* [2008] EWCA Civ [2009] 1 WLR 83, [96]-[97] (Rix LJ). I am prepared to assume, as both parties submitted, that the same test applied to the suspension decision.
29. In deciding whether there is such evidence in this case, it is important to read the submissions of 8 July 2021 and 15 July 2021 and their various cover notes and attachments not in an overly legalistic way, but as a fair-minded lay person would read them. That is why I have set out their material parts in some detail.

30. When the private and public documents are considered in sequence and as a whole, it is, in my judgment, clear that the Secretary of State had not decided whether to suspend the NNNPS until after he received the submission of 15 July 2021.
31. First, the submission of 8 July 2021 says in terms in the summary in para. 2 and again in para. 7 that the Secretary of State will be asked separately to consider whether to suspend the NNNPS. Paragraph 2 is clear that a decision on that issue is not being sought now. The cover note to the Secretary of State's private office is even more explicit in noting the importance of "not having a view on suspension or not of the NPS" (emphasis in original). If, despite these clear statements, a decision had in fact been taken before the publication of the TDP, one would expect the Secretary of State's private office to have said so. That they did not provides a very strong indicator that no such decision was in fact taken.
32. Second, the words "While the NPS continues to remain in force", which appear in the TDP published on 14 July 2021, in context, is most obviously understood as indicating only that the announcement of a review of the NNNPS did not mean that the NNNPS was being suspended. Rather, it continued in force for the time being. Given the perceived importance of the NNNPS in terms of legal certainty, this was an important point to make. The public was not told about the timescale for the suspension decision, but the private documents I have set out above make clear that the latter decision had not yet been taken, though it was expected to be taken soon.
33. Third, the fact that the same formulation ("While the NPS continues to remain in force") appears in the written ministerial statement of 22 July 2021 does not have the significance contended for by Mr Wolfe. As the drafts show, that was an evolving document. The final statement had an additional sentence not present in the 8 July 2021 draft which was added to announce the suspension decision: "While the review is undertaken, the NPS remains relevant government policy and has effect for the purposes of the Planning Act 2008."
34. Fourth, insofar as the draft written ministerial statement of 8 July 2021 conveys a view that the NNNPS "continues to provide an appropriate framework for the planning Inspectorate to make planning decisions", that is hardly surprising. The draft represented the current view of the officials who produced it. (Indeed, it might be thought surprising if their view on that question had changed dramatically between 8 and 15 July 2021.) But, as the *Redcar* case makes clear, predisposition towards a particular outcome is not the same as pre-determination. In any event, they were not the decision-makers and they made clear that they were not inviting the Secretary of State to take the decision at that stage.
35. No fair-minded reader of the documents would conclude that the Secretary of State approached the decision whether to suspend the NNNPS with a closed mind. The contrary is not arguable.

## Ground 2

36. Under ground 2, the complaint is put in two ways, which are very closely related.
37. First (ground 2a), the claimant complains that the 15 July 2021 submission did not say whether it was proceeding on the basis that the conditions in s. 11 were met. It referred back to the briefing of 8 July 2021, which in its annex (said to be relevant both to s. 6 and to s. 11 of the 2008 Act) said that – for some events – the third condition was "potentially" met. That was sufficient for deciding whether to review the NNNPS, because s. 6 required only that the three considerations set out there be taken into account. It was not sufficient for s. 11, because under that section the three tests had to be met for the power of suspension to arise. The Secretary of State thus failed to consider whether the three conditions were in fact met.
38. The Secretary of State's response is that it is obvious from the context that officials considered the three conditions to be met and they advised the Secretary of State accordingly.
39. Again, it is necessary to read the submissions to the Secretary of State together. The submissions of October 2020 and February 2021 were both clear on their face that officials did *not* believe the three "considerations" were met. As they correctly advised, this meant that, while the Secretary of State *could* review the NNNPS (as they recommended he should), he could not suspend pending review. On each occasion, the Secretary of State decided

*not* to initiate a review of the NNNPS *because* (inter alia) the three conditions were not met.

40. The 8 July 2021 submission was addressed to the same Secretary of State. It said: "We have identified two areas where we now believe that parts of the NNNPS now trigger the three considerations set out in the Planning Act". This was perhaps not the language a very meticulous lawyer might have used. But against the background of the previous two submissions (and the Secretary of State's decisions based on them), it was very clear what was being said: officials now believed that each of the three conditions in s. 11 was met. If it were otherwise, there would be no power to suspend (which was the position in October 2020 and February 2021). Yet the 8 July 2021 submission made clear that there was a power to suspend. In context, an informed reader such as the Secretary of State must have understood that, in the view of his officials, the three conditions were met. There is nothing to displace the presumption that the Secretary of State took the suspension decision on that basis.
41. The second way in which this ground is put (ground 2b) is that the Secretary of State took the suspension decision on the basis that there was doubt as to the satisfaction of this condition. Had he understood that there was no such doubt, he might have decided differently.
42. This too is, in my judgment, unarguable, for much the same reasons. The two submissions of 8 July and 15 July 2021 have to be read against the background of the submissions of October 2020 and February 2021. When that is done, it is clear that the Secretary of State was being told that all the s. 11 conditions were met. The use of the word "potentially" in the annex could not realistically have cast any doubt on this message.

### **Ground 3**

43. Under ground 3, the claimant says that the submission to the Secretary of State contained an error of law: that it would be lawful for planning inspectors to consider revised traffic forecasts or policy evolution (including in relation to emissions targets) within the framework of the current NNNPS. In fact, however, the claimant submits that s. 104(3) of the 2008 Act would require inspectors to adhere to the current statement of need and the existing guidance on the assessment of carbon emissions.
44. At the hearing, Mr Wolfe concentrated on the penultimate sentence of para. 5.17 of the NNNPS: "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." Having identified this statement as something that required review, Mr Wolfe said that the Secretary of State could not now argue that it did not matter.
45. For the Secretary of State, Mr Moules submitted that, pending the review, inspectors would be fully able to take into account within the framework of the existing NNNPS both revised traffic forecasts and the Net Zero Target and revised carbon budgets.
46. In my judgment, this ground is not properly arguable.
47. There is no real dispute about the effect of s. 104(3) of the 2008 Act. In situations such as the present where s. 104(4)-(8) do not apply, it requires inspectors to decide applications in accordance with the NNNPS so far as relevant to the application. But the NNNPS is a detailed and nuanced document. Some parts of it contain descriptive or predictive statements; other parts contain statements about how to assess applications.
48. The penultimate sentence of para. 5.17 is in the former category. Moreover, it is obviously premised on the target applicable under the CCA 2008 at the time when the NNNPS was designated. The part of the para. 5.17 that is relevant to the task that inspectors are required to perform is the final sentence: "for road projects applicants should provide evidence of the carbon impact of the project and an assessment against the Government's carbon budgets". As Mr Wolfe accepted, this cannot sensibly be read as directing inspectors to assess carbon impacts of proposed schemes against out-of-date carbon budgets dating from before the adoption of the Net Zero Target: inspectors cannot be required to ignore a change in the law. Rather, it sets a framework for assessment which can take account of the Net Zero Target and the revised carbon budgets.
49. Likewise, the key operative part of para. 5.18 is the final sentence: "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." It is quite possible that the phrasing of this sentence might change as a result of the review, but the existing language can be sensibly applied in the light of the Net Zero Target and revised carbon budgets. Inspectors will be aware that these matters make it more likely than before that an increase in carbon emissions resulting from a proposed scheme will be so significant that they will have a material impact on the Government's ability to meet its carbon reduction budgets. Nothing in paras 5.17 and 5.18 of the NNNPS imposes on them a legal obligation them to shut their eyes to this reality.

50. Mr Wolfe also accepts, correctly in my view, that inspectors can properly take account of revised traffic forecasts in conducting assessments. That seems to me to undermine the force of the submission that, because the "statement of need" remains in force, they will remain constrained by the presumption in para. 4.2 that development consent for proposals which fall within that need should be granted. The chapter outlining the need for development of road infrastructure makes explicit reference to the traffic forecasts current at the time of the NNNPS's designation. Once it is accepted, as it rightly has been, that the inspectors can take account of updated forecasts, it is difficult to see how the advice given to the Secretary of State in para. 7 of the submission of 15 July 2021 could be said to be wrong in law.
51. In my judgment, officials were entitled to advise the Secretary of State that the NNNPS "continues to provide an appropriate framework" for inspectors to make decisions, notwithstanding that it was possible (and even probable) that the "statement of need" would be subject to change following the review.

#### **Ground 4**

52. Under ground 4, the claimant complains that the 8 July 2021 submission wrongly summarised the TDP as containing a commitment to "keeping road emissions stable in the medium term". In fact, Mr Wolfe submits, the TDP contains no such commitment; and the data contained in it makes clear that it will be necessary for emissions from cars and vans to decline by well over 50% by 2035.
53. For the Secretary of State, Mr Moules accepts that the reference to keeping road emissions stable was an error, but submits that it would be surprising if the Secretary of State had been misled by it, given that he had only a week beforehand published the TDP, containing a Foreword which he himself signed. The Foreword introduced and trumpeted "our plan to decarbonise motor transport, the most ambitious of any major country".
54. In my judgment, it is well established that not every error in a submission to a Minister will vitiate the Minister's decision. The question is whether the error is "material": see *R (Mansell) v Tonbridge and Malling Borough Council* [2017] EWCA civ 1314, [2019] PTSR 1452, [42(2)]. Whether it is material will be context-dependent. Here, the context includes the fact that the Secretary of State had just published the TDP, to which he had contributed a Foreword. The commitment to decarbonise road transport was not just part of the TDP. It was the whole point of it – as its title suggests. In the circumstances, the suggestion that the error in the submission of 8 July 2021 was material is not arguable.

#### **Ground 5**

55. Under ground 5, the claimant submits that the Secretary of State's consideration of the question whether to suspend the NNNPS in part was flawed. Para. 7 of the submission of 15 July 2021 considered suspension of the statement of need and the section on carbon emissions aspects while leaving the rest of the NNNPS in place. The reason given was that "the Statement of Need cuts across much of the policy the NPS contains".
56. Mr Wolfe submits that this was inadequate because no reason was given for not suspending the sections on carbon emissions, nor for not suspending the statement of need in relation to road transport only, leaving the statement intact as respects rail.
57. In my judgment, the submission of 15 July 2021 discloses no arguable public law flaw in the decision not to suspend the NNNPS.

58. First, para. 7 of the 15 July 2021 submission makes clear that the option of part-suspension was drawn to the Secretary of State's attention. A single reason was given for not suspending: that the statement of need was so bound up with the rest of the document that it could not be meaningfully separated from it. (This is the most obvious way of reading the statement that the statement of need "cuts across much of the policy the NPS contains".) In my judgment, this was a perfectly proper basis for not suspending the statement of need. Doing so would be tantamount to suspending the whole document, given the centrality of the statement of need to the operability of the presumption in favour of development in para. 4.2.
59. Second, insofar as this ground depends on the proposition that suspension of the statement of need is necessary to give effect to the Net Zero Target or to revised carbon budgets or traffic forecast, it fails for the same reasons as ground 3 fails.
60. Third, as to the suggestion that the Secretary of State failed to consider the possibility of suspending the statement of need in relation to road (but not rail), the reason given for not suspending the statement of need at all also applies to part-suspension in relation to road transport. Doing so would either leave the effect of the NNNPS radically unclear in respect of road transport or would be tantamount to suspending the whole document as respects road transport. The Secretary of State was entitled to decide that these consequences would be undesirable and therefore to reject partial suspension.

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