Claim No: CO/2224/2023
(listed with CO/2410/2023 and CO/2407/2023)

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

IN A ROLLED-UP HEARING OF AN APPLICATION FOR JUDICIAL REVIEW:

THE KING

-on the application of-

FRIENDS OF THE EARTH LIMITED

Claimant

-and-

SECRETARY OF STATE FOR ENERGY SECURITY AND NET ZERO

Defendant

SKELETON ARGUMENT FOR FRIENDS OF THE EARTH LIMITED
for hearing 20-22 February 2024

References in square brackets are references to page numbers in the core hearing bundle [CB1/] or [CB2/] or supplementary bundle [SB1/] or [SB2/].

A. INTRODUCTION AND OVERVIEW

1. Friends of the Earth ("**FoE**") challenges the lawfulness of the Secretary of State for Energy Security and Net Zero's ("**the SoS**") decision dated 29 March 2023 to adopt the Carbon Budget Delivery Plan ("**the CBDP**") (published on 30 March 2023) ("**the Decision**") in purported compliance with (1) sections 13 and 14 of the Climate Change Act 2008 ("**CCA**") and (2) Holgate J's 19 July 2022 Order ("**the Order**") [**SB1/417-420**].

2. The Order was made after FoE, ClientEarth and the Good Law Project successfully challenged the Net Zero Strategy ("**the NZS**") in **R (Friends of the Earth Ltd & Ors) v Secretary of State for Business, Energy and Industrial Strategy** [2022] EWHC 1841 (Admin) ("**FoE (No. 1)**"). Holgate J held that the NZS unlawfully failed to discharge the SoS'

duties under sections 13 and 14 CCA and ordered the SoS to produce a lawful report pursuant to section 14 by 31 March 2023.

3. When the CBDP was produced, FoE, ClientEarth and the Good Law Project all lodged claims challenging its legality. Lang J ordered the three claims be heard together by way of a rolled-up hearing and granted the SoS permission to address all three claims in a single set of Detailed Grounds of Resistance ("**DGR**") and a single skeleton.

4. FoE challenges the Decision on the following grounds[1]:

   a. Ground 1: In breach of section 13(1) CCA, the SoS failed to consider information obviously material to the risk to delivery of individual proposals and policies set out in the CBDP, in that (a) the SoS was not provided with, and so failed to take into account, risk assessments produced by Government departments responsible for particular proposals and policies, (b) the information about delivery risks which was provided to the SoS did not fairly and accurately communicate information about delivery risks provided by relevant Government departments, and (c) the SoS was not provided with any information about the delivery risk to the Devolved Administrations' proposals and policies.

   b. Grounds 2 and 3:[2] The SoS's conclusion that the proposals and policies in the CBDP "will enable" the carbon budgets set under the CCA to be met for the purpose of section 13(1) CCA proceeded on the assumption that the reductions in emissions of greenhouse gases ("**GHG**") from all of the proposals and policies in the CBDP would all be delivered in full when there was no evidential basis for that assumption.

   c. Ground 4:[3] In breach of section 13(3), the SoS failed to conclude that the proposals and policies would make an overall contribution to sustainable development.

   d. Ground 5:[4] In breach of section 14, the SoS failed to include in the CBDP information obviously material to the risk to delivery of the carbon budgets, namely the assessment of risk to delivery of individual proposals and policies provided to the SoS; information about the delivery risk of individual proposals and policies produced by

[1] FoE adopts the numbering of grounds of challenge used in the DGRs. Ground 1 corresponds to the FoE's Ground 1(a) and (b)at §§41-49 Statement of Facts and Grounds ("**SOFG**").
[2] Grounds 2 and 3 correspond to FoE's Ground 1(d) at §§51 to 52 SOFG.
[3] Ground 4 corresponds to FoE's Ground 3 at §§66 to 70 SOFG.
[4] Ground 5 corresponds to FoE's Ground 2 at §§57 to 65 SOFG.

responsible Government departments; and information on the delivery risks relating to Devolved Administrations' proposals and policies.

5. In summary, FoE's case is:

   a. The SoS's failure to consider information obviously material to the delivery risk of individual proposals and policies meant that the SoS was unlawfully not even aware of the delivery risks associated with policies and proposals he relied upon when taking his decision under section 13(1).

   b. The CBDP did not comply with section 14 because not only were the same matters omitted from that report, but the CBDP also failed to contain any information about the delivery risk of individual policies and proposals (with the result that neither Parliament, nor the CCC nor the public could be aware of the extent of delivery risk associated with policies and proposals relied upon in the plan for meeting the carbon budgets set under the CCA).

B. FACTUAL BACKGROUND

6. On 19 October 2021, following the setting of the Sixth Carbon Budget ("**CB6**"), the NZS was laid before Parliament as the SoS's section 14 report. FoE, ClientEarth, and the Good Law Project all brought claims for judicial review concerning the NZS. On 29 June 2022, the Climate Change Committee ("**CCC**") published its 2022 Progress Report to Parliament: [**SB1/398**]. The report identified that there were credible policies in place for 39% of the emissions reductions required to meet CB6: [**SB1/405]** at first bullet point.

7. On 18 July 2022, Holgate J handed down judgment in **FoE (No. 1)**. He found that the NZS had been unlawfully adopted, because: (a) the SoS was not briefed upon, and therefore did not take into account, information he was legally obliged to consider to be satisfied that the proposals and policies in the NZS would enable the carbon budgets to be met so as to comply with section 13(1); and (b) the NZS unlawfully did not contain information which was required by section 14.

8. On 30 March 2023, the CBDP was laid before Parliament as the SoS' section 14 report. Its introduction states (§1) it is "*being published to inform Parliament and the public of the government's proposals and policies to enable carbon budgets to be met*". Contrary to past practice, the CBDP was not provided to the CCC prior to publication [**SB2/449-450/§§12-14**].

9. The section 13(1) conclusion on enabling the carbon budget to be met was at §§30-35. The assumed emissions savings for all quantified proposals and policies result in over

100% of savings required to meet the Fourth and Fifth Carbon Budgets and 97% of CB6, assuming all reductions are delivered in full: §30 [**CB2/16**]. The overall conclusion was set out at §31: "*We are confident that Carbon Budget 6 can be met through a combination of the quantified and unquantified policies identified*" [**CB2/16**]. This conclusion was based on using Global Warming Potentials (**"GWPs**") "*without feedback*" [**CB2/201/§5**].

10. A draft of the CBDP and annexes were provided to the SoS on 24 March 2023 with a Ministerial Submission, updated on 27 March 2023 [**CB1/387-389**]. The SoS took an 'in principle' decision to approve the CBDP on 27 March 2023. The final Ministerial Submission and updated CBDP (and annexes) were provided to the SoS on 28 March 2023 [**CB1/398-400**]. Some of the submissions and annexes were disclosed with the SoS' DGR. The annex to the submission, dated 28 March 2023, explained that delivery risks are captured in Tables 2 and 3 at Appendix B ("**the Risk Tables**"). Table 2 lists quantified proposals and policies [**CB1/457-538**]. Table 3 lists unquantified proposals and policies [**CB1/538-582]**. The Risk Tables replicate Tables 5 and 6 in Appendix B to the CBDP [Table 5 at **CB2/47-106,** Table 6 at **CB2/107-169**] but with the addition of two further columns setting out narrative text under the headings "Delivery Risks: Explanation" and "Delivery Risks: Mitigation".

11. On 29 March 2023, the SoS decided to lay the CBDP before Parliament (so this claim concerns what the SoS personally took into account for section 13 purposes). The CBDP was published and laid before Parliament on 30 March 2023. On 29 June 2023, the CCC published its 2023 Progress Report to Parliament. At p.97, it said that there were credible policies in place for less than 20% of the reductions required to meet CB6 [**SB2/84**].

C. LEGAL FRAMEWORK

12. **FoE (No. 1)** contains a helpful summary of the legal framework at §§28-55. Section 1(1) CCA, as amended by the Climate Change Act 2008 (2050 Target Amendment) Order 2019, requires the Secretary of State to ensure that GHG emissions are at least 100% lower in 2050 than they were in 1990 ("**the 2050 Target**"). Section 4 CCA requires the Secretary of State (a) to set five-yearly carbon budgets (that are stepping-stones to meeting the 2050 Target), and (b) to ensure that the net UK carbon account for a budgetary period does not exceed the carbon budget.

13. Section 13 provides:

> "**13 Duty to prepare proposals and policies for meeting carbon budgets**
>
> (1) The Secretary of State must prepare such proposals and policies as the Secretary of State considers will enable the carbon budgets that have been set under this Act to be met.
>
> (2) The proposals and policies must be prepared with a view to meeting— (a) the target in section 1 (the target for 2050), and (b) any target set under section 5(1)(c) (power to set targets for later years).
>
> (3) The proposals and policies, taken as a whole, must be such as to contribute to sustainable development.
>
> (4) In preparing the proposals and policies, the Secretary of State may take into account the proposals and policies the Secretary of State considers may be prepared by other national authorities." [underlining added]

14. Section 14 provides:

> **"14 Duty to report on proposals and policies for meeting carbon budgets**
>
> (1) As soon as is reasonably practicable after making an order setting the carbon budget for a budgetary period, the Secretary of State must lay before Parliament a report setting out proposals and policies for meeting the carbon budgets for the current and future budgetary periods up to and including that period.
>
> (2) The report must, in particular, set out— (a) the Secretary of State's current proposals and policies under section 13, and (b) the time-scales over which those proposals and policies are expected to take effect.
>
> (3) The report must explain how the proposals and policies set out in the report affect different sectors of the economy.
>
> (4) The report must outline the implications of the proposals and policies as regards the crediting of carbon units to the net UK carbon account for each budgetary period covered by the report.
>
> (5) So far as the report relates to proposals and policies of the Scottish Ministers, the Welsh Ministers or a Northern Ireland department, it must be prepared in consultation with that authority.
>
> (6) The Secretary of State must send a copy of the report to those authorities." [underlining added]

D. GROUND 1: FAILURE TO TAKE INTO ACCOUNT MANDATORY MATERIAL CONSIDERATIONS

15. FoE submits that:

    a. The risk to delivery of individual proposals and policies is a mandatory consideration which the SoS must take into account when making a decision under section 13(1).

    b. That the SoS was not provided with, and so failed to take into account, two categories of information obviously material to the risk to delivery of individual proposals and policies set out in the CBDP, namely (1) risk assessments produced by Government departments responsible for particular proposals and policies including RAG ratings and (2) information about the delivery risk to the Devolved Administrations' proposals and policies. In addition, the information about delivery risks which was provided to the SoS did not fairly and accurately communicate information about delivery risks provided by relevant Government departments.

16. The factual basis for this ground requires careful review of the evidence and disclosure provided by the SoS with the DGRs to understand what information was provided to the SoS, what information was available to DESNZ officials but withheld from the SoS, and the extent to which the information provided to the SoS was an accurate and fair summary of the information available to DESNZ officials. The relevant factual background is therefore set out in some detail at section D.1 below.

D.1 Relevant factual background

17. DESNZ officials asked all Government departments to provide information on the delivery risk of all proposals and policies for which they were each responsible. This exercise was referred to as the December Commission. The Guidance on the December Commission, dated 14 December 2022, explained, in a section headed "Legal Context", that "*the judgment was clear that BEIS SoS needs sufficient information on delivery risks to make an informed judgement about whether carbon budgets can be met. This must include qualitative explanation of risks and planned mitigations, in addition to RAG [Red Amber Green] ratings*": [**CB1/354** after "Delivery Risks"].

18. It had been past practice to use RAG ratings to advise Ministers on delivery risk: see Chris Thompson's Witness Statement ("Thompson 1") at §76 explaining that RAG ratings "*can provide an important "snapshot" signal that there is a range of delivery confidence and some areas may need further scrutiny"* [**CB1/272-273]**. For example, RAG ratings were

provided in a bar chart in Annex C to the 8 November 2022 Ministerial Submission [**CB1/341**]: see Chris Thompson's witness statement [**CB1/279/§97**].

19. Most Government departments provided returns to the December Commission by the 25 January 2023 deadline: Thompson 1 at §95 [**CB1/278-279**]. The SoS has not disclosed these returns, referred to as the "December returns", save for the cover note to DEFRA's initial December return dated 25 January 2023: **[CB1/373-377]**. This is despite repeated requests from FoE to disclose these documents. The SoS has provided a risk analysis dated 27 February 2023 produced by DEFRA ("**the DEFRA risk analysis**") [**SB1/551**]. It is unclear to what extent this document differs from the initial DEFRA return provided to DESNZ on 25 January 2023. Chris Thompson explains that DEFRA's December return included a Word document which set out each of DEFRA's proposals and policies alongside relevant information for each proposal or policy [**CB1/290/§132**]. This was an earlier version of the DEFRA risk analysis. Chris Thompson states that a version of the DEFRA risk analysis was sent to DESNZ officials, including him, on 20 February 2023. He explains at §136 that this is the document which was likely leaked to *The Times* and referred to in an article dated 4 April 2023 **[SB2/29-32]**. Neither the initial December Commission return nor the 20 February 2023 version of the DEFRA risk analysis have been disclosed.

20. Towards the end of February 2023, DESNZ officials asked DESNZ sector leads to do <u>two</u> things. <u>First</u>, to produce sectoral risk summaries to be included in the section 14 report: see 18 February 2023 email [**SB1/540-541**]. This was called the "February Commission on sector summaries". <u>Secondly</u>, to recast the information Government departments had provided on delivery risk to "*describe and explain the delivery risk for each individual policy and proposal, and then explain the mitigation we are taking to address this delivery risk and why that gives us the necessary confidence in delivery of our policies*": [**CB1/378**]. This was called the "February Commission on P&Ps". The request came with guidance which "*suggested prompts based on the delivery confidence RAG rating*" ("the February Guidance") [**CB1/379**]. The February Guidance advised that: policies labelled green or green-amber (denoting very high and high delivery confidence[5]) should be relabelled as "*high certainty in the delivery of this policy*"; policies labelled amber-red or red (denoting low and very low delivery confidence), where that rating is due to uncertainty, should be relabelled "*uncertain delivery risk*"; for policies labelled amber-red or red, where that rating is due to "*real and present risks*", labels should be replaced with a description of "*the actual risks faced (with a couple of short lines) and then finishing with a summary sentence, such as: If not mitigated, these risks could materially effect* [sic] *the successful delivery of the savings in full associated with the policy*": [**CB1/379**]. The February

[5] The meaning of RAG ratings is set out in Table 4 of the December Guidance [**SB1/486**].

Guidance also stated: "*For all amber and reds: please include short summaries of the Template 'route to Green' data, with added line <u>on why this gives us confidence/certainty</u> that the policy can be delivered and deliver the associated carbon savings*" (underlining added).

21. Sector leads were to provide returns by 1 March 2023: [**CB1/284-285]** at §114. The SoS has not disclosed these returns, referred to as the "February returns". In an email of 6 March 2023, an DESNZ official wrote to sector leads asking them to amend some sector risk summaries provided in response to the February Commission after feedback received from Chris Thompson and others. The email stated: "*I know there is a trade off here between adding more of this detail and having a safe narrative that everything is going ok, but anything you can add, which is in the public domain already/is not too sensitive, would be helpful*": [**SB2/4**].

22. The SoS was not provided with the December returns (which contained RAG ratings for each proposal and policy), nor even told of their existence (so would not have known they were available to ask for). Instead, he was provided with the Risk Tables at Annex B of the 28 March submission [**CB1/449-582**] in which all RAG ratings are removed and either replaced with the labels specified in the February Guidance or no label at all. The SoS was also provided with the sector summaries produced pursuant to the February Commission on sector summaries: [**CB1/427-435**].

<u>D.2 Applicable legal principles</u>

(a) Mandatory considerations under section 13(1) CCA

23. FoE submits that the risk to delivery of individual proposals and policies was a mandatory consideration which the SoS was legally obliged take into account when making a section 13(1) decision. FOE thought that proposition would be uncontroversial given §204 of **FoE No. 1** that "[*O]ne obviously material consideration which the Secretary of State must take into account is risk to delivery of <u>individual</u> proposals and policies*" (underlining added).

24. It is unclear, however, whether the SoS now accepts that the risk to delivery of individual proposals and policies, as opposed to an overall risk assessment, was a mandatory consideration. The SoS's DGRs state (§23) that, because the question of whether risk to the delivery of individual quantified proposals and policies was a mandatory consideration was not directly in issue, Holgate J did not address in detail what the mandatory relevant

consideration that he identified entailed, and how risk to delivery of individual proposals and policies might be addressed in practice.

25. FoE submits §204 of **FoE (No. 1)** was part of its ratio because it was an integral part of the reasoning which led to Holgate J's conclusion that the quantification of the effect of individual proposals and policies was an obviously material consideration. See, in particular, §211 where Holgate J explained that the risk to delivery of individual proposals and policies and quantification of those proposals and policies are both required to enable the SoS to evaluate the deliverability of the statutory targets. Even if, contrary to this submission, this part of the judgment were *obiter dicta*, as a matter of principle, the Court should find that the delivery risks of individual proposals and policies – as opposed to the overall delivery risk to achieving emissions targets – were an obviously material consideration which the SoS had to take into account when making a section 13(1) decision.

(b) Summarising material information for decision-maker

26. Where a decision-maker relies upon a briefing from others, they need not be told everything, provided they get "*the salient facts which give shape and substance to the matter, the facts of such importance that, if they are not considered, it could not be said that the matter has been properly considered*": per Brennan J in the High Court of Australia in **Minister for Aboriginal Affairs v Peko-Wallsend Ltd.** (1986) 162 CLR 24,30-3 cited with approval by Sedley and Keene LJJ in **R (National Association of Health Stores) v Department of Health** [2005] EWCA Civ 154, §§ 60-64. Those briefing the decision-maker may précis information provided that:

    a. All information on a mandatory material consideration is included. The question here is whether the information contained in the risk assessments produced by Government departments was relevant to the SoS's assessment of whether further work needed to be carried out to address uncertainty, and whether the overall figure was robust or too high: **FoE (No. 1)** at §214. Put another way, would this information have influenced the SoS's assessment of the merits of particular measures in relation to the "*all-important issue of risk to delivery*": **FoE (No. 1)** at §214.

    b. The information must fairly, accurately and adequately reflect the material on which it is based and present issues in a balanced way: **R (Hindawi) v Secretary of State for Justice** [2011] EWHC 830 (QB) at §80; **Bracking and others v Secretary of State for Work and Pensions** [2013] EWCA Civ 1345 at §73; **R (Khatib) v Secretary of State for Justice** [2015] EWHC 606 (Admin) at §53; **Northern Ireland Badger Group and Wild Justice v DAERA** [2023] NIKB (25 October 2023) at §95.

D.3 Failure to take into account information obviously material to the risk to delivery of individual proposals and policies set out in the CBDP

27. There are three aspects to this part of the claim:

a. The SoS was not provided with, so failed to consider, risk assessments produced by other departments (at the request of DESNZ officials) which contained information highly material to the critical issue of the risk to delivery of individual proposals and policies.

b. The information about delivery risks to the SoS did not fairly and accurately summarise information about delivery risks provided by other departments. So the SoS was given a misleading summary of the delivery risk, which masked the extent of delivery risk.

c. The SoS had no information about the delivery risk to the Devolved Administrations' proposals and policies.

(a) Effect of withholding departmental risk assessments and RAG ratings from SoS

28. Due to the SoS's failure to provide most of the December and February Commission returns, the full extent of information relating to delivery risk withheld from the SoS is not before the Court. However, what has been disclosed shows that departmental risk assessments were recast so as (a) to remove information material to the extent of delivery risk and (b) to understate the extent of delivery risks assessed by other departments:

a. RAG ratings were replaced with entirely ambiguous labels. See thus the FoE table comparing DEFRA information to DESNZ on 27 February 2023 (its final December return/the DEFRA Risk Analysis [**SB1/551**]) with the much more limited information provided to the SoS [**SB2/398**]. It shows 21 policies labelled "red""red/amber" – denoting low and very low delivery confidence –replaced in the Risk Tables provided to the SoS with 17 policies labelled "uncertain" and 3 unlabelled. Critically, there is little difference in terms of the "narrative" summarising the delivery risk between Defra's December commission return and the risk tables provided to the SoS (other than, critically, the lack of RAG categorisations). All changes removed detail: RAG ratings were <u>not</u> replaced by clearer or more detailed explanations on the delivery risk for each policy and proposal.

b. That relabelling meant information was presented in a skewed way. Whilst green/green-amber labels (denoting very high and high delivery confidence) were replaced with the description "high certainty of delivery" – conveying a greater sense of confidence, the delivery risk associated with red/red-amber levels was removed entirely, masking the low delivery confidence conveyed in the RAG ratings.

c. The SoS was not told RAG ratings had been replaced, or that, in accordance with the February Guidance, "red" and "red/amber" policies were relabelled as having

uncertain risk, or that policies had no label despite "*real and present risks"*: see Annex B to the Section 13 Advice of 28 March 2023 at §§29-33 [**CB1/414**]. So the information to the SoS was misleading as to delivery risk assessed by the responsible Government department. Per Lord Deben, "*uncertain*" is ambiguous, and "*could mean a range of different things*": [**SB2/452-453]** at §25.

29. As a result of departmental risk assessments being withheld, the SoS was not provided with, and so failed to consider, information highly material to the critical issue of the risk to the delivery of individual proposals and policies.

(b) Information provided to SoS was misleading as to extent of delivery risk

30. Not only was relevant information withheld from the SoS, the information provided was misleading on the delivery risk identified by responsible Government departments. Although it is not possible to set out the extent to which information provided by other Government departments was inaccurately summarised by DESNZ officials, the information which has been disclosed shows the following.

31. First, the information provided to the SoS is a wholly misleading summary of the information about delivery risk of DEFRA policies provided by DEFRA.

    a. In the cover note to its initial December return, DEFRA advised DESNZ officials in relation to delivery risk: "*our emissions savings projections by and large represent maximum feasible savings rather than a likely scenario. Delivery confidence is low for many of these emissions savings and scientific uncertainty limits precision. Key assumptions underpinning these numbers that are subject to high levels of uncertainty include land area that will be available for peatland restoration and afforestation; policy update rates by businesses, land managers and farmers; and sector-level economic growth projections. We have kept policies and proposals with high delivery uncertainty in template A, as per BEIS advice issued around this commission*": [**CB1/376]** at §22. This information about sector level delivery risk was not provided to the SoS.

    b. Instead, the DEFRA sector summary produced through the February Commission stated that "*Many of the delivery risks faced in these sectors are due to a need for further research and innovation, dependencies on other stakeholders to deliver, supply chain and sector capacity issues and the need to manage potential trade-offs with other priorities. Such as food production. There is increased risk to delivery as many of our proposals and policies are in the early stages of development"*: [**CB1/431**] at §27. There is no reference in the information provided to the SoS that DEFRA had informed DESNZ that its policies have "*high delivery uncertainty*"; that "*delivery*

confidence is low for many of these emissions savings" and that its emissions savings projections represent "*maximum feasible savings rather than a likely scenario*".

32. Secondly, removal of RAG ratings resulted in understating/masking the extent of the delivery risk for individual proposals and policies in the information provided to the SoS.

    a. Chris Thompson explains that the RAG ratings in the December returns broadly reflected those that had been provided in response to a commission undertaken in August and September 2022, which were in turn reflected in the bar chart set out in Annex C to the 8 November 2022 Ministerial Submission [**CB1/279]** at §97. Annex C shows that just under 100 $MtCO_2e$ per annum of savings required to achieve CB6 were from proposals and policies with "very low confidence" or "low confidence" of delivery; just over 50 $MtCO_2e$ per annum from proposals and policies with "medium confidence" of delivery and well under 50 $MtCO_2e$ per annum from proposals and policies with "very high confidence" or "high confidence" of delivery: [**CB1/341].**[6]

    b. In contrast, the information to the SoS said nothing on the extent of the emissions reductions associated with proposals and policies which responsible Government departments have assessed as having low or very low delivery confidence.

(c) Failure to provide delivery risks to DAs' individual proposals and policies

33. The SoS was legally required to consider this information. He did not. The explanation provided for the SoS not gathering this information is inadequate.

34. Chris Thompson says that, on 9 January 2023, a DESNZ official contacted the Devolved Administrations ("**DA**") to request information about each DA's proposals and policies to reduce emissions, including expected annualised emissions reductions and delivery risks: [**CB1/295-296**] at §151. He states that responses did not include much detail and that "*this was not unexpected*". No explanation is given as to why this information was not requested earlier nor why further efforts were not made to gather more information pertinent to delivery risk. Mr Thompson explains that the DAs hold less quantified data due to limited analytical and modelling capacity [**CB1/295]** at §155. But that does not explain why no further efforts were made to obtain information about policy delivery, policy priorities and implementation time-scales (as required for section 13 and known to the DAs).

35. Despite not having substantive information about the deliverability of the DAs' proposals and policies relating to agriculture, LULUCF, water, wastewater and F-gases, the SoS relied

[6] For context, this means that just under 50% of the emissions reductions required to achieve CB6 were from proposals and policies with "very low confidence" or "low confidence" of delivery and well under 25% of the emissions reductions required to achieve CB6 were from proposal and policies with "very high confidence" or "high confidence" of delivery.

on these proposals and policies for the purposes of section 13, calculating savings assuming that all proposals and policies would be delivered in full [**CB2/15-16]** at §26. There was even less of an evidential basis for this assumption than for the policies of central Government departments. In the cover note filed with the initial December return, DEFRA noted that numbers in relation to DA proposals and policies "*should not be treated as either accurate or reliable*" noting DAs may choose to implement different policies across environment and farming sectors: **[CB1/373-374**] at §§6-7. The devolved proposals and policies are assumed to deliver 73 $MtCO_2e$ across carbon budgets 4, 5 and 6: see Rows 181 and 190 of Table 2 [**CB1/532-533 and 536-537]**. The absence of <u>any</u> substantive risk assessment(s) meant there simply was no proper basis for the SoS to be satisfied under section 13(1) that the proposals and policies "*will enable*" carbon budgets to be met. Taking into account a briefing which said he was not being provided with information on the delivery risks in question – or that it was "*limited*" – was not him taking into account the required information on delivery risks and cannot be said to comply with the obligation to take such information into account.

(d) Summary of effect of withholding information from the SoS

36. Overall, the SoS was not provided with information obviously material to the delivery risks of proposals and policies in the CBDP. Also, the information about delivery risks which <u>was</u> provided to the SoS, did not fairly, accurately and adequately communicate information on delivery risks from Government departments, including RAG assessments. The information provided masked the extent of delivery risk.

37. The SoS' ignorance of highly material information on delivery risks of individual proposals and policies was all the more concerning given he was also advised that the assessment that 97% of emissions required to achieve CB6 was based upon the assumption that the quantified proposals and policies in the CBDP would be delivered in full: see, to this effect, **FoE (No. 1)** at §214. Lord Deben expresses surprise that the RAG ratings were not provided to the SoS, and doubts that if they had been, the SoS could have formed the view that the policies would enable the statutory emissions targets to be met: [**SB2/453]** at §27.

<u>D.4 Chris Thompson's explanation for withholding information from the SoS</u>

38. The SoS relies on evidence provided after the fact on the decision of officials to withhold information about delivery risks. Chris Thompson states (simply for the purposes of these proceedings) that the RAG ratings were "*not helpful and may be misleading*" [**CB1/271-272]** at §75 and (at §100) that "*it was never my intention that when advice on the plan was given to the Secretary of State he would be provided with a RAG rating or equivalent*". No record of this reasoning, contemporaneous or otherwise, has been provided. This

explanation contradicts the written instructions of officials involved in running the December Commission, namely that RAG ratings would be provided to the Minister: see Guidance on December Commission' [**CB1/362-363**]; this guidance was approved by Chris Thompson himself [**CB1/276]** at §87. It is also inconsistent with previous practice within DESNZ: see, for example, Annex C attached to the Ministerial Submission dated 8 November 2022 did use RAG ratings to show the Secretary of State the projected emissions savings [**CB1/341**]. Such contradictory evidence is not admissible: **United Trade Action Group v Transport for London** [2021] EWCA Civ 1197 at §125.

39. Mr Thompson's explanation that the RAG ratings may be misleading is at odds with the approach taken by the CCC, which uses a RAG rating for assessing deliverability of policies: see CCC's 2023 Progress Report to Parliament at Table 1 [**SB2/94]**.

40. This after the event justification is also contradicted by the fact that the RAG ratings from Government departments were in fact used by officials to create the risk tables they relied on for the purpose of advising the SoS on section 13 compliance and on the section 14 report.[7] If officials concluded that the RAG ratings were not helpful and might be misleading, then the RAG ratings should not have been relied upon by officials to assess the delivery risks of individual proposals and policies and provide section 13 advice to the SoS in the first place. Rather than withhold this information from the SoS, officials should have revisited the assessments to produce ones which did not suffer from those deficiencies or alternatively communicated these reservations to the SoS (as being obviously material to the delivery risks of individual proposals and policies) for him to evaluate. This is not an issue of reasonableness; it is a clear error of law through failure to have regard to a material consideration.

E. GROUNDS 2 AND 3: THERE WAS NO PROPER BASIS FOR THE SOS TO CONCLUDE THAT PROPOSALS AND POLICIES "WILL ENABLE" THE CARBON BUDGETS TO BE MET

41. Grounds 2 and 3 – which correspond to FoE's Ground 1(d) – should be taken together as they both concern the (lack of an) evidential basis for the SoS's conclusion that the proposals and policies in the CBDP "*will enable*" the carbon budgets to be met for the purposes of section 13(1) CCA. Three issues require determination:
    a. Whether, in fact, the SoS was advised to proceed on the assumption that the proposals and policies in the CBDP would be delivered in full.

[7] Indeed, when a Government department failed to provide RAG ratings, DESNZ officials chased them as they were the basis for the advice given to officials: see email dated 27 February 2023 from DESNZ officials to Defra officials stating "*We need to present this is in a clear and consistent way to enable our SoS to take a view on the delivery risk of the overall package and to do this need to understand the RAG rating for each measure*": [**SB1/552]** second full paragraph.

b. Whether there was a proper basis to support this assumption.

c. Whether there was a proper basis for the SoS to conclude that CBDP proposals and policies "*will enable*" the carbon budgets to be met for the purpose of section 13(1).

E.1 Applicable legal principles

42. A decision may be challenged on the basis that it has no sufficient evidence basis (**R (Association of Independent Meat Suppliers and another) v Food Standards Agency** [2022] 3 All ER 965 at §11) or that the reasoning involved a serious logical or methodological error: **R (Law Society) v Lord Chancellor** [2019] 1 WLR 1649 at §98, per Leggatt LJ (as he then was). The question is whether the decision-maker's conclusion can be justified on the basis of the evidence before it: **R (Wells) v Parole Board** [2019] EWHC 2710 (Admin) at §§32-34, Saini J. In **FoE (No. 1)**, Holgate J emphasised (at §192) the importance that officials and Ministers set out a "*sufficiently clear and full explanation of the reasoning process*" relied on to reach a conclusion that for section 13(1) purposes the proposals and policies will enable carbon budgets to be met, as a *quid pro quo* for any enhanced margin of appreciation to be afforded to such reasoning.

E.2 The SoS was advised to proceed on the assumption that the proposals and policies in the CBDP would be delivered in full.

43. The submission to the SoS containing the section 13 advice dated 27 March 2023 [**CB1/388**] stated, at §9:

> "You should note that this quantification relies on the package of proposals and policies being delivered in full. Our advice is that it is reasonable to expect this level of ambition – having regard to delivery risk (See Annex B) and the wider context".

44. That advice was reflected in the final text of the CBDP, at §26 **[CB2/15-16]**. It also accorded with previous advice given to the SoS, that the carbon budget targets could only be met if all proposals and policies are delivered in full:

a. The Ministerial Submission of 30 November 2022 [**CB1/347**] advised, at §10, that the SoS that "Latest projections show you have sufficient savings to meet carbon budgets if *all* planned policies and proposals are delivered in full … But there are significant delivery risks and little or no headroom particularly for later carbon budgets."

b. In advance of publication of the NZS, the SoS was advised that "*the assessment was based on an assumption that the quantifiable proposals and policies would be 'delivered in full'*": **FoE (No. 1)** at §212. It was in relation to this advice that Holgate J emphasised the Minister be given sufficient information to understand the

uncertainty relating to the delivery of particular measures in circumstances where he was told that the BEIS assessment was based upon the assumption that the quantified policies would be delivered in full: **FoE (No. 1)** at §214. Thus, the SoS's conclusion that the proposals and policies will enable the carbon budget to be met for the purposes of section 13 plainly proceeded on the assumption that all proposals and policies would be delivered in full. There needed, therefore, to be a sufficient evidential basis to sustain that assumption, as recognised by Holgate J at §204 of **FoE (No. 1)**.

45. Contrary to the clear wording of the March 2023 advice, the SoS now contends that he was not advised that he should reach his decision on the basis of an assumption that all quantified proposals and policies would be delivered in full: DGR [**CB1/233]** at §100. That submission is based on Thompson 1 §198 **[CB1/309]**, that "*the underlined text was not intended to convey to the Secretary of State advice that he should conclude, or assume, or otherwise proceed on the basis, that each and every proposal and policy would be delivered in full. Rather, the text was intended to make the point that the total volume of quantified emissions savings … had been calculated on the basis that the package of proposals and policies would be delivered in full…*". That gloss on the advice provided to the Minister finds no support in the section 13 advice, in any other contemporaneous document, or the CBDP.[8] It is also at odds with the advice to the SoS in November 2022 and in advance of publication of the NZS: see §44 above. Thompson 1 §198 is inadmissible: **United Trade Action Group** §125.

E.3 There was no evidence to support the assumption that all proposals and policies would be delivered in full

46. The assumption all proposals and policies will be delivered in full is not supported by the information about delivery risk in the Risk Tables provided to the SoS. Analysis carried out by FOE (but not available to the SoS at the time of taking his section 13(1) decision) shows that 150 of the 191 quantified proposals and policies listed in the Risk Tables, accounting for 91% of the total Table 2 emissions reductions for achieving the carbon budget targets, are said to have uncertain delivery risks, or the Risk Tables say nothing about the degree of delivery risk at all: [**SB2/117-118**] at §§13-18. Moreover, 11 high impact proposals and policies in Table 2 (i.e. proposals and policies projected to achieve emissions savings over 20 $MtCO_2e$ over CBs 4 to 6) accounting for 549 $MtCO_2e$ (or 32% of all emissions savings listed in Table 2) have "uncertain" levels of delivery risk. Disclosure of the February Guidance shows 11 proposals and policies initially given "red" or "red/amber" RAG ratings

[8] As Lord Deben observes, the "*first assumption*" in the CBDP is that "*everything will go to plan*" [**SB2/451]** at §19.

by responsible Government departments, denoting a low or very low degree of delivery confidence (as per the December Guidance).

47. Further, the assumption that all proposals and policies will be delivered in full was contradicted by the more detailed information about delivery risk withheld from the SoS:

    a. As explained in relation to Ground 1, DEFRA had advised that "*emissions savings projections by and large represent maximum feasible savings rather than a likely scenario*"[**CB1/376]** at §22.

    b. In November 2022, there was a concern that the emissions savings achievable from quantifiable proposals and policies could slip to 85% of those required to reach CB6 given changes in policy ambition, technical updates, delivery risk and delays since publication of the NZS: Ministerial Submission dated 30 November 2022 [**CB1/537]** at §11. The delivery confidence in proposals and policies did not change with information from the December Commission returns. Thompson 1 §97 [**CB1/279]** explains that RAG ratings in the December Commission returns broadly reflected those in Annex C to the 8 November 2022 submission and that "*this was to be expected given the long timeframe of most proposals and policies it was unlikely that there would have been many significant changes in the intervening period*". But Thompson 1 at no point explains (even if such evidence were admissible here) how the quantifiable emissions reductions which could be achieved changed from that forecast in November 2022 (quantifiable proposals and policies could slip to around 85% of those required to achieved CB6) to 97% in March 2023. The only information on the change in emissions reductions achievable by quantifiable proposals and policies between November 2022 and March 2023 is: (a) the returns from responsible Government departments were broadly the same as those from August/September 2022; and (b) assessment of returns led to some initially quantified proposals and policies being reclassified as unquantified. There is therefore a significant gap in the evidence as to how the forecast for quantifiable emissions reductions changed from a risk that they could slip to 85% in November 2022 to a forecast of 97% of emissions reductions required to achieve CB6 by March 2023.[9]

48. In this case, a clear explanation is lacking – and was not provided to the SoS – on two key parts of the analysis underpinning the advice to the SoS:

    a. The basis for the significant increase in quantifiable emissions reductions between November 2022 and March 2023.

[9] Defra also flagged a significant gap of 13% between Defra's Net Zero Strategy effort share and Defra's quantified list for England: see cover note to December return, sent 25 January 2023: [**CB1/374]** at §8.

b. The basis for the advice that the SoS should assume all proposals and policies would be delivered in full. No explanation was given as to how the degree of delivery risk – including "low" and "very low" delivery confidence – was factored into this advice.

49. In light of the degree of delivery risk associated with proposals and policies relied upon to enable the carbon budgets to be met, the information provided to the SoS did not provide a proper basis to conclude that all proposals and policies would be delivered in full.

E.4 There was no proper basis for the SoS to conclude that proposals and policies "will enable" the carbon budgets to be met for the purpose of section 13(1)

50. As explained at SFG §56, FoE's position is that to satisfy the section 13(1) duty, a numerical projection must show that at least 100% of the required reductions will be achieved. This argument was rejected in **FoE (No. 1)**: §177, so it is unlikely to succeed here. FoE reserves the right to make this argument before the Court of Appeal.

51. Holgate J went on to find, however, that, in light of the fact that the targets are quantified, there must be some quantitative assessment of the effect of proposed policies and that if those quantified effects fall significantly below meeting the whole of the emissions reductions required, then the SoS would need to be satisfied that the meeting of that shortfall by qualitative analysis is demonstrated with sufficient cogency: §185.

52. It is submitted that there was no lawful basis for the SoS to reach the conclusion that the proposals and policies will enable the carbon budgets to be met.

53. If, as FoE submits is clearly the case given the advice provided to the SoS, the SoS was advised that the proposals and policies will enable the carbon budgets to be met only if all planned policies and proposals are delivered in full, then there was no proper basis to support this assumption either in the delivery risk assessment provided to the SoS (as summarised at §46 above) or in the more detailed information about delivery risk withheld from the SoS (as summarised at §47 above). There is also the broader criticism made by Lord Deben over a plan as significant as this one relying upon everything going smoothly; he describes this as "*unsatisfactory*": [**SB2/451**] at §19.

54. If, contrary to this submission, the SoS was not advised to assume that all proposals and policies are delivered in full, there would have been an even greater shortfall in the quantified effects of the proposed policies. A sufficiently cogent analysis would have been required to demonstrate how this shortfall would be met. However, nothing in the advice provided to the SoS explained the basis on which he could or should conclude that the proposals and policies will enable the carbon budgets to be met if the proposals and proposals are not delivered in full. The CCC, by contrast, concluded in its 2023 Progress

Report that there were credible policies[10] in place for less than 20 % of the emissions reductions required to meet CB6. As the expert body, the court should give "*considerable weight"* to the CCC's advice (**FoE (No. 1)** at §215). The disparity between the SoS's conclusion and the CCC's conclusion underscores the importance that the court scrutinise whether there is a proper basis for the SoS's decision.

55. These concerns apply with even more force to the CBDP (compared to the NZS), since it adopted the less conservative GWP "*without feedback*" basis compared to the more conservative "*with feedback*" approach used in the NZS. As noted by Holgate J at §157 of **FoE (No. 1)**, the NZS expressly relied upon the conservatisms in the use of the "*with feedback*" GWPs as providing "*additional headroom*" with which to manage the uncertainty in the NZS's emissions projections.

F. GROUND 4:[11] BREACH OF SECTION 13(3)

56. Section 13(3) requires proposals and policies "*must be such as to contribute to sustainable development*". "*Sustainable development*" has been defined as "*meeting the needs of the present without compromising the ability of future generations to meet their own needs*" (e.g. **Spurrier v Secretary of State for Transport** [2019] EWHC 1070 (Admin) at §635).

57. The SoS's conclusion that there is "*likely*" to be some contribution simply does not satisfy the mandatory statutory requirement. Whilst the statutory language affords the SoS an element of discretion as to the *route* taken to contribute to sustainable development, the statute dictates the requisite *outcome*. Therefore, for the CBDP to be lawful, nothing less than the SoS being certain that the section 13 policies and proposals would contribute to sustainable development was permitted by the statutory scheme.

58. Section 13(3) has been breached in two key ways. First, the SoS failed even to conclude that the proposals and polices will contribute to sustainable development, as required by section 13(3). The conclusion that the "*overall contribution to Sustainable Development is likely positive*" does not discharge section 13(3). Secondly, there is a real and significant risk that the UK's Nationally Determined Contribution ("**NDC**") deadline in 2030 will not be met by the CBDP. This mattered for the purposes of section 13(3), because a failure to meet the NDC risks compromising the ability of future generations to meet their own needs, and so undermined the core aspect of sustainable development.

59. It follows there was a breach of section 13(3), because: (i) the SoS did not lawfully

[10] The CCC's criteria for determining which policies are credible is set out at p.380 of the CCC's 2023 Progress Report [**SB2/94].**

[11] Ground 4 corresponds to FoE's Ground 3 at §§66 to 70 SOFG.

conclude the proposals and policies would contribute to sustainable development; and/or (ii) the SoS failed to take into account an obviously material consideration, namely that, the significant uncertainty surrounding whether the proposals and policies will ensure the NDC will actually be met, risks adversely impacting future generations and undermining the goals of sustainable development.

G. GROUND 5:[12] FAILURE TO INCLUDE IN THE CBDP INFORMATION RELATING TO DELIVERY RISK OF INDIVIDUAL PROPOSALS AND POLICIES IN BREACH OF SECTION 14

60. Section 14 requires a report to show how proposals and policies will meet the statutory targets, including all information obviously material to the critical issue of delivery risk.

61. Information on delivery risk included in the CBDP was limited to the following:

    a. A high-level summary of the delivery risk to the package of proposals and policies: see §§36-40 of the CBDP [**CB2/17-18]**. This explains, at §37, that policies included in the Government's Energy and Emissions Projections[13] ("**EEP**") baseline "*have high delivery confidence as they are at an advanced stage of development and have either been implemented already or are planned policies where the funding has been agreed and the design of the policy is near final*". It goes on to explain, at §38, that: "*Non-EEP proposals and policies vary in their degree of delivery confidence…as we move towards Carbon Budget 6, a greater number of proposals and policies that are currently at an earlier stage of development will move into implementation and form part of the EEP baseline, giving higher delivery confidence.*"

    b. Sectoral level summaries of the delivery risk picture: see Appendix D of the CBDP (at pp.173-182) [**CB2/174-183**] entitled "*Sectoral summaries of delivery confidence*".

62. In breach of section 14, the CBDP failed to include:

    a. Any information about the risk to delivery of *individual* proposals and policies, even that provided to and taken into account by the SoS for section 13 purposes;

    b. The information about delivery risk of individual proposals and policies produced by responsible Government departments, including RAG ratings.

[12] Ground 5 corresponds to FoE's Ground 2 at §§57 to 65 SOFG.

[13] The Government's EEP publication provides projections of energy, emissions and electricity generation under policies that have been implemented and those that are planned where the level of funding has been agreed and the design of the policy is near final: **[SB1/431-461].** See also Technical Annex [**CB2/203-204]** at §§11-19.

63. These are all obviously material to the critical issue of risk to the delivery of statutory targets and, as explained in the SFG at §§57 to 65, should have been included in the CBDP to comply with the language and statutory purposes of section 14 of the CCA 2008.

G.1 Applicable legal principles

64. In **FoE (No. 1)** Holgate J held the "*legal adequacy*" of a section 14 report is assessed by reference to its "*legal object*": "*to enable its readers to understand and assess the adequacy of the Government's policy proposals and their effects*" and "*in the interests of public transparency*": §245. Holgate J emphasised the importance of this to the democratic process and to our constitution as a whole: "*Parliamentary accountability is no less fundamental to our constitution than Parliamentary sovereignty*": §189. Approving the reasoning of Clarke CJ in **Friends of the Irish Environment CLG v The Government of Ireland** [2020] IESC 49, Holgate J held that "*the public are entitled to know what current thinking is*" and "*form a judgement both on whether the Plan is realistic and whether the types of technology considered in the Plan are appropriate and likely to be effective*". Holgate J further held that in order to meet the requirements of section 14, the SoS must inform Parliament and the public under section 14 of all subjects which are "*obviously material to the critical issue of risk to the delivery of the statutory targets*": §254.

65. The summary of **FoE (No. 1)** at §25 of the DGRs is inaccurate. It says the duty requires explanation and quantification of the emissions savings that are projected to result from the package of quantified proposals and policies. That is incorrect. Holgate J said the report must address "*contributions from individual policies which are properly quantifiable*" and that the report must "*not lead a reader to misunderstand predictions of the effect of each policy as "targets", or to fail to appreciate the uncertainties involved*": §257 (underlining added). The summary is also incomplete. It misses out Holgate J's core findings on the section 14 obligation: its purpose is to ensure Parliament and the public are given sufficient information to form a judgement both on whether the plan is realistic; and that to enable this function to be discharged the report must include all information *"obviously material to the critical issue of risk to the delivery of the statutory targets*".

66. The SoS submits section 14 should be interpreted by reference to the common law duty to provide reasons. No support is given for this proposition which is both contrary to well-established principles of statutory interpretation and the reasoning of Holgate J in **FoE (No. 1)**, that section 14 should be construed by reference to its statutory context and

purpose, namely to facilitate "*parliamentary accountability*" and "*serve the public's interest in transparency regarding government policy under the CCA 2008*": §242.[14]

G.2 The advice to the SoS on the information to include in the section 14 report

67. In December 2022, internal briefings to DESNZ officials showed that the understanding was that the section 14 report needed to explain the delivery risks of individual proposals and policies. Guidance set out in a slide-deck dated 20 December 2022 stated "*In order to be legally compliant, the section 13 advice has to meet various requirements including that it must … explain delivery risks of individual proposals and policies (quantified and unquantified) and explanatory detail for the achievement of carbon budgets*" and that "*the published section 14 report also needs to cover these points … however: we are likely to have more discretion around the level of detail*": [**SB1/493**]. Chris Thompson does not explain when the decision was taken to change this position and to advise the SoS that the CBDP should not include delivery risks for individual proposals and policies.

68. It appears that legal advice as to what needed to go into the section 14 report was provided in February 2023. This was referred to in an email from a DESNZ official dated 27 February 2023 [**SB1/552**] which stated:

> "Since our last commission relating to the JR, legal Counsel have given us a steer for section 14 that a sensible and proportionate approach to take for the policy list is to include, for each unquantified policy, a summary of its effects on meeting carbon budgets. We have interpreted that this can be met by combining in 2 previous commission asks on 'description of what quantified policies are supported' and 'importance of proposal to the NZ system'. I appreciate that this means publishing information that we previously did not expect to be included in the public list and so was not included/flagged to your Ministers as such."

69. Officials advised the SoS in the 28 March 2023 Ministerial Submission that "*We have provided all relevant information to you in order for you to determine whether the package of proposals and policies enables carbon budgets to be met. It does not follow that the same information must be published in the Carbon Budget Delivery Plan".* It went on to state: "*we do not consider that it would be appropriate or necessary to set out information about specific delivery risks for each of the proposals and policies as we have to you – which enables you to look at the contribution of each measure and its associated delivery*

[14] It is also at odds with the SoS's submission in **FoE (No. 1)** that it was significant that the section 14 report did not include an obligation to give reasons unlike sections 3(6), 7(6) and 22(7). As Holgate J held, at §251, "*the functions are plainly different"*.

risk. Instead, we propose publishing sector summaries of delivery risk in the [CBDP], rather than outlining delivery risks for each individual proposal or policy" [**CB1/417**] at §41.

G.3 Breach of section 14

70. The failure to include any information about the delivery risk for individual proposals and policies is contrary to the requirement that a section 14 report include all information "*obviously material to the critical issue of risk to the delivery of the statutory targets*": **FoE (No. 1)** at §254. Not only did the SoS fail to include information material to the risk to the delivery of the carbon budgets, the information about the delivery risks for proposals and policies which was included in the CBDP does not even accurately reflect the RAG ratings and other information which was provided to DESNZ officials.

71. The tables prepared by FoE [**SB2/398**] comparing the information on delivery from the CBDP with that on delivery risk which existed at the time (namely the risk tables provided to the SoS and the RAG ratings provided by Government departments) shows the CBDP did not include information clearly material to the critical issue of the delivery of statutory targets. Without this information, neither Parliament nor the public will have been aware of the extent of the risk to delivery of individual proposals and policies,[15] including the following:

    a. The fact that a significant number of high impact proposals and policies have uncertain levels of delivery risk, as set out in Tables 2 and 3 (which were provided to the SoS but not included in the CBDP). This is leaving aside the ambiguity inherent to such a label; a point that Lord Deben comments on [**SB2/452-453]** at §25.

    b. That a number of proposals and policies included in the CBDP do not themselves contribute to emissions savings (beyond those identified as such in the CBDP).

    c. That, at least in relation to the Defra RAG rating, a large proportion of the policies were labelled as red or red/amber, denoting low or very low confidence.

    d. It was provided to DESNZ officials but not the SoS or included in the CBDP.

72. The result is that neither Parliament nor the public was given the information necessary to form a judgement on the CBDP (which is the core democratic imperative here). It is inevitable that, as a result of the lack of transparency, the public and Parliament will have failed to appreciate the uncertainties involved and have been prevented from critically engaging with the thinking underpinning the report: as to the importance of transparency for engagement see **NI Badger Group** at §63 and §68. As Lord Deben has explained CCC

[15] Save to the extent that the extent of delivery risk was discussed in an article in *The Times* dated 4 April 2023 referring to the leaked Defra risk analysis.

was not even provided with information about delivery risk beyond that included in the CBDP, either before or after publication: [**SB2/450]** at §16. So failure to include this information in the CBDP has also impacted on the CCC's statutory function of providing independent scrutiny of the SoS's plan as set out in a section 14 report. Lord Deben's evidence is that the CCC's prior experience has been that section 14 reports are normally prepared "*in parallel with the CCC as the statutory expert body*" (Lord Deben's witness statement, [**SB2/449]** at §13), and this failure to share information with the CCC leads Lord Deben to conclude that the Government "*did not want us to examine the CBDP carefully before they published it*. *That is regrettable*". It also meant that the Secretary of State did not have the benefit of advice and analysis from the independent expert body appointed under the CCA, which could have influenced the quality of the CBDP itself.

73. The SoS submits that it was for the SOS and/or his officials to judge what to include in a section 14: §121 DGRs. But the adequacy of a report under section 14 is a matter for the SoS, not officials: **FoE (No 1)** at §256. Anyway, the discretion available to the SoS to decide what to include in a section 14 report is circumscribed by the following:

    a. The core requirements of "explanation" and "quantification" derived from the section 14 obligation to "set out" the proposals and policies "for meeting the carbon budgets": **FoE (No. 1)** at §248. As set out in **FoE (No. 1)** at §254, that includes information obviously material to the critical issue of risk to the delivery of statutory targets. A discretionary exercise cannot make lawful a section 14 report which does not – as here – meet the minimum legal requirements for such a report.

    b. The obligation not to mislead Parliament and the public by inaccurately summarising information and/or withholding material information so as to mislead by omission. As Holgate J stated in **FoE (No. 1**) the report must "*not lead a reader to misunderstand predications of the effect of each policy as "targets", or to fail to appreciate the uncertainties involved*": §257.

74. Chris Thompson says why he and other officials recommended that the risk of delivery to individual proposals and policies should not be in the CBDP at Thompson 1 §101. These newly stated reasons are not in any contemporaneous documentation and were not provided to the SoS, who was simply told that the officials did not consider the inclusion of this information "*appropriate or necessary*": see Annex B of advice to SoS dated 28 March 2023 at [**CB1/417]** at §41. What the contemporaneous records do show is that DESNZ were concerned, when preparing information on delivery risk about "*having a safe narrative that everything is going to be ok"*: see email of 6 March 2023 [**SB2/4**]. The *ex post facto* reasons are first, that it was understood that section 14 of the CCA 2008 did not impose a legal requirement that a section 14 report should include this information.

The legal advice relied upon for this view as to necessity is not disclosed. For the reasons set out above, this is legally incorrect. The second reason given is that it would be unusual for Government to publish the type of information set out in risk summaries, particularly in relation to early-stage proposals. However, the contemporaneous records show that the initial intention was to publish information about delivery risk of individual proposals: see §20 above. The third reason given is that summaries of risk at a sectoral level are "*a more meaningful and helpful way of conveying risk, as they enable the identification of cross-cutting risks that potentially pose material risks to the emissions savings that the package of proposals and policies are intended to deliver*". That reason is unsustainable in the face of the comparison of the high-level summaries about delivery risk included in the CBDP and the information about delivery risk which was available at the relevant time (i.e. the RAG ratings and the Risks Tables provided to the SoS).

75. Critically, the SoS was not informed of the ex post facto reasons given for not publishing. He was simply advised that including this information was not "*appropriate or necessary*". In addition, he was not informed of the existence of RAG ratings provided by Government departments. It follows that the SoS was not in a position to form a view on whether information on individual delivery risks should be included in the CBDP to satisfy section 14 or to consider the reasons for non-inclusion now put forward by Chris Thompson. Consequently, those reasons are legally irrelevant: see **FoE (No. 1)** at §256.

COSTS

76. Lang J ordered that CPR 45.41-45.43 applies thus FoE's costs liability is capped at £10,000 inclusive of VAT. The reciprocal costs cap has been set at £35,000 for each of the three claims [**SB2/512]** at §5.

H. RELIEF

77. FoE seeks:
    a. A declaration that the SoS has failed to discharge his obligations under sections 13 and 14 CCA, and the Order;
    b. A mandatory order requiring the SoS take action to comply with his obligations under sections 13 and 14 CCA including by concluding a further section 13 assessment and producing a section 14 report compliant with the judgment in this claim by a date to be set by the Court;
    c. Liberty to apply;
    d. All FoE's costs, capped at £35,000 inclusive of VAT.

DAVID WOLFE KC, CATHERINE DOBSON, NINA PINDHAM

2 February 2024