

Neutral Citation No: [2026] NIKB 10

Ref: McA13000

ICOS No: 24/100079

*Judgment: approved by the court for handing down
(subject to editorial corrections)**

Delivered: 11/03/2026

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION

IN THE MATTER OF AN APPLICATION BY JOHN HAMILTON HASSARD,
ROBIN BRUCE, CAROL PORTER, ROBERT MCKEAN, DAVID PEOPLES,
WILDRIDGE COOTE, DERICK DONNELL, DAVID BRUSH AND
VICTOR BRUSH AS MEMBERS OF THE ALTERNATIVE A5 ALLIANCE
("AA5A")

AND IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 67BA
OF THE ROADS (NORTHERN IRELAND) ORDER 1993 (AS AMENDED)

Mr Marc Willers KC and Mr Acland Bryant (instructed by McIvor Farrell Solicitors) on
behalf of the Applicants

Mr David Elvin KC and Mr Michael Neeson (instructed by the Departmental
Solicitor's Office) on behalf of the Respondent

Mr Stephen Toal KC and Mr Plunkett Nugent (instructed by Conor Sally & Co Solicitors)
on behalf of Niall McKenna, Michael Kerr, Grainne Donnelly, Barbara Ward,
Benny Hurl, Damien Harvey, Seamus Marlow, Colin Mullin and Sean Quinn as
Committee members of the Enough is Enough campaign group, Interested Parties

Dr Tony McGleenan KC and Mr Philip McAteer (instructed by the Departmental
Solicitor's Office) on behalf of the First Intervener in the Appeal

Dr David Wolfe KC and Mr Conor Fegan (instructed by Laura Neil, Solicitor) on behalf
of the Second Intervener in the Appeal

McALINDEN J

Introduction

[1] Following on from my earlier judgment in this case, which was delivered on 23 June 2025 ([2025] NIKB 42), the respondent appealed the matter to the Court of Appeal and the Department of Agriculture, Environment and Rural Affairs ("DAERA") then sought leave to intervene in the appeal, as did the charity Friends of the Earth ("FOE"). Leave to intervene was granted to both bodies by the Court of Appeal and when the matter came on for hearing before the Court of Appeal in early

December 2025, the Court of Appeal dealt with a number of issues but, having considered the submissions from DAERA on the climate change aspect of the case, the Court of Appeal concluded that there were points that were being canvassed before the Court of Appeal that had not been raised before me at first instance and, as a result, the Court of Appeal made an Order remitting the matter back to me, directing that I should consider the new affidavits filed by the first intervener (DAERA) and determine what the first intervener's responsibilities are under section 52(1) of the Climate Change Act (Northern Ireland) 2022 ("the 2022 Act") and how those responsibilities relate to the functions exercised by the respondent/appellant in this case and to provide an addendum judgment dealing with the new evidence and the issue identified above.

[2] The matter came before me for hearing on these points on 15 December 2025, 7 January 2026, 25, 26, 27 February 2026 and 5 March 2026 when I heard submissions from Department for Infrastructure ("Dfi"), DAERA, FOE and the applicants (respondents to the appeal) and I received further affidavit evidence which was in addition to that filed by DAERA as first intervenor before the Court of Appeal.

[3] In order to comply with the direction of the Court of Appeal and address the issues raised in the affidavit evidence submitted by DAERA, Dfi, the applicants and FOE, I consider it important to reiterate what I actually said in the judgment delivered on 23 June 2025 as I fear that the Dfi and DAERA may have misinterpreted my judgment as imposing upon the Dfi and DAERA duties and responsibilities which, on a fair reading of the judgment, are neither prescribed nor mandated by the terms of the judgment. I also consider it important to highlight those passages of the Dfi Statement and its submissions before me at first instance which addressed the recommendations of the Planning Appeals Commission ("PAC") arising out of the 2022 Act in order to demonstrate that the case that is now being put forward by Dfi and DAERA is materially different from and inconsistent with the case that was then being made by the Dfi.

[4] The Dfi Statement at 5.3.16 (page 150) asserted, correctly in my view, that the 2022 Act does not prohibit:

"the authorisation of new infrastructure development, nor does it prohibit the authorisation of new development which may give rise to an increase in GHG [green house gas] emissions either during construction or operation."

The Statement then, correctly in my view, acknowledged that section 52 of the 2022 Act requires the Dfi and every other NI government department to exercise their own functions, so far as it is possible to do so, in a manner that is consistent with (a) meeting the 2030, 2040 and 2050 targets and (b) staying within the carbon budgets that have been set. The Dfi also acknowledged that under section 29(4) of the 2022 Act, the Dfi and other government departments, when developing policies, must ensure that those policies are consistent with the targets set out in the 2022 Act. The Statement went on

to assert that this means that departments whose functions include authorising infrastructure development:

“should therefore consider the emissions implications of such projects as part of the discharge of this duty and other duties under the Act.”

[5] In its Statement, the DfI set out at Table 5.3-2 “an updated GHG emissions assessment for Section 2 and Phase 1B, and the whole scheme.” In this Table, the “predicted net increase in emissions resulting from the construction and operation of the A5WTC” were compared to the UK and Northern Ireland carbon budgets. The DfI then asserted at page 157 of the Statement that the A5 Western Transport Corridor (“A5WTC”) scheme is:

“expected to result in an increase in emissions (~972,520 tCO_{2e}) in both the construction and operational phases, compared to the scenario where the scheme is not built,”

and (at page 159) that:

“in light of the status of the A5WTC as an Executive Flagship project, the Executive will need to consider the increased carbon emissions associated with the A5WTC project when meeting its obligations under the Act.”

[6] These quoted passages are highly significant in that the DfI, at the time that it decided to proceed with a section of the road, clearly and unequivocally accepted that the Northern Ireland government and its constituent departments would have to consider the increased carbon emissions associated with the construction and operation of the road in the context of meeting the obligations under the 2022 Act.

[7] The Statement went on to assert (at page 159) that prior to:

“considering and approving the decision to proceed with this part of the scheme, the Executive was fully informed of the predicted additional GHG emissions associated with the construction and operation of the road. The emissions generated from the construction and operation of the scheme will therefore be included within the Executive’s plans to deliver the emissions reduction targets specified in sections 1, 3, 4 of the Act, and as required by section 24 of the Act to ensure that any carbon budget set under the Act is not exceeded.”

[8] The language of the Statement could not be clearer. It was clearly and positively asserted by the DfI that the estimated additional emissions resulting from the

construction and operation of the road had been carefully calculated using robust modelling and those additional emissions would be included within the Northern Ireland government's plans to meet the targets and to stay within the carbon budgets set out under the 2022 Act.

[9] The DfI Statement positively asserted that the DfI's modelling demonstrated that the transport sector will "almost fully decarbonise by 2050" and that at the time that the decision to proceed with the road was made, the DfI were confident that "it will still be possible to achieve its transport sector obligations and that the transport emissions from the scheme will not be incompatible with achieving the objectives of the Act." With specific reference to the contents of any climate action plan ("CAP") which might subsequently emerge, the DfI argued that when one considered the estimated minor contribution of the scheme to the three published Northern Ireland carbon budgets, one could have confidence that "given the priority afforded to the Scheme, it will not prevent the emissions targets specified in Sections 1, 3, 4 and 24 of the Climate Change Act (Northern Ireland) 2022 from being met."

[10] The clear impression given by DfI in its Statement which formed the basis of and the rationale for proceeding with the approved section of the scheme was that, given the Executive's unflinching support for the scheme, it could safely be assumed that DAERA, when it eventually published the draft CAP, would factor in the estimated GHG emissions resulting from the scheme into the plans to meet the Northern Ireland carbon budgets and the targets set out in the 2022 Act. Although DfI stated that it did not accept that a finalised CAP had to be in place prior to it being able to approve the construction of the road, its Statement noted that work was ongoing on the preparation of the first draft CAP which, as it would be a cross-cutting measure, would have to be approved by the Executive before going out for consultation. The DfI's case as made out in its Statement was that, as it was doing all that was required of it to decarbonise transport and as it was confident that all the other departments were doing likewise in respect of their various spheres of responsibility, including the construction sector, and bearing in mind that this scheme was an Executive Flagship project, it was safe to assume that any draft CAP which would subsequently be published and put out for consultation would have to factor in the impact of the construction and operation of the road in setting out proposals and policies indicating how it was intended that the 2022 Act targets would be met. Given this degree of confidence, it was unnecessary for the DfI to await the publication of a finalised CAP in order to commence construction work on the road.

[11] The DfI Statement subsequently went on to deal with PAC Recommendation 17 which recommended that if the DfI "announces a decision to proceed with any part of the scheme" it should contemporaneously publish detailed calculations which have been agreed with DAERA showing the expected trajectory of GHG emissions in Northern Ireland in the period between 2030 and 2050 in the absence of the scheme and the impact on that trajectory of the GHG emissions expected to arise from the construction and operation of the part of the scheme being authorised. This recommendation was not accepted by DfI and in my first judgment I was not critical

of the DfI's stance in respect of this PAC recommendation. I went on to highlight that the Statement at pages 165 and 166 contained a rather frank admission about the inability to show the trajectory towards net zero with and without the road coupled with the DfI's repeated assertion that the GHG emissions generated from the construction and operation of the new road would be factored into the government's plans to meet the targets and to stay within the budgets set under the 2022 Act:

"In the absence of an approved Climate Action Plan and more detailed knowledge of the carbon impact of future infrastructure projects, it is not currently possible to show the trajectory with and without the Proposed Scheme. However, whilst the scheme will result in an increase in emissions, the A5WTC is a priority investment for the Northern Ireland Executive, and therefore the emissions generated from the construction and operation will need to be factored into the Executive's plans to meet the emissions reduction targets specified in sections 1, 3 and 4 of the Act and as required by section 24 of the Act to ensure that any carbon budget set under the Act is not exceeded."

The use of the phrase "it is not currently possible" is very telling. The obvious inference to be drawn from this phrase when coupled with the preceding phrase "(i)n the absence of an approved Climate Action Plan" is that it could well be possible to show the trajectory with and without the proposed scheme when the CAP was finalised. In other words, the emissions from the scheme would feature in the CAP.

[12] The repeated references to the A5WTC being an Executive Flagship Project and a priority investment for the Northern Ireland Executive give the clear and unambiguous impression that the position adopted by the DfI in its Statement was the Northern Ireland Executive's position; a position agreed by all the departments. This is largely confirmed by documentation which has now been made available. There was an earlier version of the DfI Statement in June 2024. In respect of the 2022 Act section of the Statement, there were some slight differences between the June 2024 draft and the October 2024 final version. What is important is that the June 2024 version was the subject of discussions between DfI and DAERA and that DAERA had input into the finalised version. In essence, the final version of the DfI Statement was agreed in advance by DAERA.

[13] The extent of the engagement between DfI and DAERA in advance of the final Statement being produced by DfI can be seen in the contents of various briefing papers and submissions to the Minister from DfI officials in the lead up to the publication of the final Statement. For instance, on 20 May 2024, Mr Hutchinson prepared a submission to the Minister (SUB-1288-2024) in which the issue of Executive referral is addressed. Para 4.1 indicates that the opinion of senior counsel had been sought on this issue and the advice is redacted in the copy of the document provided to the court. However, para 4.2 (page 2469 of the appeal bundle) states:

“With this in mind and given the volume and complexity of the information that the Executive would need to consider, it is proposed to forward a summary paper to it within the next couple of weeks outlining the project and the key headline issues. The content of this paper will be drafted with input from Senior Counsel. It is anticipated that further papers can then be issued over the ensuing weeks with a final paper in early August prior to your decision, anticipated to be made later that month.”

[14] Section 6 of this submission deals with Climate Change Recommendations. It is very clear that there was very close cooperation between DfI and DAERA in developing responses to the PAC’s recommendations on climate change (Page 2470 of the appeal bundle):

“6.3 The responses developed have been subject to recent legal review, with DAERA now considering this feedback to inform a final agreed, cross Departmental response.

6.4 In addition, the project team has engaged with the Department for Economy to seek their agreement on the recommendation responses, given their responsibilities under the ‘business and industrial process sector’, and recent engagement has taken place with the Strategic Investment Board (SIB) on the latest draft of the Infrastructure 2050 Investment Strategy for Northern Ireland (ISNI) document to ensure there are no contradictions between its contents and that of our proposed responses.”

[15] The crucial paragraphs of this submission to the Minister are paras 6.5 and 6.6. They are set out in full:

“6.5 In summary, we are steering towards a position where, while it is recognised that the project will result in a modest increase in emissions in both the construction and operational phases, the Executive would commit to ensure carbon is considered in the sign-off of any future projects following the A5. The additional emissions from the A5WTC would therefore be considered as ‘committed to’ emissions when planning how the Climate Change Act (Northern Ireland) 2022 Emissions Targets and Carbon Budgets will be met. It is recognised that a commensurate decrease at a national level will be needed in line with the

net zero trajectory. This will be achieved by balancing emission increases and reductions across different sectors to achieve the required decrease overall. The Northern Ireland Climate Action Plan is being developed which will set out the policies and programmes which will support delivery of the Climate Change Act.

6.6 A further meeting is scheduled with DAERA before the end of the month, by which point the project team will be seeking to reach an agreed position to confirm the climate related content within the A5WTC Departmental Statement.”

[16] Could the true position be any clearer? DfI and DEARA were working hand in glove on the finalisation of the climate change sections of the DfI Statement. In a further submission to the Minister dated 17 June 2024, Mr Hutchinson in section 5 of the submission stated there was continued close co-operation between DfI, DAERA and Department for the Economy (“DfE”) in developing responses to the PAC’s recommendations on climate change and that an overall final cross-departmental response was close to conclusion with a final review by senior counsel anticipated later that week. “The final wording will then be integrated within the proposed Departmental Statement.”

[17] In a further submission (SUB-1398-2024) dated 28 June 2024, Mr Hutchinson provided the Minister with the draft Departmental Statement and recommended that the draft Departmental Statement along with the PAC’s Final Report be forwarded to the Executive Committee (pages 2521 and 2522 of the appeal bundle). The documentation reveals that this occurred on 2 July 2024.

[18] Mr Muir, the DAERA Minister, wrote to Mr O’Dowd, the then DfI Minister, on 17 July 2024 (pages 3144 to 3146 of the appeal bundle) specifically commenting on the draft DfI Statement. Minister Muir emphasised the need for as many detailed mitigation measures as possible to reduce the emissions from the scheme. He suggested that the next iteration of the draft Statement would benefit from “more explicit detail on what those mitigation measures are, or are likely to be, and to what extent they will reduce emissions.” Mr Muir noted that the 2022 Act does not specifically prohibit new development or infrastructure projects which may increase omissions but he went on to state that:

“the Act does place clear responsibilities on all departments to deliver the targets within it and the carbon budgets which will be set under it. Where projects such as the A5WTC will contribute additional emissions, the overall approach in the relevant sectors (or other sectors as required) may need to be adjusted to ensure that a pathway

for achievement of carbon budgets, emissions targets and Net Zero is in place.”

This clearly indicates that at that time the DAERA Minister was of the view that emissions from the proposed scheme would be taken into account when devising a pathway for staying within carbon budgets and achieving emissions targets.

[19] Minister Muir acknowledged that DAERA was responsible for preparing and publishing the CAP but emphasised the point that the statutory responsibility for the development of policies and proposals to achieve the necessary reduction in emissions “is shared by all Departments.” He (correctly in my view) stated that DAERA does not act as a statutory decision maker in determining the policies and proposals in the sectoral area of responsibility of any other department. He acknowledged the importance of section 52 and correctly stated that the 2022 Act requires departments to exercise their functions, so far as it is possible to do so, in a manner consistent with the achievement of those emissions reduction targets and carbon budgets. He stated that it was “right and proper” that the potential impacts of the A5WTC project “have been considered in the context of those duties.” Importantly, he went on to state:

“I note this principle has been recognised in Para 5.3.19 of the draft Departmental Statement which commits the DfI to considering how the Act’s net emission reduction targets will be met in any decision on the A5WTC. More detail of how this will be achieved would be beneficial in the next draft of the Departmental Statement.”

[20] Minister Muir noted that DAERA and DfI officials were working together on a cross-departmental basis to develop the first CAP. He stated that the CAP is required to meet the carbon budget and will be “evidence-based.” He noted that the draft Departmental Statement indicated that the DfI was confident that climate objectives can be achieved in tandem with delivery of the scheme. He then tellingly stated that:

“It would be useful for DfI to set out more detail on their rationale for this assessment in the next version of the document.”

[21] Following on from this correspondence from Minister Muir, DfI officials made a further detailed submission to Minister O’Dowd on 6 September 2024 (appeal bundle pages 3047 to 3083). In relation to climate change and GHG emissions, the submission indicates that the draft Statement, in particular paras 5.3.16 to 5.3.19, were amended to include a more detailed analysis in order to address the issues raised by Minister Muir in his correspondence. Crucially, 3.6.14 of the submission summarises the engagement between DfI and DfE and it is noted that:

“The results of the most recent emissions assessment for the A5WTC have been shared with DfE and it

acknowledges that construction related emissions will form part of the sectoral plans for which it is responsible.”

[22] Minister O’Dowd replied to Minister Muir by correspondence dated 10 September 2024 (appeal bundle 3128 to 3131). In essence, this response sets out and explains what proved to be the finalised versions of paras 5.3.16 to 5.3.19 of the DfI Statement which issued in October 2024.

[23] The DfI Minister then provided his Executive colleagues with an Executive Paper in September 2024 in order to seek Executive consideration and agreement prior to taking a final decision to proceed with part of the scheme at that time. Executive agreement was forthcoming and the finalised DfI Statement issued in early October 2024.

[24] I have gone through this in some detail because I consider it important to demonstrate that the position set out in the DfI Statement of October 2024 was one which was adopted with the full knowledge and agreement of the Northern Ireland Executive, and DAERA in particular, and that this agreement clearly extended to the assertions contained in the DfI Statement, at para 5.3.16 (page 159) and para 5.3.19 (pages 165 and 166) of the Statement which were in the following clear terms:

“5.3.16 ... The emissions generated from the construction and operation of the scheme will therefore be included within the Executive’s plans to deliver the emissions reduction targets specified in sections 1, 3, 4 of the Act, and as required by section 24 of the Act to ensure that any carbon budget set under the Act is not exceeded.

When compared to the anticipated Northern Ireland Carbon Budgets the scheme is expected to contribute 0.4621% to CB1, 0.1019% to CB2, and 0.1163% to CB3.”

“5.3.19 ... the emissions generated from the construction and operation will need to be factored into the Executive’s plans to meet the emissions reduction targets specified in sections 1, 3 and 4 of the Act and as required by section 24 of the Act to ensure that any carbon budget set under the Act is not exceeded.”

[25] This was the clearly stated position of the DfI in its Statement of October 2024 and yet we learn from Mr Hutchinson’s second affidavit, sworn on 30 January 2025, at para [49] that on 3 September 2024, one month before the DfI Statement issued, DAERA provided a working draft of the CAP to all Northern Ireland departments for comment and the working draft that was provided contained a draft transport chapter which had been prepared by the DfI which contained its policies and proposals for achieving emissions reductions targets in its sector. On 23 September 2024, DfI

responded to DAERA's request with comments on the full working draft of the CAP. That response has never been exhibited to any affidavit but irrespective of its contents, it is highly relevant to the court's consideration of the issue of the DfI's compliance with section 52(1), that the DfI did not see fit in its Statement to refer to the fact that a working draft of the CAP was in its possession and that it had provided commentary on same or that the working draft of the CAP did not make any reference whatsoever to the project level emissions estimated to result from the construction and operation of the road.

[26] At the first hearing before me, the case made out by DfI was that the estimated GHG emissions resulting from the construction and operation of the scheme were expected to contribute minimally to the first three Northern Ireland Carbon Budgets which have now been set (0.4621% to CB1, 0.1019% to CB2 and 0.1163% to CB3). It was asserted that the results of the updated GHG emissions estimates were shared with DAERA (the department with responsibility for preparing the CAP) and with other departments including the DfE, the department with responsibility for the Business and Industrial Process ("BIP") sector, which included construction. It was asserted that the Executive was fully briefed on the size of the estimated GHG emissions resulting from the scheme and the Executive's unanimous approval of the scheme was given on a fully informed basis.

[27] In relation to emissions linked to the construction of the road, as opposed to its operation, this issue was addressed in detail by the submission of two affidavits sworn by Mr Richard Hume, the Head of the Business and Industrial Process Team within the Business, Gas, Minerals and Renewable Electricity Directorate of the DfE. These were sworn on 27 March 2025 and 3 April 2025 and they were provided to the court during the first oral hearing of this challenge before me. The contents of these affidavits were addressed in detail in my first judgment. Mr Hume's two affidavits averred that the approach which had been adopted by DfE in respect of the development of a sectoral plan for the BIP sector was to identify policies that would reduce carbon emissions within the BIP sector rather than to concentrate on specific projects contributing to emissions in the sector. This approach, it was averred, followed the guidance and advice of the Climate Change Committee ("CCC"). This should be contrasted with the contents of the submission by DfI officials to the Minister quoted in para [21] above.

[28] Mr Hume's affidavit evidence indicated that GHG emissions from the BIP sector accounted for 11.9% of the total GHG emissions in Northern Ireland in 2022, with manufacturing and construction accounting for 8.51% of total GHG emissions in Northern Ireland in that year. It was averred that emissions from the BIP sector have fallen from 5.6 MtCO₂e in 1990 to 2.5 MtCO₂e in 2022, representing a 54.9% reduction against the 1990 baseline which has been set in the 2022 Act. This reduction, it was averred, had been achieved by adopting a policy-based approach across the sector rather than concentrating on the potential emissions from individual projects. It was averred that the latest modelling produced by DAERA, using its GHG Emissions Projection Tool ("EPT") which quantified the impact of UK-wide and NI-specific

policies relating to the NI BIP sector, indicated that the BIP sector will produce lower GHG emissions than those recommended by the Climate Change Committee (“CCC”) in its pathway for the carbon budget period 2023-2027 for the BIP sector.

[29] It was further averred that the DfE had shared with the DfI some of the policy initiatives which were contemplated within the DfE’s CAP proposals and these policy initiatives had been taken into account by the DfI when developing some of its carbon mitigation proposals for the scheme and the proposed contractual conditions that would govern the construction of the road. This, it was argued, was clear evidence of collaboration and co-ordination between departments as contemplated by section 52 of the 2022 Act. Given that the estimated total of GHG emissions due to the construction of the proposed road was in the region of 267 ktCO_{2e} spread over the entire construction phase, it was averred that this was a small fraction of the 11,000 ktCO_{2e} which the CCC has estimated to be the BIP share of the first carbon budget (2023-2027). It was further recognised that the construction phase could well stretch into the second carbon budget period and, if it did, the construction related GHG emissions would not have to be solely accounted for in the first carbon budget period.

[30] The key point made in Mr Hume’s affidavit evidence that was adduced during the first oral hearing of this challenge before me which was highlighted in my first judgment was the assertion that the BIP sector was on target to meet its sectoral 2022 Act goals and targets even factoring in the GHG emissions resulting from the construction of the proposed road and that this position was made known to the DfI and the Executive prior to Executive approval for the scheme being sought. However, what is now very clear from the more recent evidence provided for the purpose of the appeal and also for the second hearing before me, which I will discuss in greater detail below, is that the actual estimated emissions from the construction of the scheme are not taken into account at all in the modelling which is used to demonstrate that changes in practice in construction methods overall in Northern Ireland will see a reduction in GHG emissions in the construction sector in this jurisdiction to such an extent that the 2022 Act goals and targets will be met.

[31] I repeat what I was keen to emphasise in my earlier judgment, namely that section 52 of the 2022 Act does not prevent a major infrastructure project which is a source of significant GHG emissions being devised, promoted, constructed and put into operation by the DfI or any other Northern Ireland government department with responsibility for such activities but what it does clearly rule out is the construction and operation of such a major project in the absence of robust planning, synchronisation and co-ordination between all Northern Ireland government departments to ensure that the project fits into the plans, strategies and policies which map out a realistic and achievable pathway to achieving net zero by 2050, meeting the interval targets on the way and staying within the carbon budgets that have now been set.

[32] I was also at pains to point out that in my view, the duty imposed upon the DfI by section 52 did not require it to await the finalisation of a CAP by DAERA before

making a decision authorising the scheme to proceed. I stated that such a requirement would be much too prescriptive. I stated that in order to comply with its section 52 duty when making a decision such as this, the DfI needed to be able to produce cogent evidence that its decision has been made following careful planning, synchronisation and co-ordination between all Northern Ireland government departments, the result of which demonstrated that the project fitted into plans, strategies and policies which mapped out a realistic and achievable pathway for Northern Ireland to achieve net zero by 2050, meeting the interval targets on the way and staying within the carbon budgets that have now been set.

[33] I stated that a finalised, agreed and approved CAP would be one obvious source of such cogent evidence. However, that is clearly not the same as saying that a CAP had to be in place before a decision to proceed with the scheme could be lawfully made. However, in the absence of a finalised, agreed and approved CAP, the necessary cogent evidence would have to be garnered from another source or sources and, bearing in mind the nature and extent of the responsibilities assigned to DAERA by the 2022 Act, I stated that it was reasonable to conclude that DAERA would be the first port of call in this regard.

[34] Referring back to para [24] above, it is clear that this is exactly what the DfI said in its Statement and this statement was made with the agreement of and, indeed, input from DAERA. It was positively and unequivocally asserted that the emissions generated from the construction and operation of the scheme would be included within and factored into the Executive's plans to deliver the emissions reduction targets specified in sections 1, 3, 4 of the 2022 Act, and as required by section 24 of the Act to ensure that any carbon budget set under the Act was not exceeded.

[35] What I sought during the first hearing and, indeed, invited the respondent to provide, was cogent evidence that this inclusion and factoring in had, in fact, taken place. In my first judgment, I concluded that the DfI Statement did not detail or contain any reference to any such evidence being provided by DAERA and, in contrast with the evidence provided by DfE at the hearing of this matter, nothing was forthcoming from DAERA to indicate that prior to the DfI making its decision, it had provided the DfI with any form of evidence or evidence-based assurance that, even in the absence of a finalised CAP, the submissions, plans, strategies and policies in each of the sectoral areas had been garnered and collated and the assessment of DAERA was that they would accommodate the construction and operation of the road and at the same time would map out a realistic and achievable pathway for Northern Ireland to achieve net zero by 2050, meeting the interval targets on the way and staying within the then proposed carbon budgets.

[36] I concluded that this evidential lacuna rendered the DfI decision non-compliant with the duty imposed by section 52 and it rendered the decision irrational as it was a decision which was taken in the absence of an adequate evidential base. I note that one of the grounds of appeal is that I did not take steps to join DAERA as a notice party during the first hearing and that I did not require input from that department during

that hearing. I specifically invited the respondent to provide evidence to fill the evidential lacuna which to my mind was identified during the hearing. affidavit evidence from DfE was forthcoming. There was absolute silence from DAERA. Having agreed with the DfI Statement that the emissions generated from the construction and operation of the scheme would be included within and factored into the Executive's plans to deliver the emissions reduction targets specified in sections 1, 3, 4 of the 2022 Act, and as required by section 24 of the Act to ensure that any carbon budget set under the Act is not exceeded, it would appear that DAERA, at that time, chose to contribute nothing by way of evidence.

[37] After the completion of the first hearing of this case, and a matter of a few days prior to judgment being delivered, DAERA eventually brought forward a draft CAP on 19 June 2025, well outside the statutory time-limit for doing so under the 2022 Act. I would have thought that as a matter of common courtesy, I would have been alerted to this in advance or at the very least immediately afterwards. Instead, I became aware of this development through items appearing in the press. In order to ascertain whether any evidential strands which I had been looking for were contained or laid out in the draft CAP, I looked carefully at the contents of same, positively seeking to find something which might support the respondent's case. Having considered the draft CAP and the Quantification Report which appeared at Annex A, I noted that the pessimistic views expressed by the CCC as to the prospects of Northern Ireland meeting the climate targets it had set itself and the difficulties which would be encountered in adopting the stretched pathway which appeared to be the only way in which those targets could be met, had been borne out. I further noted that the CAP as drafted did not make any reference to this major infrastructure project in the context of the process of formulating and co-ordinating plans, strategies and policies that map out a realistic and achievable pathway for Northern Ireland to achieve net zero by 2050, meeting the interval targets on the way and staying within the then proposed carbon budgets.

[38] If I had found any evidence which was supportive of the respondent's case, I would have convened a further hearing to assess the new material. However, as there was nothing, I concluded that there was no merit in convening a fresh hearing. I see that I am now being criticised for not convening such a hearing. If DfI or indeed DAERA considered that there was anything in the draft CAP which impinged upon the extant challenge, despite the fact that the draft CAP was entirely silent on that subject, then I would have expected a request for a reconvened hearing to have been forthcoming from one or other department. That did not occur. As stated above, I was not even afforded the courtesy of notification of the impending or actual publication of the draft CAP.

[39] I turn now to consider the fresh evidence which has been introduced before the Court of Appeal and subsequently before me. I start with the affidavit of Mr Patrick Savage sworn on 18 November 2025. Mr Savage is a senior civil servant presently attached to DAERA and he is the Deputy Director primarily focused on the

development of the CAP. He has played a central role in the efforts to model the impacts of CAP policies and proposals on projected GHG emission levels.

[40] According to Mr Savage, in order to assess the past and present level of GHG emissions in each of the sectors listed in section 33 of the 2022 Act, the UK GHG inventory (which is the official statistical estimate of historic GHG emission levels in the UK) is used to estimate Northern Ireland's share of the UK GHG inventory and, thereafter, this share is divided amongst the section 33 sectors. DfE leads on "business and industrial processes" and DfI leads on "transport". Section 33 also lists "infrastructure" as a sector. However, Mr Savage, in his first affidavit at para [13] states that:

"The infrastructure sector could not be associated with an appropriate proportion of the emissions in the inventory. All Northern Ireland GHG emissions are accounted for in other sectors. Infrastructure is therefore treated as a cross-cutting sector and is led by DfI."

[41] It should be remembered that at the first hearing the affidavit evidence of Mr Richard Hume, the Head of the Business and Industrial Process Team within the Business, Gas, Minerals and Renewable Electricity Directorate of the DfE which were sworn on 27 March 2025 and 3 April 2025 and which were submitted to the court during the oral hearing of this challenge stated that the GHG emissions resulting from the construction of the proposed road would be accounted for in the BIP sector which falls within the responsibility of DfE.

[42] Returning to Mr Savage's affidavit evidence, it would appear that the departments with responsibility for the section 33 sectors have to devise policies and proposals to reduce the level of GHG emissions in the sectors for which they have responsibility and each department must provide estimates of the GHG emissions savings which will result from the adoption of those policies and proposals. The departments have to identify the means by which the impact of each policy or proposal on GHG emissions in the relevant sector is assessed. There seems to be a degree of latitude afforded to individual departments as to how they assess the impact of individual policies and proposals. In preparing the draft CAP, DAERA is not responsible for either devising policies or proposals in section 33 sectors for which it does not have direct responsibility, nor is it responsible for assessing the impact of policies and proposals in sectors for which it does not have direct responsibility.

[43] In short, it would appear that Northern Ireland's estimated GHG emissions are calculated as a percentage of the estimate of the UK GHG emissions as a whole. This percentage is then divided up between the various sectors identified in section 33 and the departments responsible for those sectors have to devise policies and proposals to bring about reductions in the emissions in the sectors for which they have responsibility and they also have to identify how they calculate the impact of each policy or proposal but it is clear that this calculation is an estimate based on modelling

which may have its origin in the GHG inventory. It would appear that for the purposes of preparing a CAP, there is no actual measurement of GHG emissions in each sector in Northern Ireland and what we have for each sector is an assigned percentage of an estimate of the NI GHG emissions which is derived from an assigned percentage of the overall UK GHG inventory.

[44] Each department has to develop policies and proposals in an effort to reduce sectoral GHG emissions and each department has to estimate the impact of those policies and proposals over time. What is also clear from para [17] of Mr Savage's affidavit is that in estimating GHG emissions in Northern Ireland, no account is taken of individual major infrastructure projects and, in particular, no account whatsoever is taken of the impact of future major infrastructure projects when assessing how successful policies and proposals will be in reducing GHG emissions in each sector. Actual or calculated emissions from such large infrastructure projects are, in essence, entirely left out of account. This explains why the A5WTC was not referred to in the draft CAP which was published in June 2025.

[45] The thrust of Mr Savage's affidavit evidence is that estimated project emissions are irrelevant to the process of preparing sectoral plans or indeed a CAP. The sectoral plan for transport concentrates on moving from internal combustion engines to batteries, moving from private transport to public transport and reducing the need for journeys by car. It does not matter if this road will result in more trips by car and lorry than otherwise would be the case if the road was not constructed because these vehicles will be powered by battery and the electricity needed to charge these batteries will not be generated using fossil fuels. In relation to the construction phase of the road, again the BIP sectoral plan envisages the construction sector embracing policies and programmes which will dramatically reduce the GHG emissions in this sector. Excavating, earth moving and road laying machines will be greener as will quarrying machines used in quarrying operations, concrete production machines and operations, and roads material production which involves the use of copious amounts of bitumen (a constituent of petroleum) will all be greened up. It does not matter that all these machines and processes will have to be extensively utilised during the construction phase of this project because these machines and processes (as a result of the policies and programmes adopted) will be greened up. Further, carbon capture technology, now in its infancy, will be sufficiently developed to make a real impact on GHG levels in the atmosphere and, again, the electricity needed to power carbon capture technology will be produced by means that do not involve the use of fossil fuels.

[46] Pausing there for comment, the plan is for the construction phase of this road to commence as soon as possible, but it is clear that all these policies and programmes are not in place right now to bring about the reductions that are, at best, envisaged to occur over time. Further, the very fact that DfI presented such detailed estimates of additional emissions emanating from the scheme during construction and over its lifetime both to the PAC and then to me would strongly suggest that large infrastructure projects cannot be ignored in the manner suggested by Mr Savage. If

they could be then why go to all the trouble making detailed and complex calculations of project emissions estimates?

[47] Mr Savage in para [21] of his affidavit acknowledges that although assessments have been made by DfI of the projected emissions from the A5WTC project:

“there is no means by which to integrate these within sector or NI level GHG Inventory estimates or future emissions projections.”

Mr Savage avers that it is simply not possible to do so and project level emissions are not incorporated in “regional or national emissions projections at inventory level.”

[48] It is further averred that there are no sectoral emissions targets or sectoral carbon budgets set under the 2022 Act and that adherence to the various carbon budgets and targets set out in the Act will be assessed based on total Northern Ireland emissions only. Mr Savage concludes his first affidavit by stating that as project level emissions are not included in the CAP process, DAERA is not in a position to give any form of assurances “around the specific implications of the A5WTC project on Northern Ireland’s overall pathway.”

[49] If this is correct, then it is clear that the case made by DfI to the PAC and to the High Court at the first hearing of this matter was completely at variance with the case that is now being made. The PAC was told and I was told over and over again that the emissions from the construction and utilisation of the proposed road project had been carefully estimated and these estimated emissions would be taken into account when deciding how to stay within the carbon budgets and achieve the reduction targets and, bearing in mind that this was an Executive Flagship Project, the Executive would ensure that the project could proceed, be completed and become operational and at the same time Northern Ireland would achieve net zero by 2050. What we are now told by DAERA, through Mr Savage’s evidence, is that the specific estimated emissions from the construction and operation of the scheme have not, are not and will not be taken into account when assessing whether Northern Ireland will stay within the set carbon budgets and meet the statutory reduction targets and that DAERA is not and will not be in a position to give any form of evidence based assurance on the impact of the A5WTC project on Northern Ireland’s pathway to net zero.

[50] The affidavit evidence of Mr Savage gives the clear impression that the above stated view was the view of DAERA all the way through this process and that this is not a viewpoint that has taken root following the delivery of my first judgment. However, I question whether this is the case. It must be remembered that DAERA had a large hand in finalising the DfI Statement that was issued when this project was announced. That Statement clearly stated that estimated scheme emissions had been taken into account. During the first hearing before me, I was repeatedly told by DfI that the emissions from the construction and utilisation of the proposed road project

had been carefully estimated and these estimated emissions would be taken into account when deciding how to stay within the carbon budgets and achieve the reduction targets and, bearing in mind that this was an Executive Flagship Project, the Executive would ensure that the project could proceed and be completed and at the same time Northern Ireland would achieve net zero by 2050. DAERA helped formulate the DfI Statement and agreed with its contents. Nothing to the contrary was heard from DAERA during that first hearing of this challenge. Nothing was heard from DAERA when the draft CAP was published and it is not until shortly before the appeal is due to be heard that DAERA decide to make the case that they now make.

[51] The second affidavit of Mr Patrick Savage was sworn on 22 December 2025, after the second hearing before me had commenced on 15 December 2025. This affidavit exhibits the UK Greenhouse Gas Inventory 1990-2023. The preface describes this document as the UK's National Inventory Document ("NID") submitted in 2025 to the UN Framework Convention on Climate Change ("UNFCCC"). It contains national greenhouse gas emission estimates for the period 1990-2023, with descriptions of the methods used to produce the estimates. The inventory was compiled by a consortium led by Ricardo, a company that describes itself on its website as a global leader in the provision of strategic, environmental and engineering consultancy services and this company is in turn owned by WSP, a Canadian based consulting and professional services conglomerate. The preface states that the inventory was compiled according to the International Panel on Climate Change ("IPCC") 2006 Guidelines. Each year the inventory is updated to include the latest available data. Improvements in methodology are backdated as necessary to ensure a consistent time series. Methodological changes are made to take account of new data sources, or new guidance from IPCC and any officially sponsored or otherwise reputable research.

[52] Section 3.4 which is a sub-heading of Energy Common Reporting Tables ("CRT"). Sector 1 sets out Method Statements ("MS") for estimating emissions in specified categories of activities. For example, MS 3 describes the method used to calculate emissions in manufacturing industries and construction (excluding iron and steel use of derived fuels and off-road machinery). MS 6 relates to off-road machinery. In relation to the methodology adopted in this category, it would appear that Ricardo were commissioned to conduct a detailed government-supported machinery population and usage survey with industry stake-holders in 2022. MS 8 relates to road transport and the methodology used relies upon traffic data, vehicle licencing statistics, automated number plate recognition data, MOT data and data relating to the actual consumption of petrol and diesel by road transport in the UK contained in the Digest of UK Energy Statistics ("DUKES"). What is clear from the GHG Inventory is that estimated emissions from individual large-scale projects are not included in any relevant methodologies. For instance, there does not appear to be any mention of HS2 which has been under construction since 2019.

[53] Mr Savage swore a third affidavit on 6 January 2026 and this affidavit details his recent discussions with Mr Hugh McNickle, a statistician within the

Northern Ireland Statistical and Research Agency (“NISRA”) who has been seconded to DAERA and is presently the lead Northern Ireland statistician associated with the production of the Northern Ireland GHG inventory. The discussion centred around other discussions which Mr McNickle had with Mr Kevin Hegarty and Ms Caroline Maxwell from the Strategic Investment Board (“SIB”) between December 2024 and March 2025. It would appear that SIB engaged with the UK Department for Energy Security and Net Zero (“DESNZ”) in an attempt to ascertain what impact large scale projects like the A5 have on GHG emissions profiles, compared to what may be projected in absence of such projects. The DESNZ responded by providing a summary of how DESNZ Energy and Emissions Projections (“EEP”) take account of manufacturing and construction project growth. It would appear that meetings were then arranged between NI and GB civil servants to attempt to flesh out the explanation given by email.

[54] It would appear that EEP are prepared by DESNZ using the statistical analysis of historical data including past trends and relationships between gross domestic product (“GDP”), industry sub-sector output and past energy demand in that industry sub-sector. Projections on future industry sub-sector output, energy needs and emissions are based purely on statistical analysis and the department does not make assumptions about government economic policy. The department uses the Office for Budget Responsibility’s (“OBR”) future GDP projections to project future industrial sub-sector output, future energy use and future emissions, taking into account the impact of energy and climate change policies which have already been implemented or for which funding has been secured (EEP ready policies).

[55] Following on from these discussions, there was continued engagement between SIB and DAERA and a paper on Carbon Management and Quantification was prepared by SIB in July 2025. Mr Savage’s first affidavit at paras [42] to [45] summarises how the approach recommended by SIB which involved factoring in quantified emissions from new projects when assessing whether Northern Ireland would stay within the agreed carbon budgets was not agreed by the Northern Ireland Civil Service (“NICS”) Board, following input from DAERA. In essence, this approach was not agreed because DAERA indicated in correspondence to the Chair of the NICS Board dated 10 September 2025 that it wished to intervene in the A5 appeal and “a more prudent approach” would be to wait for the outcome of an appeal.

[56] Following on from Mr Savage’s affidavit evidence, a further affidavit was sworn by Mr Hugh McNickle, on 10 February 2026. As outlined above, Mr McNickle is the Principal Statistician within NISRA and he is currently seconded to DAERA, producing the official statistics on GHG emissions since May 2020, and he states that he has consulted widely when preparing this affidavit and that the DfI and the UK DESNZ have reviewed the final version of the affidavit and are content that it incorporates “an accurate reflection of the DfI and DESNZ position on the relevant matters addressed herein.” I will have more to say about this later.

[57] Mr McNickle sits on the Executive Board of the National Inventory Steering Committee (“NISC”) which is described as the “governance body for the UK Green House Gas Inventory (“GHGI”). Mr McNickle avers that the UK GHGI acts as the authoritative source for UK territorial emissions estimates and is used to fulfil the UK’s domestic and international GHG reporting obligations. The NISC is divided into two boards, the Executive Board and the Advisory Board. The Advisory Board is chaired by the head of the GHGI team in DESNZ. It is averred by Mr McNickle that “statistical colleagues and technical leads within DAERA sit on this board.”

[58] The Executive Board on which Mr McNickle sits is chaired by the National Atmospheric Emissions Inventory (“NAEI”) Programme Senior Responsible Owner (“SRO”) who is the DESNZ Deputy Director of Climate Science. Mr McNickle is responsible for the production of the annual Northern Ireland GHG inventory and this estimates historic GHG emissions and it is updated annually. The most recent version was published on 10 June 2025 and this covers the years 1990 to 2023 and it appears as the sole exhibit to Mr Patrick Savage’s second affidavit.

[59] Mr McNickle also has responsibility for producing the NI GHG projections for future years and the latest version of this report was published on 27 September 2024 which was just before the publication of the DfI Statement. This report which is exhibited to his affidavit provides estimates for GHG emissions for the years 2022 to 2032, using the 2021 NI GHG inventory as a starting point. It is the central thrust of Mr McNickle’s affidavit that the methodologies and modelling used to produce these projections do robustly factor in the impact of matters such as future major infrastructure projects, although they do not specifically incorporate or refer to the estimated emissions from individual projects and he goes on to explain this in some detail in his affidavit and this will be discussed below.

[60] It is important to note at this stage that it would appear that the projections in this report take account of the estimated impact of some established GHG reduction policies but the report makes clear at internal page 15 that:

“policies currently being developed for inclusion in the Climate Action Plan have not been included in this publication. New policies, once finalised, will be incorporated into future updates.”

[61] It is also important to note at this stage that the graph set out in Annex 4 of the report “Total GHG emissions from 2021 GHG Inventory (1990 to 2021) and updated projections (2022 to 2032) against Climate Change NI targets” is concerning in that it graphically illustrates that on the basis of the established policies, it was estimated that NI would not reach the 2030 interim GHG target and would miss it by slightly more than 4.8MtCO₂e. It should be remembered that this report was available to DfI when it published its Statement in early October 2024. The graph set out in Annex 4 of the report can usefully be compared with two tables which appear in the draft CAP which was published some nine months later in June 2025. The relevant sections of the draft

CAP are 5.3 and 5.4, internal pages 51 to 56, and the relevant tables are Table 6 and Table 8.

[62] Annex 4 in the September 2024 report used the 2021 GHG inventory (1990 to 2021) and provided updated projections for the period between 2022 and 2032. It should be remembered that the report specifically stated that the projections did not take account of policies and programmes which would be announced in the draft CAP, when published. The graph in Annex 4 showed a thickly hatched line representing the projected emissions and it was projected that emissions would fall from 22.5 MtCO₂^e in 2022 to 19.6 MtCO₂^e in 2032. The graph also showed a finely hatched straight-line path from 2020 to 2030 which represented the “CC Act NI target at least 48% reduction from baseline by 2030.” The target figure was stated as 15.2 MtCO₂^e. As noted in para [61] above the graph set out in Annex 4 of the September 2024 report indicated that NI would not reach the 2030 target and it could not be described as a near miss. However, if one then considers Tables 6 and 8 contained in sections 5.3 and 5.4 of draft CAP published in June 2025, the updated 2022 GHG inventory shows that there has been a change in the 1990 Base Year from 29.2 MtCO₂^e to 29 MtCO₂^e and there has been a change for the year 2021 from 22.5 MtCO₂^e to 22 MtCO₂^e. The GHG inventory figure for 2022 is 21.3 MtCO₂^e. The central projected emissions are estimated to fall from 20.5 MtCO₂^e in 2023 to 18.4 MtCO₂^e in 2027. The two tables only show figures up to 2027. The improvement in the projected reductions of GHG emissions during this period is stated to be the result of the policies and programmes which are set out in the sectoral plans in the draft CAP.

[63] However, in addition to the improvement in the projected reductions of GHG emissions during the relevant period due to the impact of policies and programmes contained in the draft CAP, it is clear from Table 8 that there have been adjustments to the CCC pathway following publication of the 2022 GHG inventory. Because of the reductions in the GHG inventory for the base year, the amount of the actual reductions in each year to reach the average annual reduction figure of 33% is slightly less. Table 8 also reveals that the average annual reduction of 33% is just met in the central scenario and is not met in the headwinds scenario. The central scenario is used to assess whether NI will remain within its first carbon budget. It is argued by the applicants and FOE that this is not an example of adopting a precautionary approach.

[64] Also of interest in the September 2024 Report is Figure 7: Land Use Change and Forestry (“LULUCF”) (internal page 13). Land use change includes changing the use of land from farm land to dual carriageway road and we know from the DfI Statement that approximately 800 hectares is likely to be vested for the purposes of constructing the section of the road project for which DfI approval has been given. The graph in figure seven estimates the amount of GHG emissions resulting from changes in land use in the period between 2022 and 2032. What is interesting from the graph in figure 7 on internal page 13 (page 48 of the exhibits to Mr McNickle’s affidavit) is that the graph indicates that the amount of GHG emissions from change in land use does not really change at all in any of the years between 2022 and 2032. However, it is clear that

it is intended that in this period, almost 800 hectares of rural land will be vested for the purposes of building the road.

[65] From the layman's perspective, the issue that arises from this chart is as follows. If the estimates are modelled in such a manner as to somehow factor in the impact of matters such as future major infrastructure projects, how can it be the case that GHG emissions from change in land use is constant in the years between 2022 and 2032, with no blip to account for the construction of the road? Does this mean that other anticipated changes in land use which give rise to the emission of GHG are going to reduce during that same period or does it mean that other changes in land use such as afforestation, the restoration of peatlands and the conversion of cropland into grassland which actually result in the capture of GHG from the atmosphere are going to dramatically increase during the same period?

[66] Another exhibit to Mr McNickle's affidavit is a document entitled "Projections of Emissions and Removals from LULUCF Sector to 2050 2100" which was published in October 2024 and which appears at pages 249 to 298 of the bundle of exhibits. This is a document produced by DESNZ and it states that LULUCF is divided into six land use types: Forest Land; Crop Land; Grassland; Wetlands; Settlements; and Other Land. The methodology used for projecting the change of land use is set out in Annex 1 internal page 43 (page 291 of the bundle of exhibits):

"Conversion of "rural" land to Settlement can vary considerably over time, driven by national and global factors affecting, for example, housing demand, construction material availability/cost and political priorities. Settlement land includes both housing and other infrastructure and 'developed' land."

"We assume that projected increase in numbers of households in the future can be used as a simple proxy for future demand for land conversion to Settlement. The projections of household numbers (ONS 2020) use the latest national population census and trends in population demography and household formation to project household numbers for England and the devolved administrations..."

"We explored the relationship between the change in the number of households per year and the area of land converted to Settlement on mineral soils reported in the national GHG Inventory 1990-2018 for each country in the UK ... This analysis indicated that the best fit for England, Scotland and Wales, using linear regression, used a five-year offset between household increase and land conversion to settlement for the period 1995-2020 ... No

best fit relationship was found for Northern Ireland ... The best fit relationship for Wales was used for Northern Ireland to estimate projections.”

[67] What is immediately apparent from this explanation as to the methodology used to estimate change of land use is that the modelling concentrates exclusively on trends in population growth and estimated increases in the number of households and in respect of Northern Ireland, local statistics are not used and the statistics for Wales are used instead. From the layman’s perspective, it is hard to see how this modelling in any way, shape or form takes into account or incorporates the impact of matters such as future major infrastructure projects.

[68] If one then considers the estimates set out in Table A2.4: Land use areas 2022-2050 for Northern Ireland (1,433 kha), one sees that this table sets out snapshot estimates for three scenarios (baseline, central and stretch) for the amount of the total land in Northern Ireland used for settlement in the years 2022, 2025, 2030, 2040 and 2050. In all three scenarios it is estimated that in 2022, the amount of land used for settlement in Northern Ireland is 60kha, and in 2025 the amount of land used for settlement in Northern Ireland is 63kha. This is an increase in 3,000 hectares in three years. In the period between 2025 and 2030 (a 5-year period) the increase in the baseline scenario is 4,000 hectares. In the central scenario the increase in the same five-year period is 3,000 hectares and in the stretch scenario, the increase in the same period is also estimated at 3,000 hectares.

[69] The five-year period between 2025 and 2030 is the period during which it is anticipated that the road will be constructed. This construction will involve the change of use of almost 800 hectares of land in Northern Ireland. It is hard to see how these estimates reflect this large change in land use over a relatively short space of time. That is not at all surprising, having regard to the fact that change in land use is modelled from population and household numbers trends and in the case of Northern Ireland, using Welsh statistics. Mr McNickle deals with LULUCF emissions from paras [91] to [97] of his affidavit. He avers that the LULUCF NI projections as incorporated in the draft CAP were derived from analysis conducted by the UK Centre for Hydrology and Ecology (“UKCEH”) on behalf of DAERA. It is averred by Mr McNickle that the analysis conducted by UKCEH incorporates a series of assumptions set out in the UK LULUCF projections document, including assumptions on the ongoing changing use of land whereby farmland is built on for infrastructure purposes with an annual conversion rate from grassland and cropland to settlement. This is the basis for the increases described in para [66] above. In essence, the case now being made by DAERA is that this assumption more than accounts for the change in land use resulting from the construction of the road. I fail to see the logical basis for this assertion.

[70] Returning to Mr McNickle’s affidavit, he avers that he is the Principal Statistician associated with the GHG emissions projections contained in the draft CAP which was published in June 2025. These projections are set out in the Quantification

Report which is exhibited to Mr Savage's first affidavit between pages 3127 and 3257. He avers that the production of the NI GHG projections publication and the CAP GHG projections are reliant on the use of DAERA's NI GHG projection tool commonly referred to as the Emissions Projection Tool ("EPT"), the operation of which he manages.

[71] Mr McNickle goes on to describe the development of DAERA's EPT which was intended to allow the Assembly to monitor progress towards GHG emissions reductions targets. The EPT takes into account the impact of UK policy measures to reduce GHG emissions and also Northern Ireland specific measures. The first version of the EPT was developed in 2008 by a company that is now part of the Ricardo/WSP conglomerate. It is averred that although the EPT has evolved and been refined over time, the methodology for calculating projected admissions in the Business and Industrial Processes sector has remained essentially the same. It is averred that the EPT is designed to calculate projected emissions based on UK and NI data that relate to expected future changes in relevant variables such as energy demand and the combustion of fuel to meet this demand. The EPT utilises a "top down", "holistic" methodology. It is not based on the accumulated impact of individual projects. Instead, it uses economy-wide relationships to project how emissions will change as a result of the change in demand for fuel in order to meet those projected future energy needs.

[72] Central to the case now being put forward by DAERA, is the averment of Mr McNickle to the effect that by reason of the above explanation, the EPT captures all of the increased emissions resulting from energy demand, including the demand related to all future construction activity. It is immediately clear that this can only be correct if the calculation of estimated future energy demand is nuanced and sophisticated enough to incorporate either directly or indirectly by the use of appropriate proxy indicators what the likely energy demand from future infrastructure projects during the relevant period will be. Mr McNickle avers that the impact of what he describes as "overarching assumptions" that are fed into the EPT mean that the eventual actual emissions from projects such as the A5 are accounted for in the projections and estimates and that to incorporate the actual projected estimates for the A5 into this model would result in "double counting".

[73] So, what are these "overarching assumptions" that are fed into the EPT that mean that the eventual actual emissions from projects such as the A5 are accounted for in the projections and estimates? Before answering that question, Mr McNickle proceeds in his affidavit to inform the reader that the EPT is also used to combine the outputs of the analyses of sector-specific policies and proposals to reduce GHG emissions which have been developed by the individual Northern Ireland departments and which are incorporated into the draft CAP. He rejects the suggestion that the draft CAP ignores future activities which might increase emissions and simply focuses on emissions estimates calculated on a "business-as-usual" basis and then factors in estimated reductions in GHG emissions following on from the implementation of the relevant policies and proposals.

[74] Crucially, for present purposes, he quotes from page 13 of the Quantification Report which forms part of the draft CAP that the “underlying sectoral sub-models include macro-variables such as economic and population growth.” These seem to be the “overarching assumptions” referred to above. In essence, projections of overall economic growth and population growth are used to estimate future energy needs (including the energy needs related to construction, transport and change in land use which are all part and parcel of that estimated economic growth) and those projected energy needs allow for accurate estimates and projections of future GHG emissions to be made. In essence, the actual activities which occur, be they in the construction, transport or change in land use sectors, are as a result of those macro-variables and not the other way around. In essence, Mr McNickle avers that the current methodologies account for future development and resulting emissions across the sectors and negate the need to attempt to incorporate project level emissions.

[75] Mr McNickle then goes on to describe in greater detail the macro-variables that inform the projections contained in the EPT. It would seem that the Northern Ireland EPT relies heavily on data sourced from the DESNZ Energy and Emissions Projections (“EEP”) which are informed by “growth assumptions in key macroeconomic inputs.” The key macroeconomic inputs used include:

“official population and household projections, future levels of UK GDP and disposable income, future growth rates for industrial production, and financial considerations such as projected currency exchange rates and future wholesale prices of electricity. All of these are considered in the EEP in determining the mix of projected fuel use to meet the economy’s future energy demands.”

[76] Mr McNickle goes on to aver that the UK GHG Inventory which is designed to provide accurate assessments of GHG emissions during past years similarly and, he argues, consistently does not incorporate modelled emissions relating to past individual projects into the GHG inventory. Historic emissions estimates are not reported on a project-by-project basis. Historic emissions are calculated and reported on a sectoral basis, based on assumptions derived from macro level modelling, such as determining the amount of fuel combusted by any given sector over a reporting period. The UK GHG inventory methodology takes account of the total historic fuel use in the UK economy during the relevant period before modelling how that fuel use is disaggregated into UK specific sectors and then modelling how specific percentages of the UK wide sectoral fuel use should be allocated to the various devolved governments (“DGs”).

[77] Mr McNickle avers that the main inputs that are used to calculate the historic figure for UK GHG emissions from the construction sector during any given period are the statistics relating to the production of cement during the relevant period, the use of non-road mobile machinery (“NRMM”) during that period and the change in

land use during the same period. Emissions related to cement production are defined as either “combustion related emissions” which are the GHG emissions from fossil fuels burnt to produce electricity which was used to provide the power for cement production or “process related emissions” which are GHG emissions from fossil fuels actually burnt in the production of cement in cement kilns. It would appear that emissions estimates within the cement production industry “are collated from process operators via the industry’s trade association, the Mineral Products Association (“MPA”) and from third-party verified site-specific data from the UK and EU Emissions Trading Scheme (“ETS”). Mr McNickle avers that emissions relating to cement production are largely site specific so that in determining the amount of emissions to allocate to Northern Ireland, use is made of specific information with respect to cement production that actually occurs in Northern Ireland.

[78] In relation to the calculation of historic estimates for GHG emitted in any given period by NRMM in the UK as a whole, figures relating to the amounts of fuel used by all mobile machinery during the relevant period are utilised. These figures are obtained from the sectoral data contained in the Digest of United Kingdom Energy Statistics (“DUKES”). Estimates relating to fuel use by NRMM within the construction sector are calculated using a methodology contained in a report entitled: “Improvements to the National Atmospheric Emissions for NRMM – Non-Agricultural Machinery” and this methodology involves “desk-based reviews, stakeholder engagement, market surveys and wider data collection activities for an estimate of the NRMM fleet within the UK construction sector.”

[79] In relation to the disaggregation of UK estimates of the NRMM fleet within the UK construction sector into Northern Ireland estimates, a “top-down” approach is used in which certain assumptions are made using proxy data. The proxy data used in this exercise is gleaned from the 2011 employment statistics sourced from the Office for National Statistics (“ONS”) Inter-Departmental Business Register (“IDBR”). In essence, the number of persons employed in the construction industry in Northern Ireland during the relevant period is used as the basis of the methodology for disaggregating the UK estimates of the NRMM fleet within the UK construction sector into Northern Ireland estimates.

[80] Bearing in mind my observations set out above on the estimation of GHG emissions resulting from land use change, I would comment at this stage that from the layman’s perspective, estimates of historic construction related GHG emissions appear to be calculated in a most convoluted and indirect manner and one could be excused for wondering if, in fact, there is in reality much of a relationship between these historic estimates and actual historic GHG emissions in the construction sector in Northern Ireland.

[81] Having described the methodology utilised to estimate historic emissions in the construction sector for the purposes of the UK and NI GHG inventories, Mr McNickle then goes on to describe the methodology used by DESNZ in its EEP which, as has been indicated above, is one of the main tools used to predict future GHG emissions

in the UK. In essence, the EEP, using the same overarching assumptions as those used in the GHG inventory, focusing on various projections of economic and demographic drivers, utilises a set of models, the outputs of which are combined and aggregated to project future energy demand and GHG emissions for the UK. There are three related models in the EEP, namely: the Energy Demand Model (“EDM”); the Dynamic Dispatch Model (“DDM”); and the Prices and Bills Model (“P&B”). The EDM projects demand for energy sources including electricity and renewable fuels. The DDM projects the electricity generation mix and the electricity wholesale price. The P&B projects retail energy prices. The outputs of these models are combined and aggregated for reporting purposes within the EEP.

[82] The data that is fed into these models include historic GDP and future household number projections from ONS and GDP growth projections and other predictions of long-term economic determinants from OBR. It is averred that these help compile an objective trajectory of future energy demand for the UK including NI. One of the overarching assumptions in the EEP is that all economic activity is accounted for in the statistics and forecasts used in EEP calculations. It is averred by Mr McNickle that at the heart of the EDM is the econometric analysis of historic data relating to over 2,500 variables representing all sectors of the UK economy. One such variable is construction Gross Value Added (“GVA”) which I understand is a measure of the net contribution of the construction sector to the UK economy calculated as the value of construction output (projects) minus the costs of materials, fuel and services used during the production. The EDM utilises ONS generated historic GVA data and projects into the future the recent trend in construction GVA as a proportion of total GDP up to a period of 20 years. Thereafter, it is assumed that construction GVA will rise at the same rate as GDP. For each type of fuel used to produce the energy needed to facilitate GDP growth, the EDM projects forward a trend in energy intensity (the energy demand per unit output) using an assumption that the energy intensity in each year is an average of the previous three years. In this way, future annual demand for specific types of fuel used in construction can be estimated and the future GHG emissions from the use of these fuels can also be calculated. It is further averred that outputs from the EDM are fed directly into the NI specific EPT in order to calculate projected GHG emissions in NI, including those emanating from the construction sector.

[83] Mr McNickle avers that by employing econometric analysis of historical data, the EEP is able to establish strong and robust relationships which describe how economic growth and other variables are related to the consumption of energy. These relationships are then used, together with projections of the relevant variables, to provide estimates of future energy use and resulting GHG emissions. He concedes that while historical statistics and GDP growth forecasts will never produce completely accurate estimates of future GHG emissions, the addition of estimated emissions from individual proposed projects to the overall projections derived from the EEP would result in double counting. The thrust of Mr McNickle’s evidence is that the EEP modelling already accounts for growth and hence emissions generated by individual future projects just as the UKGHG inventory modelling accounts for

historic emissions from individual projects in the overall estimates of historic emissions in the relevant sectors.

[84] Mr McNickle avers that a “top-down” approach to the estimation of projected GHG emissions in construction is used in both the UK EEP and the NI EPT. He states that it is impossible to account for projected GHG emissions in construction using a “bottom-up” approach (accounting for the cumulative emissions from each individual project) as this would mean that the same approach would have to be adopted for all activities across the entire economy that give rise to GHG emissions and presumably, in order to achieve consistency, the same approach would have to be adopted to calculate historic GHG emissions. Mr McNickle avers that there is presently no central process with the ability to track and record all such activities across the entire economy. There is no methodology or modelling presently available which could be used to make relevant assumptions based on the relationships of such activities to each other and there is no methodology available which would facilitate the apportionment of project level emissions in a common reporting framework.

[85] Returning to the relationship between the UK EPP and the NI EPT, Mr McNickle avers that the projected trends in energy intensity for each fuel type produced by the EEP, as described in para [80] above, are incorporated into the NI specific EPT within the tool’s Business Sector and the EPT is then used to estimate the annual growth in specific fuel use and the resulting change in total projected emissions in Northern Ireland. These growth rates are further categorised by defining the type of fuel combusted within each of the broad energy types and in respect of the construction sector, this includes the annual growth rate for the differing types of diesel that can be used within the construction industry. Mr McNickle avers that the NI specific EPT employs central price growth, economic growth and population growth assumptions derived from the EPP. These make up what is described as the baseline scenario. Mr McNickle avers that impact of UK-wide policies devised after the Low Carbon Transition Plan of 2009 are not factored in to this baseline scenario. However, the EPT does generate assessments of the Northern Ireland specific impact of these 2009 policies and these assumptions feed into the overall projection for GHG emissions on a sectoral basis in Northern Ireland.

[86] Turning to the past and future estimation of road transport related GHG emissions, Mr McNickle avers that the historic road transport related GHG emissions which are found in the UK GHG inventory are derived from DUKES data related to the volumes of petrol and diesel consumed by road transport vehicles in the UK. The total volumes of petrol and diesel consumed in any given period are compared with the historic data relating to the UK’s vehicle profile (fleet information) and activity (traffic data) for the same period. Allowances are made for different emissions profiles between hot and cold engines and estimates include estimates of the Annual Vehicle Kilometres (“VKM”) for the road network in GB by specific vehicle type with the data being provided by the UK Department of Transport (“DOT”). A similar data set specifically relating to Northern Ireland was prepared by the former Department of Regional Development up to 2014 but there have been no updates since that time due

to lack of funding. Since that time the 2014 NI data relating to VKM have been extrapolated forward using the growth rates derived from the GB data.

[87] Mr McNickle avers that in Northern Ireland it has been recognised and accepted for some time now that the NI GHG inventory account of emissions emanating from the road transport sector does not contain bespoke NI road transport activity data. To remedy this shortcoming, the DfI developed the bespoke Transport Emissions Model (“TEM”) which was discussed in great detail in the DfI Statement. The benefits of the TEM are that it takes into account the specific NI vehicle fleet profile (including age, typical vehicle size and fuel type) which is different from GB and also takes into account differences in the road networks including the rural-urban split between GB and NI, the geography of the region, differences in the strategic transport systems such as the much more developed rail network in GB, differences in travel patterns including driving distances (VKM) and the types of journeys undertaken.

[88] It is averred by Mr McNickle that the NI specific TEM that was painstakingly developed calculates emissions based on two primary factors: vehicle activity (VKM); and fuel or energy source. The TEM does not assign emissions to specific roads but estimates emissions based on the overall size and characteristics of the vehicle fleet and the total distance travelled. It is clear, therefore, that upgrading a road from a single carriageway to a dual carriageway does not by itself influence the calculation of road transport emissions within the TEM. In relation to the issue of fuel or energy source, the model takes into account historical vehicle trends for Northern Ireland (percentages of petrol, diesel and electric vehicles in the fleet at any given time together with statistics relating to the turnover and retention of the existing stock and new vehicle registrations) and it also factors in the dates on which key emissions reductions policies such as the implementation date for the ban on the sale of new vehicles with internal combustion engines (petrol or diesel) and uses these sets of data to project forward how the profile of the vehicle fleet in Northern Ireland is likely to change over time. In this way, it is possible to project forward how emissions will change as the NI vehicle fleet profile swings from internal combustion engines (“ICE”) to electric vehicles (“EV”).

[89] Estimates of the growth of the NI vehicle fleet are made using macro-level variables including population growth, economic trends and vehicle turnover rates. New road infrastructure is not seen as a driver for growth in the NI vehicle fleet. However, it is accepted in the TEM that a new road typically influences traffic patterns (induced traffic) resulting in changes in route choice, redistribution of trips, changes in the timing of travel, and some long-run increases in total kilometres travelled due to improved network capacity. However, the TEM’s concentration on fleet modelling means that road length and the location and configuration of new road infrastructure are not required inputs for emissions calculations. As stated above, the main inputs are VKM and the type of fuel or energy source derived from the NI vehicle fleet profile.

[90] Mr McNickle highlights the fact that the TEM was used to produce projected road transport emissions which were incorporated in the draft CAP and Quantification

Report published by DAERA in June 2025. It is averred that the relevant tables in the Quantification Report do not ignore matters that will cause increased GHG emissions. For example, VKM in the HGV sector is estimated to increase every year and it is estimated that total VKM (cars, LGV and HGV) will increase every year from 2031. The projections also predict increasing numbers of vehicles associated with population and economic growth with an increase in the total number of vehicles from 2025 to 2050. As a testament to the capabilities of the TEM and the robustness of the predictions it produces, Mr McNickle avers that it has now been agreed by DESNZ and Ricardo that the TEM, as a valuable and credible evidence source, will be used from 2027 to inform the NI GHG inventory.

[91] It is clear from the DfI Statement that the TEM can be used to model the expected transport emissions from a particular scheme. This was clearly done for the A5WTC. However, it is averred by Mr McNickle that this involves a very different approach from that which is used to project emissions and analyse the impact of transport sector policies at a sectoral level in order to devise a credible, evidence-based decarbonisation pathway for the transport sector. The two approaches are very different and cannot be combined. It is averred that the sectoral level projections include any increases which may result from individual road construction projects.

[92] Mr McNickle concludes his affidavit by highlighting that while the A5WTC is a significant project in NI terms, it is not that exceptional when viewed against the NI Executive's history of delivering major infrastructure, particularly when it is understood that in relevant years multiple such projects proceeded simultaneously. In essence, it is averred that infrastructure work of comparable size and complexity has been brought forward as part of the DfI's capital programme. In essence, it is averred that the construction of the A5 should not be treated as exceptional in terms of emissions modelling. However, such an argument, for argument it is, does not take account of the fact that this major infrastructure project was the first one to go through the planning process following the enactment of the 2022 Act.

[93] This issue is dealt with at paras [98] to [102] of Mr McNickle's affidavit and the court's attention has been drawn by FOE to para [102] of Mr McNickle's affidavit and the last sentence in particular. In support of his opinion that the A5 should not be treated as exceptional in emissions modelling he states: "When the A5 proceeds, it displaces other projects: when delayed, other projects proceed instead." The point made by FOE is that this at last reveals the government's true thinking in respect of how the emissions arising from the construction of the A5 are taken into account in the methodologies and modelling that are presently used. The methodologies and modelling will take account of a project such as the A5 because other planned projects will be displaced. It is argued by FOE that this means that the presently used methodologies and modelling will not fully account for the emissions arising from the construction of the A5 if other projects proceed apace and if that is the case then it is incumbent upon the government to publicly identify the other projects which will be displaced to allow the A5 to be built. No such information has ever been provided. Therefore, how do we know that such necessary displacement is planned or will take

place to accommodate the construction of the A5? This is a pretty fundamental point which has not been addressed by either department during this hearing.

[94] Mr McNickle also avers that one has to exercise caution when considering the estimates of the project level emissions relating to the construction of the A5WTC and the potential for the incorporation of those project level emissions in the draft CAP. Mr McNickle highlights the fact that the estimates of the project level emissions relating to the construction of the A5WTC include emissions relating to the production of steel used in the construction of the road which will in all likelihood not be manufactured in NI and would never be included in a NI GHG inventory but would, instead, in accordance with the international inventory system, be taken into account in the country where the steel is produced.

[95] The last affidavit lodged on behalf of DAERA/DfI is an affidavit sworn by Mr Anthony Courtney on 18 November 2025. He is an Assistant Director in DAERA and he was part of the team that worked on the progression of the 2022 Act. The affidavit gives an account of the genesis of the legislation and the passage of a Private Member's Bill and a Bill sponsored by DAERA through the Assembly. Noting that the legislation, as enacted incorporates elements of both Bills, I will not comment further on the contents of this affidavit because I have already provided my considered comments on the various provisions of the Act in my earlier judgment. I am somewhat concerned by the submission of an affidavit from a civil servant which sets out to provide some form of authoritative interpretation of the provisions of the Act. I will say no more on this subject but will reiterate and explain what I had to say about the relevant provisions of the 2022 Act below.

[96] I need mention in passing two further affidavits which were submitted for my consideration. Those are an affidavit sworn on 5 January 2026 by Ms Laura Neal the solicitor for FOE and a more recent affidavit sworn on 23 February 2026 by Mr Ciaran O'Hare, the solicitor for the applicants. I will not dwell on the content of these affidavits because they blatantly stray into territory which should be avoided by instructing solicitors when providing affidavit evidence. This evidence should be evidence of fact within the knowledge and belief of the deponent. Affidavits should not contain statements that fall within the realms of expert opinion evidence unless the deponents of the affidavits are accepted as possessing the appropriate level of expertise in the relevant field of specialist knowledge. Unfortunately, both affidavits are replete with examples of breaches of these rules. In simple terms neither of the deponents could have gone anywhere near a witness box in a court to give the evidence that they purported to give in their affidavits and, therefore, the court cannot and should pay any regard to the affidavits that have been submitted to the court.

[97] I return to the specific issues that the Court of Appeal has asked me to address. I remind myself that I was directed to consider the new affidavits filed by the first intervener (DAERA) and determine what the first intervener's responsibilities are under section 52(1) of the 2022 Act and how those responsibilities relate to the

functions exercised by the respondent/appellant in this case and to provide an addendum judgment dealing with the new evidence and the issue identified above.

[98] The new affidavit evidence is mainly concerned with the methodologies and modelling used to calculate past GHG emissions for the purposes of preparing UK and NI GHG inventories and for the purposes of preparing estimates of future GHG emissions in the UK and NI, taking into account policies and programmes which are or will be implemented to either reduce the levels of GHG emissions or capture and sequester GHGs from the atmosphere. In summary, the more recent affidavit evidence indicates that project level emissions are not specifically taken into account either historically or looking forward but the methodologies and modelling tools used to estimate past emissions and future projected emissions are internationally approved, are robust and are capable of accurately accounting for potential emissions from major infrastructure projects in the relevant sectoral emissions estimates. The case now being put forward by both departments is that it is impracticable/impossible to incorporate project level emissions in past GHG inventories or future estimates of GHG emissions and even if it were practicable/possible, the incorporation of project level emissions even if just for major infrastructure projects would result in double counting because the methodologies and modelling presently utilised takes account of the environmental impact of such projects.

[99] I am being exhorted by the two departments to take that evidence at face value. I appreciate that it is challenged by the applicants and the FOE who argue with some support from documentation garnered from other jurisdictions that it is both possible and practicable to incorporate project level emissions in historic inventories and future emissions projections and that such an approach is finding traction in England and Scotland. However, no expert evidence has been adduced by either the applicants or the FOE to legitimately challenge the expert evidence adduced by DAERA and in the absence of me being able to conclude that DAERA and/or DfI is/are acting irrationally in using the methodologies and modelling that have been identified in the affidavit evidence which has recently been submitted by DAERA, I would be wrong to conclude that DAERA and the other NI departments with sectoral responsibilities are required by law to adopt a different approach to the estimation of past and future GHG emissions by including in the relevant methodologies and models the actual estimated emissions from major infrastructure projects.

[100] One of the “Aunt Sally” or “Straw man” arguments put forward by DfI/DAERA in the prosecution of this appeal and in the fresh hearing before me is the argument that in my first judgment I either expressly or impliedly ruled that the provisions of the 2022 Act required the relevant NI departments when preparing sectoral plans and DAERA when preparing a CAP to include project level emissions in their estimates of future GHG emissions. I make it clear that the judgment does not by express statement or by implication impose any such requirement. How sectoral plans are developed, including the methodologies and modelling used, are matters which are largely within the exclusive decision-making competence of the

relevant departments. If the departments have a rational basis for such decision-making then the court should not impose its views in respect of such methodologies and modelling simply on the basis that it considers that different methodologies and modelling might produce more accurate estimates of future GHG emissions or the methodologies and modelling used contain elements that appear to be less than robust. The same applies to the preparation of a CAP by DAERA.

[101] In para [16] of my first judgment I stated that before dealing with the AA5A's seven specific grounds of challenge, I would expand the relevant chronology to some extent to incorporate references to some important dates prescribed by the 2022 Act and in order to do so it would be necessary to provide an overview of the Act and the duties it imposed on Northern Ireland government departments. I went on to provide this overview in paras [17] to [31] of that judgment. There is nothing in that section of the judgment which could be construed as imposing a duty on DAERA or other NI government departments to specifically include project level emissions in a CAP or sectoral plans. For the avoidance of doubt, I do not consider that Part 3 of the 2022 Act requires DAERA to prepare a CAP on the basis of the inclusion of project level emissions in future emissions estimates. Part 3 of the Act does not preclude such an approach but it certainly does not mandate it. Similarly, I do not consider that section 13 of the 2022 Act requires NI government departments when formulating sectoral plans to incorporate project level emissions in their sectoral specific emissions projections. Section 13 of the Act would not prevent such an approach but it certainly does not mandate it.

[102] Crucially, section 52(1) of the 2022 Act insofar as it imposes duties on each of the NI government departments to ensure that the net Northern Ireland emissions account is below a certain amount and that the net Northern Ireland emissions account for carbon dioxide for 2050 is below a certain amount and to exercise their own functions, so far as is possible to do so, in a manner that is consistent with the achievement of those objectives, does not prescribe the methodologies and modelling which the NI government departments must use for the calculation of emissions which may result from the exercise of their functions in order to demonstrate that they are doing everything possible to meet their obligations under the 2022 Act. Section 52(1) does not prevent a NI government department from using methodologies and modelling for the calculation of emissions which involve taking specific account of project level emissions but equally section 52 does not mandate such an approach.

[103] In my first judgment I held that section 52 is inextricably linked to sections 1, 3 to 5 and 24 of the 2022 Act and it should be interpreted in a manner which best supports the achievement of the goals that are at the heart of those other provisions, ie the requirement for Northern Ireland not to exceed the carbon budgets that have been set and the requirement for Northern Ireland to achieve the reduction targets set for 2030, 2040 and 2050. I held that section 52 is a provision which exhorts each individual Northern Ireland government department to do its bit in the achievement of those goals and it does so by placing a duty on each individual Northern Ireland

department, when exercising its functions, to do so in a way that facilitates the achievement of these goals, insofar as it is possible for each individual department to do so. All the Northern Ireland government departments must co-operate with each other to assist each other in the achievement of these goals. Such co-operation must be consistent with the proper exercise of each department's own functions. In other words, when engaging in such co-operation, one department cannot take on the functional responsibilities of another department and each department must not shy away from exercising its assigned functions simply because of what appear to be difficult challenges faced by any of the departments in meeting the targets and goals set out in the 2022 Act. I would add at this stage for the avoidance of doubt that the references to departmental functions in section 52 must include the specific functions ascribed to departments under other provisions of the 2022 Act.

[104] In its work in formulating the CAP (a function assigned to DAERA) DAERA must have regard to its duties under section 52. However, that does not mean, nor did I expressly or impliedly state that it meant that DAERA was in some way responsible for the content of other departments' sectoral plans. DAERA has overall responsibility for the formulation of the CAP and it must take the lead in co-ordinating the actions of the various departments in an effort to ensure that the 2022 Act targets and budgets are met but that does not mean that it has to take on the role of mandating to any department what should be contained in its sectoral plan. I hope that this disposes of another "straw man" argument that has now raised its head in the appeal.

[105] In my earlier judgment, I held that each department has to draw up plans, policies and strategies so as to enable it to do its bit in the achievement of those goals both individually and in co-operation with the other Northern Ireland government departments. Joined up thinking, synchronisation and co-ordination of effort are what section 52 is all about. I hope I was very clear in stating that section 52 does not prevent a major infrastructure project which is a source of significant GHG emissions being devised, promoted, constructed and put into operation by the DfI or any other Northern Ireland government department with responsibility for such activities.

[106] However, following the conclusion of the second hearing before me, I remain firmly of the view that section 52 does clearly rule out the construction and operation of a large scale infrastructure project in the absence of robust planning, synchronisation and co-ordination between all Northern Ireland government departments to ensure that the project fits into the plans, strategies and policies which map out a realistic and achievable pathway to achieving net zero by 2050, meeting the interval targets on the way and staying within the carbon budgets that have now been set. How this is achieved is largely a matter for the NI government departments. Nothing I said in the first judgment or this judgment should be taken to mean that the court is somehow mandating that project level emissions should be specifically factored in, provided that such emissions are properly accounted for in the methodologies and modelling presently used in Northern Ireland to project future GHG emissions.

[107] For the avoidance of any doubt, the reason why the applicants' case succeeded before me following the first hearing which resulted in the quashing of the orders made by the DfI in this case was not because DfI or DAERA or any other NI government department for that matter had failed to factor in project level emissions into their estimates of future GHG emissions; it was simply because DfI had made it clear in its Statement and specifically made the case before me that the specific emissions that were estimated would be generated from the construction and operation of this road had been and would be specifically taken account of in the overall assessment of whether Northern Ireland would meet its 2022 Act targets and remain within the budgets set thereunder AND I was not satisfied that there was a sufficient evidential base to support that assertion. I simply relied on the following express wording of the DfI Statement to reach these conclusions and I set this out clearly in para [197] of my previous judgment which I set out in full.

“[197] However, as noted above, the DfI has had to admit that “there is not a clear picture at a Northern Ireland level of all the other schemes and emitting activities which will happen between now and the 2050 Net Zero Target.” Further, there is unlikely to be full clarity in respect of these issues in the short term but it is asserted that any decisions taken now will need to be factored into: “how the Act’s net emissions reduction targets will ultimately be met.” It is further stated that: “(w)hilst the scheme will result in an increase in emissions, the A5WTC is a priority investment for the Northern Ireland Executive, and therefore the emissions generated from the construction and operation will need to be factored into the Executive’s plans to meet the emissions reduction targets specified in sections 1, 3 and 4 of the Act and as required by section 24 of the Act to ensure that any carbon budget set under the Act is not exceeded.””

Again, I have to stress that the DfI’s decision to proceed with the road was not struck down because project level emissions should have been specifically identified and factored into the draft CAP and/or the NI government departments’ individual sectoral plans but were not. Rather, it was struck down because the DfI’s case, at the time the decision was made and at the time I conducted the first hearing of this matter, was that such specific project related emissions estimates had been taken into account and the DfI were justifiably confident that even taking specific account of these emissions the 2022 Act targets would be met and the budgets would not be exceeded and I simply was not satisfied that the DfI had shown me the evidential basis to support this case.

[108] It now transpires that I was 100% right in my conclusions because the case that is now being made by DfI and supported by DAERA is that specific project level

emissions have never, are not, will not be, and cannot be taken into account when producing GHG inventories or when preparing GHG future emissions projections. However, they go on to argue that they can still be confident that the road can be built and the 2022 Act targets can at the same time be met and the budgets will not be exceeded because the multi-factorial macro-variables including estimates of GDP and population growth that are fed into their robust methodologies and modelling tools which are used to predict future GHG emissions do enable them to state with confidence that the GHG projections over the course of the first and into the second carbon budgetary periods do take account of future projects of this magnitude and those same projections do indicate that the targets will be met and the budgets will not be exceeded.

[109] I do not consider that it is my task to determine whether this new case holds water although I have pointed out a number of examples where I suspect it is far from water tight. This new case was not the case that was put before the PAC and it was not the case that was put before me at the first hearing. It is a case which is significantly at variance with the case that was put before the PAC and before me first time round. I cannot envisage any circumstances in which it would be permissible for a government department to make a decision on the basis of one case and when that decision is quashed on the grounds that the evidential foundation for that case was found to be lacking, to appeal that decision and during the course of that appeal to attempt to justify the decision on the basis of a different case and one which is fundamentally at variance with the first case. But this is exactly what is being attempted in this appeal.

[110] Following my first judgment, it would have been possible for the DfI to make a fresh decision on the basis of this fresh case and to allow those who wish to challenge the fresh decision the time afforded by the relevant statutory provisions to scrutinise the fresh decision and fresh case and to challenge it with or without the benefit of expert input. This option was not taken by the DfI. During the course of the second hearing before me, I invited the two departments to again give serious consideration to this option. The hearing was adjourned to allow Dr McGleenan KC and Mr Elvin KC to take instructions from the relevant Ministers and departments. When the hearing resumed, I was informed that their firm instructions were to proceed with the appeal. Even if this approach to litigation were permissible, it clearly causes material prejudice to the original applicants who are now the respondents to the appeal because they are being forced to attempt to deal with a new case which has evolved as this appeal/second hearing before me has progressed. This is entirely unfair and unacceptable and constitutes an unprincipled approach to litigation by two government departments.

[111] What is worse, from my perspective, is that the DfI and DAERA, in adopting this course of action are putting forward the proposition that the case that they are now making was always the case that was being made by DfI and that it was my wholesale misunderstanding of the case that was actually being made by the DfI before me first time round and my failure to take steps to properly acquaint myself

with the detail of that case which led to the erroneous first instance decision which is now being appealed. I state with the utmost conviction that I regard this approach as nothing less than “gaslighting.” I know the case that the DfI made before me during the first hearing and I carefully and comprehensively analysed that case. The case that is now being made is not the case that was presented before me.

[112] In my first judgment in this case, I accepted the DfI’s argument that the duties imposed upon the DfI by section 52 did not require the department to await the finalisation of a CAP before making a decision authorising the scheme to proceed. I stated that such a requirement would be much too prescriptive. The irony of the DfI’s present approach is not lost on me, in that the DfI now seek to justify their decision by explaining in great detail and by placing great reliance upon the methodologies and modelling used by DAERA in the preparation of the draft CAP which has now been put out for consultation. If the DfI are right that the case that they are now making has always been the case that they were making, how on earth could the DfI have made the challenged decision in the absence of, at the very least, a draft CAP? How could they have explained their thinking without reference to the draft CAP and the methodologies and modelling used therein to estimate future GHG emissions? Their assertion in their statement that they did not have to await the finalisation of a CAP before making a decision authorising the scheme to proceed fundamentally undermines their present assertion that the case that they are now making was the case that was made before me first time round.

[113] Further evidence of this glaring and somewhat breathtaking inconsistency of approach is found in the section of the DfI Statement that deals with Recommendation 17 of the PAC Report. In my first judgment in this matter, I, again, was persuaded by the DfI’s arguments that they did not have to follow that recommendation and I stated that Recommendation 17 was far too onerous a condition to attach to a decision in respect of an infrastructure project of this nature. I concluded that the requirement to show “the expected trajectory of net Northern Ireland greenhouse gas emissions through 2030 to 2050 in the absence of the scheme, and the impact on that trajectory of the greenhouse gas emissions expected to arise from the construction and operation of the part of the scheme being authorised” did not arise out of any duty imposed on the DfI under the provisions of the 2022 Act and it served no legitimate purpose in the context of the present challenge.

[114] Without wishing to reopen old arguments, I think it is important to re-examine the DfI’s reasoning for not complying with Recommendation 17, solely for the purpose of ascertaining whether the reasoning is in anyway consistent with the proposition that the case that they are now making is the case that was made before me during the first hearing. As I specifically noted in my first judgment, the DfI Statement responded to Recommendation 17 of the PAC Report by stating that it is not possible at this stage to show the trajectory for GHG emissions with or without the proposed scheme as:

“there is not a clear picture at a Northern Ireland level of all the other schemes and emitting activities which will happen between now and the 2050 Net Zero Target.”

The DfI Statement went on to assert that there is unlikely to be full clarity in respect of these issues in the short term but that any decisions taken now will need to be factored into “how the Act’s net emissions reduction targets will ultimately be met.”

[115] If the case being made now is the case that was being made then, why on earth not just respond to Recommendation 17 by stating that this recommendation entirely misunderstands the entire CAP process and that it is impossible to show the trajectory for GHG emissions with or without the proposed scheme because specific project level emissions are not included in calculation of future GHG emissions estimates because if they were that would clearly result in double counting? The manner in which the DfI chose to respond to Recommendation 17 of the PAC Report again fundamentally undermines their present assertion that the case that they are now making was the case that was made before me first time round.

[116] For the avoidance of doubt, I have set out in great detail the case that is now being made by DfI and DAERA not for the purposes of assessing the merits or otherwise of that case. My firmly held view is that the merits of this new case should only be undertaken by a court if and when a fresh challenge emerges to a fresh decision taken by the DfI on the basis of this new case. The reason why I have set out that new case in such great detail is to illustrate beyond peradventure that it is indeed a new case and one which is fundamentally at odds with the case which was previously made before me.

[117] I trust I have satisfactorily and comprehensively addressed the issues that were remitted to me by the Court of Appeal and that this judgment is of assistance to the Court of Appeal in its deliberations.