



Carbon Budget Delivery Plan: Judgment

Robert Williams · Nina Pindham

15 May 2024



Background



Climate Change Act 2008



Climate Change Act 2008

CHAPTER 27

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PART 1

CARBON TARGET AND BUDGETING

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- 11 Limit on use of carbon units

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s.13 - Duty to **prepare** polices and proposals

S.13(1) - *“The SoS must prepare such proposals and policies as the SoS considers will enable the carbon budgets that have been set under this Act to be met.”*

S.13(3) - *“The proposals and policies, taken as a whole, must be such as to contribute to sustainable development.”*

S.13(4) - *“...the SoS may take into account the proposals and policies the SoS considers may be prepared by other national authorities”*

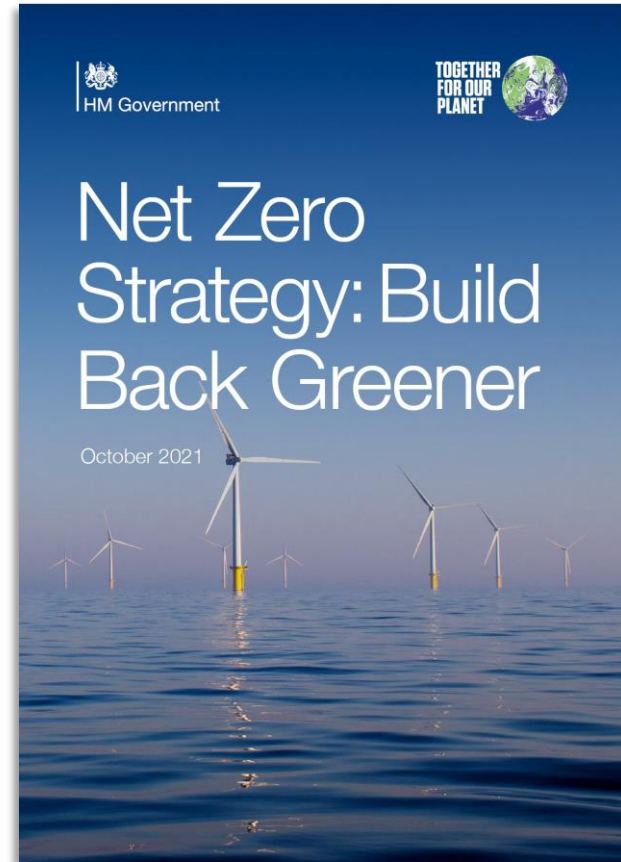
••• s.14 - Duty to **report on** policies and proposals •••

S.14(1) – “...the SoS must lay before Parliament a report setting out proposals and policies for meeting the carbon budgets for the current and future budgetary periods...”

S.14(3) – “The report must explain how the proposals and policies set out in the report affect different sectors of the economy”

Carbon Budget 6 – 2033 - 2037

- First budget based on the “net zero” target
- Required a 78% reduction in GHG emissions by end of period (c.f 1990 baseline)
- Substantially more challenging than earlier budgets



Challenge 1: *FoE v BEISS* [2022] EWHC 1841

- **S.13 – duty to prepare policies and proposals**
 - Matter of judgement for SoS, but wide margin of appreciation
 - Nevertheless, SoS decision was unlawful because failed to consider:
 - (i) the quantitative contributions that individual policies and proposals were expected to make towards meeting the carbon budget;
 - (ii) how the c.5% shortfall in the quantified contributions would be made up; and
 - (iii) the failure to consider risk to delivery of the policies and proposals

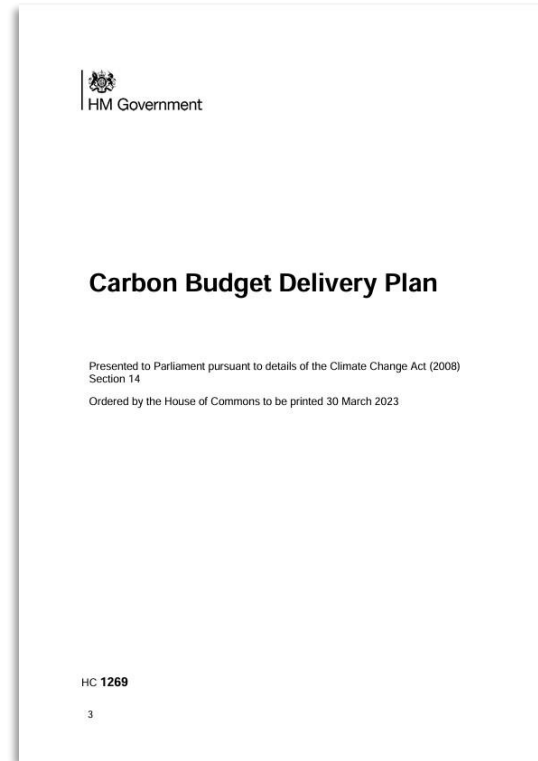
Challenge 1: *FoE v BEISS* [2022] EWHC 1841

• S.14 – duty to report

- Duty goes beyond publishing a list of policies and proposals
- Must “explaining the thinking behind the proposals and how they will enable the carbon budgets to be met”. But not required to provide “detailed workings or modelling”.
- NZS in breach of s.14 because (amongst other matters):
 - (i) Failed to include information on the quantitative contributions individual policies and proposals were expected to make;
 - (ii) Failed to explain how c.5% shortfall in the quantified contributions would be made up.

Take 2: CBDP

- Sought to address failings in NZS by:
 - Quantifying expected contributions from each policy and proposal
 - Providing information on risk to delivery (in narrative form)





The CBDP Judgment



FoE v SSES NZ [2024] EWHC 995



Neutral Citation Number: [2024] EWHC 995 (Admin)

Case No: AC-2023-LON-001856
AC-2023-LON-002005
AC-2023-LON-002008

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/05/2024

Before :

MR. JUSTICE SHELDON

Between :

(1) FRIENDS OF THE EARTH **Claimants**
(2) CLIENTEARTH
(3) GOOD LAW PROJECT

- and - **Defendant**
SECRETARY OF STATE FOR ENERGY
SECURITY AND NET ZERO

David Wolfe KC, Catherine Dobson, Nina Pindham (instructed by Leigh Day) for the First Claimant

Jessica Simor KC, Emma Foubister (instructed by ClientEarth) for the Second Claimant

Peter Lockley (instructed by Good Law Practice) for the Third Claimant

Jonathan Moffett KC, Christopher Badger, Robert Williams (instructed by the

Government Legal Department) for the Defendant

Hearing dates: 20-22 February 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 3 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Principles

- **Low Intensity of Review (§141)**
 - Rejected submission that decisions concerning climate change call for enhanced scrutiny
 - Section 13(1) assessment involves *“an evaluative, predicative judgment as to what may transpire up to 14 years into the future, based on a range of complex social, economic, environmental and technological assessments...operating in a polycentric context”*
- **No prescribed way of presenting risk information (§117)**
 - E.g. Not required to use a RAG rating or other illustrative form
- **In absence of information from Devolved Administrations, entitled to “scale up” projections for emission savings from P&P in England (§138)**

s.13(1) assessment- Unlawful

- **(1) Secretary of State had proceeded on the basis that each of the planned policies and proposals in the CBDP would be delivered in full (§126)**
 - Irrational: not justified by the evidence
 - *“If, as I have found, the [SoS] did make his decision on the assumption that each of the proposals and policies delivered in full then...this was taken on the basis of a mistaken understanding of the true factual position”*
- **(2) In the alternative, if Secretary of State had proceeded on the basis that the overall package of policies and proposals would deliver the emission savings in full (§132)**
 - Irrational: incomplete evidence
 - The SoS *“had no way of knowing which proposals and policies might not be delivered on delivered in full: he could not calculate therefore what “over delivery” was required from other quantified policies”*

s.13(3) assessment- Unlawful

- **“Likely” does not mean “must”**
 - Section 13(3): “the proposals and policies, taken as a whole, must be such as to contribute to sustainable development”.
 - CBDP states that *“the overall contribution to sustainable development is likely to be positive”*
 - Court concluded that the term “must” in s.13(3) *“connotes a degree of certainty that a particular outcome will eventuate”* (§150)
 - Likely = greater than evens chance. Does not meet the much higher threshold mandated by s.13(3)

s.14 report : no duty to include risk information on each P&P

- **S.14 requires SoS to explain the "how" the P&P will enable carbon budgets to be met**
 - Calls for a description of the P&P and the contribution that they will make to achieving the objective
- **S.14 report not required to include risk information**
 - Not required by statutory language, either expressly or impliedly (§162)
 - Not all information that is "obviously material" for purposes of s.13 assessment required to be published in s.14 report (§165)
- **Rejected analogy with "duty to give reasons" (*South Bucks*)**



Implications of CBDP Judgment



What Now?

01


What SoS has to do
now

02

Impacts on Carbon
Budget 7?

03

Development of the
law on review of
expert judgment?





Upcoming Litigation



The Packham JR Challenge

- Challenge to Government's policy changes announced by the Prime Minister in Sept 2023:
 - Delaying ban on sale of new petrol and diesel cars to 2035
 - Delaying ban on fossil fuel boilers to 2035
 - Cancelling policy requiring private landlords to ensure rent homes EPC Band C or better
- All policies taken into account in CBDP



The Packham JR Challenge



- Permission granted; Substantive hearing pending
- Grounds:
 - (i) S.13 requires Govt to have policies in place to meet carbon budgets – cannot remove key policies without identifying alternative(s);
 - (ii) Failure to take account impact on achievement of carbon budgets; and
 - (iii) Lack of consultation



Q&A

