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Màiri McAllan MSP
Cabinet Secretary for Transport, Net Zero and Just
Transition
Scottish Government
St Andrew's House
Regent Road
Edinburgh
EH1 3DG

Our Ref: SM/CG ENV10/1 & GOO323/2

Your Ref:

05 September 2023

CC: Neil Gray MSP, Cabinet Secretary for Wellbeing Economy, Fair Work and Energy

Sent by email only to: cabsecnzjt@gov.scot and cabsecwefwe@gov.scot

Dear Màiri McAllan MSP,

**Climate Change (Scotland) Act 2009 – Section 94A
Assessment of climate impact of Infrastructure Investment Plan
Judicial Review - Letter before claim**

The proposed applicants

The proposed applicant is the Environmental Rights Centre for Scotland (“ERCS”). They are supported by Good Law Project (“GLP”) who would participate in the proceedings as a co-applicant/petitioner if litigation becomes necessary. The applicants will be represented by Balfour+Manson LLP. All correspondence should be addressed to Sindi Mules, Balfour+Manson LLP, who is instructed to accept service of proceedings on behalf of the proposed applicants.

Balfour+Manson is willing to accept service by email, provided it is sent to the email address in the header of this letter and forwarded in line with any auto-response.

The proposed respondents

The proposed respondents are the Scottish Ministers who are responsible for ensuring compliance with Scotland’s obligations under the Climate Change (Scotland) Act 2009.

Background

We refer to ERCS's letter to the former Cabinet Secretary for Net Zero, Energy and Transport, Michael Matheson MSP, dated 10 February 2023 and to his letter in response of 10 March 2023. Copies of those letters are enclosed for ease of reference.

As per the letter of 10 February 2023, the position is that the Scottish Ministers have not discharged their duty under Section 94A of the Climate Change (Scotland) Act 2009 ("the 2009 Act"). There has been no publication of an assessment of the extent to which investment in accordance with the Scottish Ministers' Infrastructure Investment Plan ("IIP") is expected to contribute to the meeting of the emissions reduction targets which are set out in Part 1 of the 2009 Act.

The issue

Our view is that any assessment which is published in order to discharge the Section 94A duty must contain at least, put broadly, the following three elements:

1. identification of the current emissions reductions targets;
2. an assessment of the emissions expected to be produced as a result of the implementation of the IIP; and
3. an assessment as to whether the implementation of the IIP makes it more or less likely that the current emissions reduction targets will be met.

ERCS previously referred this matter to Environmental Standards Scotland ("ESS"). We understand that ESS shares their view in relation to the breach of statutory duty, and that a meeting between ESS and the Scottish Ministers was due to take place last month, as part of the "informal resolution" process referred to in ESS's strategic plan (see Environmental Standards Scotland, [Strategic Plan 2022-25](#) (2022), pages 16-18). We understand that this meeting has not yet taken place.

We are concerned that the Scottish Ministers have failed to acknowledge the breach of statutory duty, and that no steps have been proposed to remedy it.

Michael Matheson MSP's letter explains that the Scottish Ministers consider that they have discharged the above duty. His letter refers to Annex C of 'A National Mission with Local Impact: Infrastructure Investment Plan for Scotland 2021-22 to 2025-26' ("the IIP") and 'The Infrastructure Investment Plan 2021-22 to 2025-26 SEA Post Adoption Statement'.

With respect to Annex C of the IIP, our position is that Annex C does not meet the requirements of Section 94A(2) of the 2009 Act, for the reasons stated in ERCS's letter.

In relation to The Infrastructure Investment Plan 2021-22 to 2025-26 SEA Post Adoption Statement, we note that document refers at paragraph 5.2.33 to the need for developing a new methodology to assess the contribution made by the IIP to the emissions targets.

Neither of the two documents referred to in Michael Matheson MSP's letter are capable of discharging the Section 94A duty, because they do not contain the three elements stated above.

Judicial review

We have obtained advice from counsel on raising proceedings for judicial review. Counsel support the view as to what is required to discharge the Section 94A duty and that the duty has not been discharged. Their view is that a judicial review would have good prospects of success. Accordingly, our clients intend to raise proceedings for judicial review if the breach of Section 94A is not addressed as a matter of urgency.

Please confirm **by no later than 18 September 2023** that the Scottish Ministers accept they have not discharged the Section 94A duty, and that the Scottish Ministers will publish a climate assessment of the IIP in fulfilment of the S94A duty **by no later than 30 September 2023**.

In the absence of a satisfactory response by 18 September 2023, we reserve the right to take further action without intimation. If we are required to lodge a petition for judicial review, we will seek the expenses of doing so.

Yours sincerely



Sindi Mules
Partner
Balfour+Manson LLP