

E: [REDACTED]

Sindi Mules
Balfour+Manson LLP

BY EMAIL ONLY TO:
[REDACTED]

Your ref: [REDACTED]
Our ref: [REDACTED]

12 October 2023

Dear [REDACTED]

**Climate Change (Scotland) Act 2009 – Section 94A
Assessment of climate impact of Infrastructure Investment Plan
Judicial Review – substantive response to letter before claim**

I refer to our recent correspondence on the above matter. In my letter dated 14 September in which it was accepted by the Scottish Ministers that the documentation published to date falls short of the requirements of section 94A of the Climate Change (Scotland) Act 2009, the intention to revert to you in substance on the extent of the duty to be discharged, on remedy, and on anticipated timescales was indicated.

The section 94A duty

In your letter dated 5 September 2023, it is asserted that in order to discharge the section 94A duty any assessment must contain 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."*

The correspondence to date does not explain the legal basis for this interpretation of the section 94A duty and I should be grateful for such explanation in support of your position. In any event, the Scottish Ministers do not agree that the second element is a strict requirement under the legislation. There is no express requirement in section 94A that requires that information to be provided. The section 94A duty was not intended by Parliament to be overly prescriptive in light of the recognised uncertainties around methodologies for assessing emissions impacts.

Remedy and anticipated timescales

The Scottish Ministers are committed to complying fully with the section 94A duty and, as you are aware, are engaging with ESS on this matter through the informal resolution process. To this end, the Scottish Ministers intend to publish an assessment of the extent to which investment in accordance with the plan is expected to contribute to the meeting of the emissions reduction targets in Part 1 of the 2009 Act. In the context of the informal resolution process, it is the Scottish Ministers' intention to share with ESS the proposed assessment prior to publication. This will be done as soon as possible and before the end of the calendar year, with publication anticipated in early course thereafter.

An enhanced taxonomy approach will be adopted and will include an assessment on whether the IIP is contributing positively to the emissions reduction targets.

The Scottish Ministers appreciate your clients' concerns. It is hoped that this update provides reassurance that a remedy is underway and that the Scottish Government is absolutely committed to tackling the twin challenges of climate change and biodiversity loss. As has already been announced, the Scottish Ministers intend to publish an update of the IIP pipeline alongside the 2024-2025 Budget. The assessment to be published in satisfaction of the section 94A duty shall be updated accordingly.

Nothing in this letter is intended to restrict the Scottish Ministers' ability to advance any particular argument in the event that judicial review proceedings are raised and the Scottish Ministers reserve the right to do so.

I look forward to hearing from you.

Kind regards,

