

## GWENT WILDLIFE TRUST

### PUBLIC LOCAL INQUIRY INTO THE M4 RELIEF ROAD AROUND NEWPORT

#### EFFECTIVENESS OF PROPOSED MITIGATION MEASURES

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#### NOTE

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1. This note summarises the legal approach the Gwent Wildlife Trust (**'GWT'**) submits should be taken when considering to the effectiveness of measures proposed by the Welsh Government (**'the WG'**) to mitigate for harm to protected species that will be caused by the proposed extension of the M4 Corridor Around Newport (**'M4 CAN'**) across the Gwent Levels (**'the Levels'**).
2. In summary:
  - (a) The WG cannot rely upon proposed mitigation measures to grant consent unless it is confident those measures will succeed.
  - (b) Confidence requires "no reasonable scientific doubt" regarding the effectiveness of the mitigation measures proposed.
  - (c) In the alternative, if there is a sliding scale of confidence:
    - (i) The WG cannot be confident that mitigation measures will be effective in the absence of some scientific evidence demonstrating their effectiveness.
    - (ii) The lower the degree of confidence in the mitigation measures proposed the less likely the scheme should be approved.
    - (iii) Where there is a less than 50% probability that mitigation measures will be effective the WG cannot, reasonably be confident the measures will be effective.

## Propositions of Law

### (1) Basic Principles of European Union Law

3. EU law aims for a high level of environmental protection. It is based on the precautionary principle and the principles that preventative action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay (Art. 191 Treaty on the Functioning of the European Union ('**TFEU**')). EU law should be interpreted consonantly with these principles.
4. Article 4 of the Treaty on European Union ('**TEU**') requires all emanations of the state (including local planning authorities) to refrain from action which could jeopardise the fulfilment of EU law obligations: see C-126/96 Inter Environnement Wallonie v Regione Wallonie [1996] ENV LR 625.
5. Directives, if unconditional and precise, are enforceable by individuals against emanations of the state where they have not been fully and properly transposed into domestic law: see C-201/02 Wells v Secretary of State for Environment [2004] ECR 1723.

### (2) The Domestic Approach to Protected Species and the Habitats Directive

6. Regulation 3(4) of the Conservation (Natural Habitats, etc) Regulations 1994 ('the **Habitats Regulations**') places a competent authority under a duty to have regard to the requirements of the Habitats Directive in so far as those requirements may be affected by the exercise of the authority's functions.
7. Development consent should not be granted where: (a) the proposed development would be likely to offend Article 12 of Directive 92/43/EEC ('the **Habitats Directive**'); and (b) the development is unlikely to be licensed pursuant to the derogation powers under Article 16 of the Directive: Per Lord Brown in R (Morge) v Hampshire County Council [2012] UKSC 2 at [29]).
8. Article 12 the Habitats Directive establishes "*a system of strict protection*" for the animal species listed in Annex IV(a) of that Directive prohibiting all forms of (a) deliberate capture or killing of specimens of those species; or (b) deliberate disturbance of those species; or... deterioration or destruction of their breeding sites or resting places. Article 16 provides for the derogation from Article 12 *inter alia* for imperative reasons of overriding public interest ('**IROPI**') where: (a) there is

no satisfactory alternative; and (b) the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status.

9. Even where IROPI exist, the Habitats Directive imposes an absolute bar on the deliberate capture, killing or disturbance as well as the deterioration or destruction of breeding sites if they would be detrimental to the maintenance of the population of the species concerned at a favourable conservation status.

#### C-127/02 Waddenzee

10. In Case C-127/02 Waddenzee v Staatsscretaris van Lanbouw [2005] All ER (EC) 353 the Court of Justice of the European Union ('CJEU') held, in the context of Article 6 of the Habitats Directive, that a competent authority could only hold that a project is not likely to have significant effects on the management of a Special Protection Area/ Special Area of Conservation and that the project did not require appropriate assessment if "no reasonable scientific doubt remains as to the absence of such effects" (para. 59).
11. In reaching this decision the CJEU held at [10] that, *"It follows from the precautionary principle that where the most reliable information available leaves obvious doubt as to the absence of possible significant adverse effects on the ecosystem the benefit of the doubt will favour conservation"*

#### **Submissions**

#### A: Articles 12 and 16 Require there be 'no reasonable scientific doubt' regarding the effectiveness of mitigation measures

12. The fourth preamble to the Habitats Directive describes the preservation, protection and improvement of the quality of the environment including the conservation of wild flora and fauna as "an essential objective of general interest" pursued by the EU. In this context, the WG's acceptance that Articles 12 and 16 of the Habitats Directive embody the precautionary principle is inevitable.<sup>1</sup> Those articles establish "a system of strict protection" for European protected species designated under Annex IV(a).

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<sup>1</sup> See rebuttal statement of Richard Green §2.2.4(7)

13. The system of strict protection under those Articles would be fundamentally undermined if development consent and/or derogation licences could be granted on the basis of scientifically unproven evidence regarding the effectiveness of mitigation measures since:

(a) The state would effectively be at risk of sanctioning measures with the potential to disturb species or deteriorate breeding sites. This runs contrary to the precautionary and preventative principles and therefore contrary to the spirit of the Habitats Directive.

(b) It would lead to the risk of derogation licences be granted pursuant to s 16 of the Wildlife and Countryside Act 1981 for measures with the potential to undermine the favourable conservation status of a species.

14. The present case well illustrates the risk highlighted in (b) above. The WG itself accepts at Environmental Statement paragraph 10.8.386 that *“should displacement and relocation of bats result in the loss of, or reduced access to, favourable foraging sites, alternative roosting sites and/or other bats in the area, **the effect could be significant with regard to the long term viability of the population**”* (emphasis added). Favourable conservation status is defined in Article 1(i) of the Habitats Directive. Status will be taken as favourable when *“population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and the natural range of species is neither being reduced nor is likely to be reduced for the foreseeable future, and there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis”*.

15. In accepting that the absence successful mitigation measures could have significant consequences for the long-term viability of the population, the WG accepts the risk of undermining the favourable conservation status of certain bats. The Habitats Directive and the domestic legislation implementing it cannot sensibly be interpreted so as to permit the favourable conservation status of protected species to be put at risk as a result of scientifically uncertain mitigation measures. A test of ‘no reasonable scientific doubt’ must apply.

16. The same approach applies to determining whether a measure would disturb a protected species, or deteriorate or destroy breeding sties or resting areas under Article 12. The European Commission’s Guidance Document On the Strict Protection of Animal Species of Community Interest Under the

Habitats Directive 92/43/EEC<sup>2</sup> states at (76) in the context of “measures that ensure the continued ecological functionality (‘CEF’)<sup>3</sup> of a breeding site/ resting place” that,

*“in accordance with the precautionary principle, if the measures proposed do not guarantee the continued ecological functionality of a site, they should not be considered under Article 12(1)(d). There must be a high degree of certainty that the measures are sufficient to to avoid any deterioration or destruction.”*

17. For these reasons the ‘no reasonable scientific doubt’ test should be read across from the decision of the CJEU in Case C-127/02 Waddenzee.

#### B: A Sliding Scale of Confidence

18. Even if the WG reject this argument, Articles 12 and 14 must nevertheless be interpreted in light of the precautionary and preventative principles.
19. As the Supreme Court held in Morge development consent should not be granted for a scheme where development would be likely to offend Article 12 of the Habitats Directive and a derogation licence is unlikely to be granted.
20. Natural Resources Wales (‘NRW’) object to the M4 CAN on the basis that it would result in the severance/ fragmentation of bat habitats. The WG relies upon the proposed mitigation measures as reducing the impact of that severance/ fragmentation. At the very least, the precautionary and preventative principles apply when determining an application for a derogation licence. The less credible the evidence showing that the proposed mitigation will succeed, the less likely a derogation licence will be granted. It would run contrary to the precautionary and preventative principles to grant a derogation licence in reliance upon mitigation measures the effectiveness of which there is little or no scientific to support. The less reliable the scientific evidence base for the effectiveness of proposed mitigation measures, the less likely a licence will be granted. The same approach applies to development consent.

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<sup>2</sup>[http://ec.europa.eu/environment/nature/conservation/species/guidance/pdf/guidance\\_en.pdf](http://ec.europa.eu/environment/nature/conservation/species/guidance/pdf/guidance_en.pdf)

1. <sup>3</sup> It should be noted that the Commission Guidance draws a distinction, at paragraph 79, between CEF (which equate to mitigation measures sufficient to avoid any deterioration or destruction) with compensatory measures which aim to compensate for or offset negative effects and by definition imply the deterioration or destruction of a breeding site.

## **Conclusion**

21. In light of the above, the mitigation measures proposed by the WG concerning protected species are insufficient. Regardless of the test to be applied, there is little if any scientific evidence to suggest the measures proposed would be effective. That mitigation cannot sensibly be relied upon by the WG.

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