IN THE HIGH COURT OF JUSTICE **CO/4433/2014**
QUEEN'S BENCH DIVISION
PLANNING COURT
BETWEEN

R (otao FRIENDS OF THE EARTH ENGLAND, WALES

AND NORTHERN IRELAND Ltd.)

Claimant

v

THE WELSH MINISTERS

Defendant

SKELETON ARGUMENT
ON BEHALF OF THE CLAIMANT

Hearing Dates: 10-12 March 2015

Time Estimate: 3 days

Recommended Pre-reading (5 hours): skeleton arguments; witness statement of Gareth Clubb [2-1], witness statement of Martin Bates [2-283]; Core Documents at Section 4 [4-1 to 315]; Strategic Appraisal of Alternatives Considered During Consultation [4-358]; Post-Adoption Statement [4-713].

References in the form [X-Y] are to Section X, page Y of the bundle. References in the form [7-tab Y] are to internal tab Y of Section 7.

Introduction

1. The Claimant challenges the lawfulness of the Defendant's decision to adopt the "M4 Corridor around Newport Plan" ("the Plan") on 16 July 2014 ("the Decision") **[4-315]**, seeking declarations as to its unlawfulness and a quashing order.

2. The adoption of the Plan involves the endorsement of a plan to build a new stretch of three-lane motorway which takes a route to the south of Newport known as "the Black Route". The new motorway will cross the Gwent Levels, an area comprising four sites of special scientific interest and the River Usk Special Area of Conservation ("the protected sites").

3. The Plan was consulted on (purportedly in compliance with the European Council Directive 2001/42/EC "on the assessment of the effects of certain plans and programmes on the environment" ("the SEAD")) between 23 September 2013 and 16 December 2013. Two alternatives were evaluated and consulted upon as part of that process, both of which are very similar to the Plan and involve the creation of a major new road to the south of Newport which

in each case follows the same alignment through four SSSIs and the SAC as the Plan alignment. A "Do Minimum" Scenario was also consulted on [**4-1**].

4. The Plan was brought forward in order to meet concerns about the capacity of the existing M4 motorway between junctions 23 and 29.

5. Concerns about the procedural propriety and substantive adequacy of the decision challenged are shared by a wide range of individuals and bodies across the UK. Those who have expressed kindred concerns to those of Friends of the Earth include Natural Resources Wales (a statutory consultee) [**2-225]**; the Gwent Wildlife Trust; the Federation for Small Businesses in Wales which has 10,000 members [**2-245**]; the Campaign Against Levels Motorway [**2-241**]; Wildlife Trusts Wales[**2-53**]; Plaid Cymru [**2-158**]; the Welsh Liberal Democrats [**2-163**]; Wales Green Party [**2-205]**; the RSPB. [**2-251**]

6. Significant concerns- some close to those of the Claimant- have been expressed in the comments of the National Assembly for Wales Sustainability and Environment Committee's *Inquiry Into Welsh Government Proposals for the M4 Around Newport* of *July 2014* and in the comments of Natural Resources Wales in its consultation response of 16 December 2013 [**4-258**].

7. The Claim raises three grounds. Each ground relates to a different aspect of the Defendant's decision making process and they therefore stand independently. They may be summarised as follows:

8. Ground 2 is taken first in this skeleton argument since it is the most detailed. This ground challenges the decision to adopt the Plan for failing to comply with the SEA Directive. This ground is particularised in detail but one of the core submissions is that the process of assessment failed to identify, describe and evaluate reasonable alternatives on a comparable basis to the draft plan such that environmental decision making failed to be integrated into the draft plan and failed to facilitate proper consultation on and evaluation of options which were less environmentally harmful.

9. Ground 1 is that the Defendant's decision to adopt was unlawful because (a) it failed to grapple with two specific statutory duties which they were under in relation to the conservation and enhancement of the SSSIs, and the conservation of biodiversity and failed to explicitly acknowledge and weigh the import of the harm which the Plan will do to those protected sites

and (b) because it reliance, in the context of these duties, on mitigation measures to reduce/remove those environmental effects was flawed and irrational.

10. Ground 3 relates specifically to the carbon emission implications of the draft Plan. It is the Claimant's case that, having identified that the draft Plan would be likely to increase carbon emissions, it was incumbent upon it to consider the implications of that increase in the context of its own climate change policies and in the context of national carbon emission targets.

FACTS

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11. The Claimant is a well-known environmental organisation. Its standing and longstanding involvement in these proposals are addressed by the witness statement of Gareth Clubb [**2-1**].

12. There is a history of proposals relating to this section of the M4 extending back more than twenty years (see Witness Statement of Martin Bates **[2-288]**). In July 2009 the Welsh Assembly Government abandoned proposals for an M4 Relief Road project on the grounds that it was unaffordable. In its place it embarked on the M4 Corridor Enhancement Measures ("M4 CEM") programme[1] including, for example, measures to ease congestion around the roundabout at junction 24. In so doing it acknowledged that a range of measures to address safety and capacity issues on the M4 were urgently required[2].

13. Consultation on these measures is said to have commenced in September 2010. A document dated November 2011 *M4 Corridor Enhancement Measures Alternatives Considered* examined a long list of measures outside the CEM programme; discarded 21 possibilities and selected 15 that could be delivered outside the CEM programme (ranging from car sharing schemes to closure of junction 27).

14. A formal M4 CEM public consultation was held between March and July 2012. This consultation recognised that since July 2009 the M4 relief road or New M4 Motorway had not been seen as affordable. A consultation was therefore held in March 2012 [**6-9**] on the M4 CEM [**6-9]** options with three aims:

[1] See *M4 Corridor Enhancement Measures (M4 CEM) WelTAG Appraisal Report Stage (Strategy Level) page 6*
[2] *M4 Corridor Around Newport Consideration of the options in relation to the requirements of the Habitats Regulations* page 16

(i) Make it easier and safer for people to access their homes, workplaces and services by walking, cycling, public transport or road

(ii) Deliver a more efficient and sustainable transport network supporting and encouraging long-term prosperity

(iii) To produce positive effects overall on people and the environment.[3]

15. Six options were identified. Option A was a package of measures including a high quality road to the south of Newport (not a motorway). Options B and C concerned packages with junction improvements to the existing M4 rather than a new road south of Newport and option D involved widening the existing M4 including an additional tunnel at Brynglas. The other two options were a package of common measures and a package of public transport Improvements. [**6-39** *et seq*]

November 2012 SEA Environment Report ("the 2012 SEA Report")

16. In November 2012 an environmental assessment report relating to these options was produced for consultation which purported to be in accordance with the Strategic Environmental Assessment Directive [**6-28**].

17. This document identified (table at page 80 and see also 64 and 70[**6-43, 49, 59**]) that option A (including a high quality road south of Newport) would have major negative effects on biodiversity, soil, water, material assets, cultural heritage and landscape and townscape which were likely to affect the whole, or large part of the M4 CEM Programme area and on nationally or internationally important assets which would be likely to be direct, irreversible and permanent.

Pre-action letters January 2013

18. Following a letter before action from the Claimant, the Gwent Wildlife Trust and CALM challenging the November 2012 SEA document [**5-1**], the Welsh Government resiled from the claim within the environmental report that it was pursuant to the SEA Directive, and that SEA would be carried out once a draft plan had been formulated (see **Bates** at §61 [**2-297]**) .

March 2013 WelTAG Appraisal

[3] See *M4 Corridor Enhancement Measures (M4 CEM) Easing the Flow Consultation Document 6th March 2012m page 6*

19. The Strategy Level WelTAG appraisal of March 2013 [6-74]4 appraised the same six M4 CEM options"[5]. Accordingly, none of the options considered involved the construction of the New M4 Motorway, although one- Option A- involved construction of a high quality road south of Newport. The report from this WelTAG Appraisal concluded that Option A offered the best value for money and provided the most relief of the existing M4 [**6-139**] notwithstanding the environmental impacts on the Gwent Levels. It was recommended that option A be taken forward for further appraisal alongside public transport enhancement and common measures. The other options including packages focused on junction improvements (options B and C) and widening the existing M4 (option D) were not recommended. The report also stated that studies did not suggest that public transport improvements would result in significant reductions to M4 traffic congestion on their own.

"U-turn" – 24 June 2013 WelTAG appraisal

20. A further (third) Stage 1 WelTAG appraisal **[6-177**] was published three months later on 24 June 2013, but was not preceded by any further consultation. It suggested that Option A as previously identified was now "shortlisted" following the previous WelTAG report. It also for the first time in the consultation process over the previous three-years (from September 2010) looked again at motorway options south of Newport. The appraisal concluded that a new section of 3-lane motorway to the South of Newport following the protected TR111 route in addition to complementary work would best achieve the goals and address the problems of the M4 corridor and should be progressed. It recommended that the "Red route" advanced three months earlier as the recommended "option A" from the M4 CEM consultation should not be taken forward in further appraisal [**6-251**]. This new report recommended instead that the Black route- i.e. the safeguarded route should be advanced. It said that the Purple Route represented "a new line of investigation" and therefore had more "delivery risks" associated with it. The report also recommended continued consideration being given to public transport and complementary measures. No further public consultation exercise of a kind equivalent to the three-month consultation which preceded the March 2013 report was undertaken before this change in direction was recommended.

21. This change in policy derived from new funding opportunities for Welsh Government infrastructure projects (**Bates** at §71 [**2-300].**

[4] WelTAG is guidance published by the Welsh Assembly government in 2008 to be applied to all transport strategies to "allow the comparison of schemes on a like-for-like basis so that decision-makers can make funding decisions". Stage 1 is intended to screen and test options for testing against Transport Planning Objectives.

[5] *Ibid page 8*

2013 "Scoping" Consultation

22. In July 2013, a Strategic Environmental Assessment "Scoping Report" on the motorway proposal was issued to statutory consultation bodies[6] for responses over a five-week period.

23. The consultation document was also issued to the Royal Society for the Protection of Birds ("RSPB") at their request. The Strategic Assessment Team at Natural Resources Wales ("NRW") responded on 16 August 2013.

24. The RSPB also responded on 16 August 2013 [**6-299**]. They pointed out that they had a keen interest in the process "as one of the options is a highway across the Gwent Levels SSSIs" and highlighted the existence of a particular reasonable alternative the "Blue Route":

> "For your information I would like to inform you that the Campaign Against the Levels Motorway Consortium (CALM) has commissioned eminent transport academic Emeritus, Professor Stewart Cole to carry out a detailed study of the feasibility and cost of this alternative in relation to the "Preferred Option", and his report will be available shortly. **We consider that the next stage in this process should include this Reasonable Alternative**."

25. They also raised concerns about the failure of the scoping report to consider public transport measures as merely complementary to the attaining of the plan's objectives.

26. No response was received in relation to this submission, nor was it analysed within the SEA Report. The Defendant has now provided an Arup report containing an analysis but this has never previously been available to the Claimant or to the general public.

27. The Claimant, together with the RSPB wrote to the Minister on 12 July and 19 August expressing concern about the effect of the new proposals on the Gwent levels (encompassing numerous SSSIs and a SAC). These letters raised the option of the Blue Route/upgraded A48 south of Newport and requested that this option be treated as a "reasonable alternative" in the forthcoming consultation exercises.

2013 Draft plan and consultation documents

28. On 23 September 2013 the Welsh Government published a draft plan [**4-1**] which is known in the suite of consultation documents as promoting the 'Black Route'[7] which follows the route

[6] *SEA Environment Report 23 September 2013, page 24*

safeguarded in 2006. The draft plan and the consultation exercise expressly excluded public transport measures because these are said to be the subject of separate studies[8].

1) M4 Corridor Around Newport: Draft Plan Consultation Document

29. Two points of note about this document are:
    a. It acknowledges the major adverse impact of the Black Route on biodiversity including impacts on the River Usk SAC (page 32 INSERT REF), yet
    b. It gives significantly more positive assessments to the impacts of each of the three options considered (including the Red Route) in respect of each of the factors assessed than the November 2012 SEA appraisal gave to the Red Route.

2) SEA Environment Report 23 September 2013 [**4-58**]

30. This Report addresses the two "reasonable alternatives" identified above and the "do minimum" alternative (see page 17 onwards). It gives no reasons for excluding any further alternatives, nor for selecting those which are included.

31. This report contains a cumulative assessment of other plans and programmes including the National Transport Plan, the South East Wales Regional Transport Plan and the Wales Spatial Plan but does not consider the forthcoming plans for public transport improvement. Appendix A sets out the statutory consultees' responses to the scoping report. Appendix B to the SEA report lists and summarises the relationship of the draft plan to each of the identified pieces of legislation and guidance. Appendix C concerns baseline data.

32. In October 2013 a report to the Minister for Economy, Science and Transport entitled *Cardiff Capital Region Metro: Impact Study* was published [**6-332**]

Responses to the 2013 consultation

The Blue Route

33. On 23 October 2013 Professor Cole published his study *"The Blue Route: A Cost Effective Solution to Relieving Congestion Around Newport"* **[4-224],** a copy was submitted to the Defendant on or before 16 December 2013. Professor Cole presented his proposal to the

[7] shown inter alia on page 23 of document *M4 Corridor Around Newport Consideration of the options in relation to the requirements of the Habitats Regulations*

[8] *M4 Corridor Around Newport Consideration of the options in relation to the requirements of the Habitats Regulations* page 17

Environment and Sustainability Committee of the National Assembly for Wales on 23rd October 2013 and the Committee discussed the proposals on 6th November 2013. The Introduction to his paper summarises the proposal and explains it was:

> … developed from a Welsh Government plan in 2007, [and] uses a combination of the A48 Newport Southern Distributor Road (SDR) around Newport and the former Steelworks Road to create a dual carriageway to motorway / expressway standard. Referred to as the Blue Route, it involves an upgrade of the A48 and the 'Steelworks Road' - a length of industrial roadway purchased by the Welsh Government in 2010 for building a motorway. It would run on a line to the south of Junction 23a on the east side of Newport to Junction 28 in the west. The roads would be re-constructed as a two-lane, dual carriageway at motorway standard. The land that has been acquired as Steelworks Road is sufficient for widening to a three-lane motorway at a future date if this is needed. The Blue Route would cost **£380m**. [the report explains this is under half the cost of the Black Route at a projected £930m]

34. The study states that the advantages of this option are:

> "It would deliver what is needed at a much lower cost and with significantly less impact on the environment. It would have a lower capacity than the option favoured by the government but would be sufficient to cope with the estimated need."

35. Professor Cole's report adds:

> "The Blue Route could solve the congestion issue on the M4 earlier than the Black/Purple route since it could be completed sooner, by 2018. Combined with the Metro and rail electrification it would provide more than adequate relief of traffic congestion over the period to 2035."

36. Even with the UK Government's forecasts showing a 20 per cent growth in traffic flow between 2012 and 2030, the Blue Route would satisfy capacity requirements to 2025. However, the more likely change in car usage is a lower percentage increase, with the current plateau continuing for some time. The forecast for growth in the Welsh Government's consultation document has already been shown to be in excess of actual flows for 2012 and 2013.

37. The Environment and Sustainability Committee of the Welsh Assembly heard further evidence from a range of contributors and on 5 June 2014 the chair wrote a letter posing a series of questions about the process leading to the decision challenged.

Friends of the Earth Consultation Response

38. The Claimant submitted its consultation response in relation to the September-December consultation on 16 December 2013.

December 2013 Pre-action Correspondence

39. The Claimant sent a letter before claim to the Defendant on 4 December 2013 [**5-17**]. The Defendant responded to the Claimant's pre-action letter on 17 December 2013 [**5-31**]. In that response they rejected the basis of the challenge and further suggested that any claim would be premature given that any failures would be capable of being resolved before the Defendant came to a final decision.

2014 Plan

40. On 16 July 2014 the Defendant adopted the Plan. At the time of adoption it published a suite of documents including:

    a. The Plan [**4-315**]
    b. A Strategic Environmental Assessment Post Adoption Statement ("Post Adoption Statement")[**4-713**]
    c. A Consultation Participation Report [**4-523**]
    d. A Strategic Appraisal of Alternatives Considered During Consultation; ("the SAACC") [**4-358]**
    e. A "SEA Statement" purporting to build on the "SEA Environmental Report" published as part of the 2013 consultation;
    f. And updated versions of:
        i. The Equality Impact Assessment;
        ii. The Habitats Assessment; and
        iii. Health Impact Assessment.

41. The contents of these documents is summarised in more detail below. The Plan[9] [**4-315**], 2014 SAACC[10] [**4-358**], and WelTAG documents all lay out the same 15 "Transport Planning objectives", which, as the name suggests set out objectives from a transport planning perspective, but do not contain other objectives such as the environmental objectives (see environmental report page 37 *et* seq [**4-98]**) which may not pull in the same direction as transport objectives. The 12 environmental objectives included:

> "Reduce greenhouse gas emissions per vehicle and/or person kilometre… Ensure that biodiversity is protected, valued and enhanced…Reduce transport related contamination and safeguard soil function, quality and quantity…Minimise transport related effects on surface and groundwater quality, flood plains and areas of flood risk…Ensure that diversity, local distinctiveness and cultural heritage are valued, protected, celebrated and enhanced."

[9] At pg. 22
[10] At pg. 14

42. The Environmental Report cites three "aims for the M4 Corridor around Newport" including "to produce positive effects overall on people and the environment…" **[4-71]** and states at 3.1.1 **[4-77]** that the aim of draft plan is "to minimise the impact on the environment, while fully meeting current motorway design standards".

43. The reports also contained the reasons put forward by the Defendant for rejecting the Blue Route as a reasonable alternative.

44. Page 63 of the Post Adoption Statement [**4-780**] summarises the position on rejecting the Blue Route:

> "a 'Strategic Appraisal of Alternatives Considered during draft Plan Consultation Report' was undertaken and concluded that the Blue Route option would also incur environmental effects, notably on protected species, the Gwent Levels SSSI's and the River Usk SAC. The alignment of the Blue Route through the centre of Newport would incur greater social and economic impacts than a highway to the south of Newport and furthermore would not meet the objectives of the draft Plan; consequently, Welsh Government as the responsible authority, do not consider that the Blue Route option constitutes a 'Reasonable Alternative'."

45. In the SAACC [**4-358**] the Blue Route is dealt with from pages 24-56. The Defendant relies upon expert advice from Arup who detailed three separate scenarios under which the Blue Route could be implemented[11], and then analysed them.

46. From the SAACC [**4-358**] it appears that key objections to the Blue Route include (a) that its cost will exceed the projected cost in the Professor Cole's report[12] (b) that even with the Blue Route in place "the M4 around Newport would continue to experience severe operational problems"[13] (c) possible impact on the Newport development plan.

47. Within the SAACC criticisms of the Blue Route were repeatedly justified by reference to the "Arup Report 2014" or "Arup 2014". However, following a request that such a document should be disclosed as part of the pre-action procedure the Defendant indicated in its letter of 19 August 2014 that "Any reference to analysis in the SAACC is a reference to the work Arup conducted in putting together that document. The document therefore is the SAACC."

48. The Plan **[4-315]** was adopted on 16th July 2014.

[11] SAACC pg 31
[12] SAACC pg 28
[13] SAACC pg 28

49. A pre-action letter was sent on 01 August 2014 [**3-1**], and following correspondence it was agreed between the parties that time for the Defendant to respond would be extended to 26 August 2014 (upon which date the Defendant responded [**3-35])**, and the Defendant agreed it would thereafter take no point on promptness or delay if the claim were issued by 23 September 2014.

LAW

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50. Extracts of the relevant legislation: including extensive extracts from the SEAD and the SEA are set out in an annex for ease of reference. A summary of legal principles is set out in the statement of facts and grounds and not repeated here. Relevant legal principles are otherwise incorporated below.

ELABORATION OF GROUNDS

Ground 2: Failure to comply with SEA Directive and failure to rationally assess the environmental harms.

51. Ground 2 is taken first because it is more detailed and because it requires an understanding of the facts which enables grounds 1 and 3 to thereafter be addressed more efficiently. The numbering of the sub-grounds preserves those pleaded in the statement of facts and grounds for convenience of cross-reference.

Introduction to Ground 2: the Failure to Fulfil the Objective of the SEAD

52. The SEAD must, in common with other Directives, be interpreted purposively (see *Walton v Scottish Ministers* [2012] UKSC 44; [2013] PTSR 51 at [20]-[21]; *Ashdown Forest Economic Development Lip v SSCLG* [2014] EWHC 406 (Admin) at §§32 and 97 and European Commission's Guidance *Implementation of Directive 2001/42 on the Assessment of the Effects of Certain Plan and Programmes on the Environment* ("the Commission Guidance"). This may require interpreting the Directive in a manner which goes beyond the express terms of the text of the Directive: see for example Ouseley J's rationale for requiring equal examination of reasonable alternatives alongside any preferred option in *Heard v Broadland D.C.* [2012]

EWHC 344 (Admin) at §71. Further, the Directive must be read in light of the precautionary principle (*Ashdown Forest* at §33).

53. The SEAD states its own objective in Article 1 (numbering inserted):

> "The objective of this Directive is to [i] provide for a high level of protection of the environment and [ii] to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by [iii] ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain and programmes which are likely to have significant effects on the environment."

Judicial expressions of the purpose of the Directive have included the following:

54. Ouseley J held in *R (Buckinghamshire CC, HS2 Action Alliance Ltd and Heathrow Hub Ltd) v Secretary of State for Transport* [2013] EWHC 481 (Admin) at [18]:

> "The purpose of the Directive is to complement the environmental protection afforded by the assessment of the effects of projects required by the Environmental Assessment Directive 85/337/EEC. The SEAD applies at an earlier stage when the framework for the consideration of development consent for such projects was being set, and before options for significant change were precluded. Hence the objective of the Directive, as explained in Article 1, is to provide for a high level of protection of the environment, integrating environmental considerations into the preparation and adoption of plans and programmes, by ensuring that an environmental assessment is carried out of "certain plans and programmes which are likely to have significant effects on the environment".

55. This understanding of the SEAD as complementing the EIAD is expressed in the Commission Guidance as requiring assessment of plans and programmes "upstream" while the EIAD will assess such plans and programmes "downstream"[14]. Lord Reid explained in *Walton v The Scottish Ministers* [2012] UKSC 144 at §12 *et seq.*

> "The background to the SEA Directive, and the problem which it was designed to address, were explained by Advocate General Kokott in her opinion in *Terre Wallone ASBL v Région Wallone and Inter-Environnement Wallonie ASBL v Région Wallone* ((Joined Cases C-105/09 and C-110/09) [2010] I-ECR 5611, BAILII: [2010] EUECJ C-105/09 , points 31-32:
>
> > "The specific objective pursued by the assessment of plans and programmes is evident from the legislative background: the SEA Directive complements the EIA Directive, which is more than ten years older and concerns the consideration of effects on the environment when development consent is granted for projects.
> >
> > The application of the EIA Directive revealed that, at the time of the assessment of projects, major effects on the environment are already

[14] This phraseology deriving from The Commission's *Report on the Effectiveness of the Directive on Strategic Environmental Assessment (2009)* Com (2009) 469 final at 4.1

> established on the basis of earlier planning measures (Proposal for a Council directive on the assessment of the effects of certain plans and programmes on the environment, COM(96) 511 final, p 6). Whilst it is true that those effects can thus be examined during the environmental impact assessment, they cannot be taken fully into account when development consent is given for the project. It is therefore appropriate for such effects on the environment to be examined at the time of preparatory measures and taken into account in that context."

The Advocate General provided an example (point 33):

> "An abstract routing plan, for example, may stipulate that a road is to be built in a certain corridor. The question whether alternatives outside that corridor would have less impact on the environment is therefore possibly not assessed when development consent is subsequently granted for a specific road-construction project. For this reason, it should be considered, even as the corridor is being specified, what effects the restriction of the route will have on the environment and whether alternatives should be included."

56. As Lady Hale held at paragraph 155 in *HS 2* in the Supreme Court[15] :

> "the aim of the Directive … is to ensure that future development consent for projects is not constrained by decisions which have been taken "upstream" without such assessment, thus pre-empting the environmental assessment to be made at project level."

57. The Explanatory Memorandum to the Commission's original proposal for the SEA Directive[16] explains that:

> "1.7 By the time that an application for development consent for a project is being considered by a competent authority many important decisions will already have been taken which will partly determine the outcome of the development consent process…
>
> 1.8 One particular benefit of bringing plans and programmes within the assessment system is that it will allow the issue of alternatives… to be properly assessed. The issue of alternatives can only properly be assessed at the plan and programme level"

Overview of Process Failings in this Case

58. The detailed analysis below of the SEA process in this case (as itemised in the sub-grounds) explicates in a step by step way the failings of the process as a whole to fulfil the requirements of the Directive.

59. However, in the light of the principles cited above, it is worth prefacing that analysis by asking whether the purpose of the Directive in providing for a specific process of assessment for plans and programmes has been achieved by this "upstream" assessment such that environmental

[15] [2014] UKSC 3
[16] COM(96) 511 final

considerations have been integrated into the process before development consent for the project "downstream" is constrained.

60. The Environmental Report and the SEA consultation were undertaken on the premise that any possibility other than the building of a fast road of two or three lanes each way – on a fixed alignment over the most environmentally sensitive areas – had already been foreclosed. The complementary measures proposed were essentially identical for each alternative and consideration of alternative complementary measures or public transport measures capable of playing a part in relieving congestion on the existing M4 were not up for discussion. Each of the alternatives is assessed in the environmental report as being almost identical in terms of the environmental harm they would cause. Phasing or timing of development was left to the project phase but in truth the main aspect of the Plan: the proposal to build a new section of M4 from junction 23 and the alignment of that road is barely, if at all, "upstream" from what would be expected at the stage of consulting on a project for environmental impact assessment. As AG Kokott observed in her hypothetical example of a "routing plan" (above): "The question whether alternatives outside that [alignment] corridor would have less impact on the environment is therefore possibly not assessed when development consent is subsequently granted for a specific road-construction project".

61. This is in direct contrast to the whole purpose of SEA in a case such as this which is to assess whether alternatives outside a given alignment corridor might have less impact on the environment. As Mitting J held in the greenbelt housing case of *St Albans and City District Council v SSSCLG* [2009] EWHC 1280 at §21:

> "The policies decide that house building should occur on such a scale in and around the three towns as to require the erosion of the metropolitan green belt around them. Although acceptance of the need to accommodate economic pressures on the outskirts of London necessarily involves extensive house building and some erosion into the green belt in the London Arc, it may not be inevitable that that must occur in around the three towns.
>
> Article 5(1) and Regulation 12(2) required that reasonable alternatives to the challenged policies be identified, described and evaluated before the choice was made. The environmental report produced by ERM did not attempt that task. It should have done so and the Secretary of State should not have decided to adopt the challenged policies until that had been done. The consequence of omitting to comply with the statutory requirement is demonstrated by the outcome. A decision has been made to erode the metropolitan green belt in a sensitive area without alternatives to that erosion being considered." (emphasis in original)

Similarly, in the case of this Plan, the question whether alternatives outside the alignment corridor proposed in the plan would have less environmental impact and cause lesser erosion

to the environmental quality of the SSSIs was already foreclosed by the time of the SEA consultation in September 2013: A decision has been made to erode the four SSSIs without alternatives to that erosion being considered. The Environmental Report assesses each of the asserted reasonable alternatives as near identical in impacts in every respect (see comparison table at page 91 of the report). The detailed assessment preceding that analysis is nearly identical for each alternative. This process has therefore offered little in terms of enabling the public or the decision maker to undertake the central exercise intended by SEA: to evaluate and assess whether the environmental harms of the Preferred Plan might be mitigated or are justified.

62. This is inconsistent with the purpose of SEA as explained by Ouseley J in *HS2 (Buckinghamshire)* at §93:

> "The purpose of SEA is to ensure that the decision on development consent is not affected by earlier plans which through the framework, the rules or criteria or policies they contain, weigh one way or another against the application when the earlier plans have not themselves been assessed for likely significant environmental effects. The significant environmental effects have to be assessed at a time when they can play their full part in the decision; they cannot be left unassessed so that the development decision is made when the framework in the plan has sold the pass."

63. In this case, by the time the Environmental Report was prepared and public consultation undertaken purportedly pursuant to the SEAD, the pass had been sold on the SEAD's objective of integrating environmental considerations into the preparation and adoption of plans The major framework-establishing decisions had been taken prior to public consultation.

64. Having established this overview of the extent to which the process in this case failed to accord with the intentions of the SEAD, we turn to a detailed analysis of how this influenced the SEA process as a whole.

Ground 2(i) The Defendant's environmental assessment was improperly and irrationally premised on the basis that there was no reasonable alternative other than to build a road over a specified route across four SSSIs (the assessed variations occurring only in the route taken thereafter).
Ground 2(ii) The Defendant, in treating harm to the SSSIs as inherently unavoidable failed to rationally assess the Plan or conform to the requirements of the SEAD

65. These two sub-grounds are taken together and may be summarised, as in the statement of grounds as follows:
    (a) In deciding that the only reasonable alternative for meeting its objectives was to build a road which was (even on its own assessment) harmful to the four SSSIs (the red, purple

and black route all following the same course in that respect) the Defendant irrationally, unlawfully and in breach of the SEAD failed to undertake any assessment of the merits of any option which avoided the environmental harms of the Plan [**4-315]** and in so doing failed to rationally assess the merits of its preferred option[17].

(b) The Defendant's selection of alternatives which are all identical in proposing a road following the same route over the most environmentally sensitive areas was irrationally and/or improperly and/or inconsistently with the SEAD presented as though there were no reasonable alternatives. Alternatively it irrationally and/or improperly and/or inconsistently with the SEAD limited the range of alternatives identified (*Ashdown* at §97)[18]. The effect of doing so was to prematurely presume the environmental harm would have to be an integral part of any scheme having regard to the Defendant's objectives, rather than to test that assumption on the basis of an an identification, description and evaluation of the alternatives in a comparable way[19].

66. Appreciation of these grounds requires some detailed consideration of the relevant law and facts.

Law on Evaluation of Reasonable Alternatives pursuant to the SEAD

The SEA Directive

67. One of the means the Directive uses to achieve its objective of integrating environmental considerations into the preparation and adoption of plans is to require, by article 5, that an environmental report must be prepared which identifies, describes and evaluates the likely significant effects on the environment of implementing the plan and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme (the relevant parts of the text of the Directive are appended to this skeleton argument for easy reference).

The Regulations

68. Regulation 12(2)(b) of the Environmental Assessment of Plans and Programmes (Wales) Regulations 2004 requires an environmental report "to identify, describe and evaluate the likely significant" environmental effects of implementing the plan, and of "reasonable

[17] See SFG paragraph 93 and DGD paragraphs 52-55
[18] This sub-ground is summarised on these alternative bases in light of the Defendant's heavy reliance on what might be seen as somewhat pedantic distinctions at DGD paragraphs 56-60. A detailed explication of this sub-ground follows.
[19] See Commission Guidance 5.12 and *Heard* para 71

alternatives taking into account the objectives and the geographical scope of the plan or programme". The report has to include such of the information set out in Schedule 2 as is reasonably required although it can be provided by reference to relevant information obtained at other levels of decision-making. Item 8 in the Schedule is "an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties…encountered in completing the information." (see full text appended)

The Guidance: the Purpose of Identifying Reasonable Alternatives

69. The *Commission Guidance* states at paragraph 5.11:

> "The obligation to identify describe and evaluate reasonable alternatives must be read in the context of the objective of the Directive which is to ensure that the effects of implementing plans and programmes are taken into account during their preparation and before adoption".

Criteria for the Identification of Reasonable Alternatives.

70. The Commission Guidance provides a useful guide as to which alternatives must be assessed at paragraphs 5.13-5.14. It advises at 5.14 that "part of the reason for studying alternatives, is to find ways of reducing the significant adverse environmental effects of the proposed plan or programme". In other words the purpose of identifying and evaluating alternatives is to help fulfil the overall Objective of the Directive to reduce adverse environmental impacts by integrating environmental considerations into decision-making. The Commission Guidance glosses the requirement that an alternative be "reasonable" as requiring that it be "realistic". Whether or not an alternative is reasonable also relates to whether it falls within the competence of the authority and the objectives and geographical scope of the plan (see *Heard* at [9]).

71. The requirement to identify and evaluate reasonable alternatives does not require that every conceivable alternative be identified and assessed, nor that every alternative be assessed at every stage in the process: see *Heard* at [67]. Ouseley J was also clear in *Heard* that "obvious non-starters" can be excluded from consideration as reasonable alternatives and therefore from the obligation to provide outline reasons [66]. The Court of Appeal has recently noted however that the use of this phrase shows that the threshold for an alternative to qualify as a reasonable alternative is low *R*(*Chalfont St Peter Parish Council*) *v Chiltern District Council* [2014] EWCA Civ 1393).

The Court's Role in Reviewing Reasonable Alternatives

72. The Court of Appeal in *Chalfont St Peter Parish*, in reviewing whether an authority was under an obligation to consider an alternative as a reasonable alternative appears to have undertaken

for itself an assessment of whether this "low threshold" was crossed, rather than review the authority's decision on public law grounds (§§75-82). However, this is perhaps reconcilable with the view of Sales J in *Ashdown Forest Economic Development LLP v SSCLG* [2014] EWHC 406 (Admin) at §90-91 and Ouseley J in *Buckinghamshire County Council v Secretary of State for Transport* [2013] EWHC 481 (Admin) at §192 that an assessment of what qualifies as a reasonable alternative is a matter involving primary judgments of fact for the decision maker and therefore reviewable on a *Wednesbury* basis on the grounds that the threshold as to whether an alternative is an "obvious non-starter" being a low one, in practice the range of rational decisions as to the selection of reasonable alternatives is limited or admits of only one reasonable conclusion. Accordingly, the Courts considering in practice whether reasonable alternatives have been properly identified have not had to engage directly with the question whether it is undertaking a merits or rationality review.

The Process of Assessing Reasonable Alternatives

73. The public must be presented with an accurate picture of what the reasonable alternatives are (*Save Historic Newmarket Limited v Forest Heath District Council* [2011] EWHC 606 at [17] and *Commission Guidance* 5.11-5.14).

74. The *Commission Guidance* in a passage cited with approval in *Heard* at [8] advises that "the essential thing is that reasonable alternatives are identified, described and evaluated *in a comparable way*" (emphasis supplied). Provided that this essential requirement of evaluation in a comparable way is fulfilled, alternatives may be discarded in the course of a multi-stage SEA process so that re-examination at a subsequent stage is not required. In such circumstances, a description of what alternatives were examined had to be available for consideration at subsequent stages even if only by reference back to earlier documents (*Heard [66]*).

75. However, it is important in the context of what occurred in this case to differentiate discarding reasonable alternatives in accordance with iterative or progressive narrowing processes permitted under the SEA Directive (see *St Albans* at [14) from discarding reasonable alternatives in advance of consideration in accordance with the SEA Directive. As Ouseley J held in *Heard* at [71], the Directive requires "an equal examination of the alternatives which it is reasonable to select for examination alongside whatever, even at the outset, may be the preferred option". An iterative or sifting process cannot have the effect of sidestepping the need for equal examination of reasoanble alternatives alongside the preferred option.

The Selection of Reasonable Alternatives in this Case

76. In this case, the Defendant defends its selection of reasonable alternatives at paragraph 54 of the detailed grounds of defence as follows:

> "The Welsh Government's approach to selecting the reasonable alternatives that it did was a staged one, involving the March and June WelTAG appraisals. During the course of that staged approach, the options considered by the Welsh Government included public transport measures, two different types of improvements to the existing A48, and improvements to the existing M4. At each stage each potential reasonable alternative was assessed against the Transport Planning Objectives and the Welsh Impact Areas (including potential impacts on environment and, in particular, potential impacts on biodiversity). Accordingly, it is clear that when selecting reasonable alternatives the Welsh Government considered options which would have had different environmental impacts on the plan and it took into account those differential environmental impacts"

77. The flaws in this approach may be summarised as follows:

(a) The consequence of the approach was to eliminate prior to the SEA consultation the possibility of any comparable evaluation against the plan of alternatives which avoided or even substantially differed in their environmental impacts from the Plan, thus failing to accord with the purpose of the SEA Directive (as set out above)

(b) Alternatives which should have been treated as reasonable alternatives were eliminated in the course of considerations which did not accord with the comparable assessment envisaged by the Directive.

(c) None of the likely significant effects of the alternatives eliminated at stages prior to the SEA consultation were identified described and evaluated on a comparable basis to the Plan.

(d) Alternatives were eliminated for a failure to accord with the TPOs and Welsh Impact Areas by imposing too high a threshold and/or at too early a stage such that the public consulted in the SEA consultation; and the minister taking the decision whether to adopt the plan were deprived of the ability to weigh for themselves the relative value to be attributed to the objectives.

(e) Taking into account differential environmental impacts in the course of selecting reasonable alternatives is not the same as taking account of those in consequence of a proper SEA consultation involving comparable assessment of alternatives against the preferred Plan.

Alternatives which should have been treated as reasonable alternatives were eliminated in the course of considerations which did not accord with the comparable assessment envisaged by the Directive.

78. The Defendant is constrained to maintain the defence that the only reasonable alternatives were those assessed in the Environmental Report because no other alternatives have been

subjected to comparable evaluation in accordance with the SEAD. However, the Defendant's selection of alternatives to be treated as reasonable was not consistent with the SEAD and indeed the defence is not consistent with the view taken by the Defendant itself as to the reasonableness of the alternatives it analysed.

79. In the M4 CEM public consultation held between March and July 2012[20] the aims of the M4 CEM programme were identified as the largely same as the aims of the draft Plan (**4/19**) including the aim of producing positive effects overall on people and the environment (**6/15**). It proposed what it classed as six options: five discrete options: public transport measures and four Highway Options called A –D and nineteen "common measures" which could support the other five options. In November 2012 the Welsh Government produced an Environmental Report and undertook what purported to be a SEA [**6-28**]. The Welsh Government's position subsequently, and in these proceedings, is that the Environmental Report was not within the terms of the SEA Regulations, and that this consultation is to be regarded as "helpful development work" rather than an SEA consultation (see **Bates §61 [2-297]**). When the Consultation document was produced, however, it purported to comply with the SEA Directive and to present the options in it because they were reasonable alternatives within the meaning of that Directive having regard to largely the same aims and goals as in the September 2013 SEA consultation. The consultation document produced a comparable assessment of the same six options as the M4CEM consultation had considered. Table 21 (6/59) sets out a comparison of the options. It is implicit in the inclusion of these six options within what was intended to be an SEA consultation that the Welsh Government did not regard those six options as "obvious non-starters". Indeed, those six options had emerged from eighteen months of stakeholder and public consultation (see witness statement of Martin Bates §§ 52-57 [**2-295** et seq]) in which numerous other alternatives had been discarded.

80. Yet when the Welsh Government ultimately undertook an exercise which it regarded and regards as a lawful and proper SEA, it peremptorily excluded five of these six reasonable alternatives from identification, description and evaluation in a comparable way against the Plan. In order to defend its selection of reasonable alternatives, the Defendant asserts- as it must do- that the five options culled were regarded by it rationally as not reasonable alternatives (unrealistic, or non-starters). It is apparent it cannot fairly do this, not least since its own documentation does not support such assertions.

[20] An incomplete copy of the consultation document is at 6/9- 6/27 and a full copy will be provided to the Court

81. The March 2013 WelTAG Appraisal did not discount either the public transport measures or the common measures as reasonable alternatives. On the contrary, it recommended that they were worthy of further consideration [**6-143**]. It cannot therefore be said that they were not "reasonable alternatives", since by this point they had survived eighteen months of consultation and detailed analysis.

82. As to Highway options B, C and D, the basis upon which Highway option A was preferred in the March 2013 WelTAG was not that the other highway options were "obvious non-starters". Rather, those options had similarly emerged as some of the 'front runners' from more than a year of work, but the advice of those advising the Welsh Government through the March 2013 WelTAG appraisal was that

> "Option A provided the strongest fit with the Welsh Impact Areas and the TPOs. It is thus recommended that Option A be taken forward for more detailed WelTAG appraisal" [**6/139, Bates §66]**

The fact that Highway Options B, C and D did not, in the view of those making the WelTAG recommendations fit the objectives as strongly as Option A was not a basis on which those alternatives could be treated as not reasonable alternatives: reasonableness is not measured by a subjective assessment, prior to the SEA process, of the merits of an option

83. Thereafter, on 23 June 2013, the Defendant announced that it was to reconsider motorway options. This was because "it was likely that funding for a motorway would be available"; and "the only change that prompted the June 2013 WelTAG [Cl 6/177] appraisal was the availability of funding which enabled a solution to the problems on the M4 to be delivered in a single phase. The problems faced *and the potential options for solving them had otherwise not changed*" (**Bates §73, 76 [2-301, 302]**). This is an important acknowledgment: Although the likelihood of new funding opened or re-opened motorway alternatives which might have been perceived as preferable (including perhaps by the Welsh Government), the availability of that funding did not affect the alternatives previously identified or the ability of those alternatives previously considered to meet the objectives. It follows that those alternatives did not cease to be reasonable alternatives by virtue of a likely greater budget.

84. The June 2013 WelTAG appraisal was produced without any further public consultation [**6/177**]. The Appraisal document advised on options including doing nothing, the Red Route, the (new) Purple Route, the (new) Black Route, and complementary measures. It

recommended that the Black Route and complementary measures be the only ones taken forward for further appraisal [**6/225**].

85. Mr Bates continues by explaining at §76 of his statement that the rationale for the June 2013 WelTAG selection of options was that previous appraisal work had concluded that the other options were "not optimal solutions to the problems on the M4 around Newport… there was no need for these options to be reconsidered in the June 2013 WelTAG appraisal" [**2-302**] and that "had additional funding been applied to those other potential options, it would not have materially improved their performance against the relevant criteria".

86. The Defendant accepts openly that the alternatives which fed into the SEA consultation were generated through the March and June WelTAG appraisals. Those appraisals had ruled out all but one of the six alternatives. The fact that these alternatives emerged from and were subjected to detailed consultation, examination and consideration precludes and defies any attempt to characterise them as "unrealistic" and that was not in fact the reasons given for ruling them out. Rather, in the words of Mr Bates, these were not considered, after thorough evaluation to be "optimal solutions", or did not provide the "strongest fit" with the objectives. These alternatives can therefore be seen to have been excluded from comparable assessment against the preferred option on the basis of a view as to their merits not on the basis that they were not reasonable alternatives. That put the cart before the horse, since the purpose of the consultation exercise on the environmental report (required by article 5(1) of the SEAD[21]) is to inform the evaluation of the merits of the various alternatives (see the recent decision of the Supreme Court in *R (Moseley) v London Borough of Haringey* [2014] UKSC 56 at [39]). That puts the Minister responsible for the decision is in a position to evaluate, in light of public views on the reasonable alternatives, whether she continues to prefer the preferred option. As Ouseley J said in *Heard* at [71]:

> "It is part of the purpose of this process to test whether what may start out as preferred should still end up as preferred after a fair and public analysis of what the authority regards as reasonable alternatives."

[21] Compare Directive 2014/52/EU inserting a new article 5.1.d and Annex IV.2 into the EIA Directive imposing a duty to include "a description of the reasonable alternatives studied by the developer". Complying with this duty in this case will entail a description of more reasonable alternatives than at the SEA consultation notwithstanding that this is "downstream". This affords a further indication of the excessively narrow ambit of the Environmental Report and SEA consultation in this case.

None of the likely significant effects of the alternatives eliminated at stages prior to the Environmental Report and SEA Consultation were identified described and evaluated on a comparable basis to the Plan

87. For the avoidance of doubt, the Claimant does not suggest that every reasonable alternative has to be evaluated at every stage (that is well established), but reasonable alternatives cannot be eliminated by stages which are not themselves in accord with what the comparable assessment the SEAD envisages.

88. All of the work which the Defendant put into identifying preferred options and optimal solutions prior to June 2013 was undertaken on the assumption that funding for motorway options was not available. None of the alternatives considered, or their likely significant effects, were identified described and evaluated in a comparable way alongside the preferred option at any point. This is not therefore a case of staged analysis or progressive narrowing of options following comparable assessment in accordance with the SEAD (eg *St Albans City and District Council v SSCLG* [2009] EWHC 1280 (Admin) at [14] *Adastral New Town* at first instance per Patterson J at [127] or *Chalfont St Peter Parish* in the High Court[22] at [36]). Rather, those options were eliminated from consideration because the authority regarded them in its own (non SEA) assessments as a less strong fit or less than optimal.

Alternatives were eliminated for a failure to accord with the TPOs and Welsh Impact Areas by imposing too high a threshold and/or at too early a stage such that the public consulted in the SEA consultation; and the minister taking the decision whether to adopt the plan were deprived of the ability to weigh for themselves the relative value to be attributed to the objectives.

89. Again, following from the analysis of the process above, it can be seen that in deciding to eliminate alternatives from the SEA consultation, the Defendant did not actively take the view that the options which it had considered previously were unrealistic or non-starters, it eliminated them because it considered that they performed comparatively less well. That was a peremptory basis upon which to foreclose the ambit of the SEA consultation.

90. The final point as to the flaws in the defence at paragraph 54 is that Taking into account differential environmental impacts in the course of selecting reasonable alternatives is not the same as taking account of those impacts in consequence of a proper SEA consultation

[22] [2013] EWHC 2073 (Admin)

involving comparable assessment of alternatives against the preferred Plan. This needs no further elaboration in light of the above.

Sub-ground 2(v) The Defendant improperly and/or irrationally and/or unlawfully excluded from consideration the Blue Route or any alternative capable of testing the otherwise inherent assumptions as to the inevitability of environmental harm.

Sub-ground 2(vi) The Defendant's after the fact rejection of the Blue Route as amounting to a reasonable alternative was irrational, unlawful and failed to accord with the requirements of the SEAD

91. The Blue Route affords another example of a reasonable alternative whose likely significant effects were not identified described and evaluated in the environmental report. The significance of the Blue Route is that it highlights one option which attracted widespread support which did not involve the environmental harms of the Plan. The detailed articulation of this alternative exhibits that this proposal, or some variants on it (including variants on the Defendant's own options B and C), could have been evaluated alongside the Plan. It is an alternative which could be evaluated properly alongside the Plan if this claim is allowed. A detailed description of the evolution of this idea from 2007, through "Options B and C" in the M4 CEM work and in response to the announcement of the revival of motorway options is set out in more detail at paragraphs 30-45 above. Upon its announcement of the re-introduction of motorway proposals on 26 June 2013, the Defendant was made aware almost immediately (and prior even to statutory scoping) of the outline of the Blue Route and the intention by the campaign group CALM to work up a detailed and professional assessment of the "Blue Route" proposal with Professor Cole (see for example Wildlife Trusts Wales letter of 12 July 2013 at [**5-12]**; further letter of 19 August 2013 [**5-16**] and the RSPB letter of 16 August 2013 [**6-299**]). A published copy was submitted to the Environment and Sustainability Committee on 23 October.

92. The Post-Adoption Statement [**4-713]** concluded that "it was determined that none of the alternative solutions proposed during consultation could reasonably deliver the objectives of the draft Plan and therefore could not be considered as Reasonable Alternatives". This decision was based upon the analysis undertaken in the SAACC [**4-358**].

93. The analysis of the Blue route undertaken by the Defendant was within its own offices, without any public engagement, despite the widespread public discussion about the Blue Route at the time. This was an erroneous premise on which to dismiss the alternative (especially given the uncertainty which the SAACC comments upon at 4.1.4 [**4.392]**). In support of its findings, the SAACC references reports which are now said in fact were preliminary workings

by the author of the SAACC (Arup). This self-referential approach exhibits the degree to which the public were excluded.

94. Arup, the consultants advising the proposed Defendant, were responsible for formulating the three scenarios that in their view would constitute a viable version of the Blue Route. Arup takes a very different view as to the viability of the Blue Rout and Professor Cole's view that it would "divert around 15 per cent" of the traffic from the M4 yet explanation for the difference of view was not provided[23], or available to public comment or debate.

95. The rejection of the Blue Route by Arup on behalf of the Defendant is premised on judgments as to the weight to attribute to its ability to meet the 15 Transport Planning Objective, a matter which could and should have been left to public consultation and ministerial judgment. There is no articulation of the reasoning as to the level of attainment required for an alternative to succeed in being regarded as a reasonable alternative. Every iteration of the Blue Route suggested by Arup was assessed as having a positive or neutral impact on the attainment of all of the TPOs; save for the promotion of "more sustainable transport choices".[24] (this being the same negative impact that is found for the Plan Route).[25] While the second Blue Route scenario does have lower attainment levels that the Plan Route, it is still (on the Defendant's analysis) capable of delivering benefits. The kind of comparative analysis at [**4-409**] for example could and should have been undertaken as part of the SEA consultation so as to allow people to comment, and the minister to take a fully informed decision as to the relative merits and weight to be given to the attainments of the alternatives. Performing a comparative analysis after the event merely re-enforces the paucity of the consultation exercise in failing to allow comparison of any reasonable alternatives which had substantially different impacts to the preferred option.

96. The Welsh Government has devoted considerable attention both before the SEA process to variants of the Blue Route (upgrade of the steelworks road having been presented originally by the former transport minister) and after the SEA process in commissioning a report from Arup as to the costs of the Blue Route (set out across thirty-three pages in the SAACC). The detailed comparative appraisal of this option is indicative that this option (and other options not involving the construction of a road on the SSSIs) should and could have been treated on an equal footing with other alternatives as part of the consultation Instead the Blue Route option was improperly rejected after the SEA consultation process without public consultation.

[23] Blue Route Report pg 3
[24] *SAACC* pgs 35-6, 40-2, 45-6
[25] SAACC pg 49

97. In consort with the basis for rejecting the Blue Route, the Defendant's paragraphs 81-82 of the DGD misunderstand the low threshold applicable to reasonable alternatives. Given this and all the above it was essential that the reasons for the rejection of an alternative should take account of the level of improvement that was needed and none was provided. is no proper or adequate published rationale for rejecting this alternative (see art 5(2) SEA D).

98. For these reasons, although the responsible authority undertook an environmental assessment, that assessment was irrational and procedurally improper and did not comply with the Directive, particularly articles 5(1) and (2).

Three Further Misapprehensions by the Defendant

99. There appear to be three possible misapprehensions by the Defendant which explain how it came to consult on such a limited range of reasonable alternatives. Each of these explain the process by which an SEA process which does not accord with the Directive came to be followed and exhibit public law errors in their own right.
    (a) A Failure to Undertake a proper scoping exercise with regard to the SEA Consultation
    (b) Erroneous Advice and reasoning as to the low threshold to be crossed to establish a reasonable alternative
    (c) Confusion by the Defendant as to the Objectives against which the reasonableness of an alternative is to be assessed.

Sub-ground 2(iv): The scope of the Environmental Report was narrowed so as to exclude reasonable alternatives in consequence of a scoping exercise which was improper and in breach of article 5(4)

100. Article 5(4) of the SEAD requires that statutory consultees be consulted "when deciding on the scope and level of detail of the information which must be included in the environmental report". The Defendant's own published guidance provides a further gloss on this in suggesting that "Responsible Authorities may also find it useful to consult other organisations and individuals concerned at this stage to obtain information and opinions" (***A Practical Guide to the Strategic Environmental Assessment Directive*** (Sept 2005) at 5.A.16). Having consulted it follows that the general principles applicable to consultation apply.

101. The first opportunity that the Defendant had to include the Blue Route within the SEA process as a reasonable alternative was following the scoping consultation of July-August 2013, at which point it was alerted to the existence of the Blue Route and points were made

about the need to consider the transport options as a stand-alone alternative. The decision not to consider those options as reasonable alternatives within the SEA Report was vitiated by its erroneous understanding of and reliance upon the scoping consultation.

102. The Post Adoption Statement [**4-713]** asserts that the Defendant's decision on the alternatives to be assessed within the SEA Report was validated by consultation with the statutory consultees:

> "The proposed alternatives to be assessed in the SEA Environmental Report were included within the scoping report; this was issued to statutory consultees for consultation, in accordance with the SEA Regulations. No comments were received from the statutory consultees indicating that additional alternatives should be considered or that the proposed alternatives were not valid. Consequently, the SEA Environmental Report assessed the consulted alternatives; the draft Plan, the two Reasonable Alternatives and the Do Minimum Scenario."

103. This conclusion was (a) irrational because the questions asked in the consultation did not address the issue of alternatives and (b) failed to take into account the consultation responses that had been received. The first of these flaws is clear from the consultation questions themselves: none of the questions address the issue of alternatives and it was not possible for the Welsh Government to conclude that the statutory consultees had endorsed their selection of alternatives. Indeed, that is made all the more apparent from the subsequent comments of Natural Resources Wales, of 16 December 2013 [**4-258]**. The conclusion in the Post-Adoption Statement [**4-713]** (quoted above) was accordingly perverse and followed an unlawful "failure to ask the right questions" (per ***Tameside***).

104. The second flaw is that the Defendant evidently failed to *properly* consider (i) the formal consultation response given by RSPB to the scoping report and (ii) the informal consultation responses given by the Claimant and others.

105. The RSPB consultation response advised that there were problems with the limited number of reasonable alternatives; the reasons for rejection of public transport measures, and the upgrade of the A48 were inadequate and advised that Professor Cole had been instructed to prepare an analysis of the Blue Route. The Defendant's assertion that the scoping consultation had not raised any issues about the alternatives to be assessed within the SEA Report is not therefore reflective of the comments made. The Defendant was under an obligation to take account of the substance of the RSPB response, not to gloss over it as if it did not exist (under the fourth *Gunning* principle as recently endorsed in *Moseley* at [25]).

106. In response to this ground the Defendant disclosed with its detailed grounds of defence a report by Arup dated 30 August 2013 (**at [7-tab 13]**) which assessed the comments of the RSPB. This report was not made public save in the course of this claim. The Defendant did not record its analysis of the RSPB's scoping points either in the Environmental Report or in any correspondence to the RSPB. The lack of any public explanation of why the RSPB's points is redolent of the whole tenor of the Defendant's conduct throughout the SEA process, where it has preferred to consider alternatives in forums outside any comparative SEA assessment. Disclosure of this report raises further concern as to the Defendant's understanding of the threshold for a reasonable alternative: a point which could have been addressed if the recently disclosed report had in any way been summarised or referred to in any public document.

107. This failure also indicates a breach of the requirements of Article 5(4) in that the decision to consult with the RSPB on the scope of the SEA Report in effect constituted a designation of the RSPB as an Article 6(3) body for the purposes of the plan in question.

108. Further material submissions were made at the scoping stage by the Claimant. Although these have not been recognised by the Defendant as forming part of the consultation process they were still clearly relevant submissions by interested parties and should have been considered under Article 6(2) of the SEA Directive and pursuant to the Defendant's published policy.

Sub-Ground 2(iii) The Defendant misunderstood article 5(1) of the Directive as requiring that alternatives examined in the environmental report should "deliver" the objectives rather than take account of them and/or the reasons given for not selecting alternatives are inadequate and erroneous

109. The Post-Adoption Statement [**4-781**] asserts that "none of the alternatives suggested during consultation met the requirements to be considered Reasonable Alternatives for assessment in an Environmental Report; i.e. that they could reasonably deliver the objectives of the draft Plan". (see also [**4-770**] This discloses an error of law that article 5(1) of the Directive requires that alternatives examined deliver the objectives. That is not mandated by the SEAD. The Directive speaks of "taking account of the objectives" rather than meeting them. The Defendant's error is a significant one because it precluded the very exercise which the SEA was designed to perform: The very purpose of considering reasonable alternatives is to inform a judgment on the extent to which an alternative might perform against (in this case) the preferred option. The consequence was that the relative weighting to be given to objectives and the extent to which alternatives met those objectives was prematurely determined and no alternative was even analysed which did other than harm the SSSIs.

110. The Detailed Grounds of Defence seek to answer this point (§64) by asserting that it relies on a comment made after the event. However, the disclosure (served with the Detailed Grounds) of an internal report [**7-tab 13**] shows at pages 6 and 7 that the same misunderstanding of the threshold relevant to establishing a reasonable alternative was applied in advice given by the Defendant's consultants Arup when considering the results of the scoping request in that it appears to have been assessed on the premise that a reasonable alternative must "fulfil" the objectives. As set out in sub-grounds 1 and 2 it is evident from the approach as a whole that the Defendant did not recognise that the threshold for considering an alternative to be a reasonable one was (a) a low one (per the Court of Appeal in *Chalfont St. Peter Parish* at [75] and (b) is not assessed by reference to a view as to the *relative* merits of options.

111. The Defendant's other answer to the misapprehension as to the 'reasonable alternative threshold' (DGD§ 64 [**1-120**]) is that the substantive decision making is justified by virtue of a judgment having been taken that the alternatives excluded did not meet "all" of the Transport Planning Objectives. This further highlights the Defendant's apparent misunderstanding about the criteria for selecting reasonable alternatives.

112. Article 5(1) and correspondingly Regulation 12 (2) (b) of the 2004 Regulations requires an environmental report "to identify, describe and evaluate the likely significant" environmental effects of implementing the plan, and of "reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme". The "objectives" of a plan can never be limited solely to "transport" objectives to the exclusion of environmental and social considerations forming key parts of sustainable development, since that would undermine the purpose and effect of the Directive in providing for a high level of protection of the environment and integrating environmental considerations into decision making.

113. The exclusion of reasonable alternatives from consideration for not meeting all of the transport planning objectives is inconsistent with the Directive. This is because it precludes at the threshold, the public of the opportunity of commenting on those reasonable alternatives and ultimately the decision maker the opportunity of evaluating the preferred option against the reasonable alternatives. In the ultimate balance, the weight to be given to one alternative over another remains, entirely a matter in the discretion of the body responsible for deciding on the plan. This preclusive approach offended the very purpose of the SEAD.

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114. Further, it follows from this point that the reasons given for not selecting alternatives are accordingly erroneous and inadequate (*Heard* at [69-71]). The Defendant has not answered this point in its DGD.

Sub-ground 2(vii) The Defendant's "sifting" process by which it alighted upon the preferred option in June 2013 was procedurally improper, irrational and inconsistent with the SEAD

115. It is implicit within the Directive that the process by which those alternatives which are reasonable alternatives are evaluated must itself be consistent with the SEAD, and in particular that comparable assessment must be undertaken in the course of narrowing the options: see *Adastral New Town* at first instance per Patterson J at [127] – the emphasis being on a *progressive narrowing* of options - and at first instance in *Chalfont St Peter Parish Council* at [36] and *St Albans* at [14]. The authority in this case did not iteratively or progressively narrow its options.

116. Since the Plan was first put on the table when scoping commenced in July 2013 the only alternatives which have ever been treated as reasonable alternatives have been the Plan, the Purple Route variation in alignment and the Red route dual carriageway version of the Plan. There was no prior process of sifting which involved the Plan. The Defendant seeks to rely expressly on the consultation work undertaken prior to the SEA process on the Plan as validating its selection of reasonable alternatives considered in the Environmental Report. But there was no public consultation which led to a sifting of options assessed on a like for like basis and alighting on the Plan. The idea that the Plan proposals stood up robustly to every reasonable alternative was assumed rather than tested through the required statutory consultation process. The harm caused by the Plan to the SSSIs may not be inevitable: the Plan should not have been adopted without reasonable alternatives to that harm being consulted on publicly and considered against the Plan

117. The consequence of the abrupt new stance in June 2013 to pursue a plan not previously compared to the other identified alternatives, and not subsequently so compared, is what NRW has called "a gap in statutory processes and no clear policy rationale for pursuing a new M4 road scheme option" (NRW consultation response of 16 December 2013 [**4-261**]). Reasonable alternatives were eliminated from consideration, but not as part of a process which itself conformed to the aims of the SEAD either expressly or implicitly (see *Buckinghamshire in HC* at [127] per Ouseley J).

118. No adequate or intelligible description of what alternatives were examined and why was made available for public consideration (*Heard* para 66-67).

Sub-ground (viii) The SEA process was inadequate and / or irrational in that it did not set out adequately and intelligibly why only alternatives involving roads through the SSSIs had been selected.

119. The SEA Report which was submitted for consultation in September 2013 only describes the alternatives which were to be considered within the SEA process and does not explain why other alternatives had been excluded. The Claimant has set out above in detail its challenge to Defendant's reliance on the WelTAG appraisals of March and June 2013 as adumbrating these reasons. The issues raised by RSPB as to scope were not addressed, and in fact at page 34 [**4-95]** the Report states that the response to consultation would not be explained until the adoption of the Plan. Reasons given for the rejection of alternatives in previous documents were inadequate with a material consequence that consultees could not understand the underlying report.

120. For this reason the process was not in substantial compliance with the SEA Directive and was unlawful: see *Heard* at paragraphs 61-71.

Sub-ground 2(ix) The Defendant failed to take into account and/or to give adequate reasons regarding its consideration of current knowledge and methods of assessment in relation to the impact of planned public transport improvements traffic forecasting (in breach of article 5(2) SEAD)

121. Under Article 5(2) of the SEA Directive the Defendant is required to take "into account current knowledge and methods of assessment" in the preparation of the environmental statement. Failure to do so is potentially a vitiating error and leads to risk to the environment.

Information on the likely impacts of public transport improvements

122. Proposals to improve public transport and "common measures" are designed with overlapping objectives in mind to the road building proposals. Public transport improvements- whatever they are- will have a bearing on the levels of congestion felt on the M4. Those measures are material. Some public transport proposals were set out in an impact study published at the very same time as the September – December 2013 consultation[26]. These proposals are not considered in the SEA alongside the road building proposals. It is a nonsense to pretend for the purpose of considering reasonable alternatives they do not even exist or have no bearing at this

[26] The SE Metro comprises a Metro rail and bus system for south-east Wales, as outlined in its *Cardiff Capital Region Metro Impact Study*, published in October 2013 (as per page 3 of Blue Route)

primary stage of analysing the reasonable alternatives. The analysis of alternatives is not credible where the true picture as to future transport measures is not considered. This is not a matter of having sifted out alternatives at a prior stage: it is a case of excluding up-to-date and current thinking on relevant plans in favour of what is essentially a revival of a very out-of-date solution. Nor is it appropriate to rely on after-the-event analysis.

123. This point is illustrated in the comments of Natural Resources Wales in its letter of 16 December 2013 [**4-258]** (above):

> "We believe that the most sustainable solution for the M4 corridor issues can only come from a coordinated assessment of a range of potential measures including sustainable transport options."

This point, coming from a statutory consultee, was one to which the Defendant was required to afford great weight: *R (Hart D.C.) v SSCHL* [2008] EWHC 1204 [49]; *R (Akester) v DEFRA* [2010] EWHC 232 at [112]; *Shadwell Estates Ltd v Breckland D.C.* [2013] EWHC 12 at [72]

124. And as Professor Cole explains in his "Blue Route" paper:

> "The Welsh Government's case for a new motorway, put forward in its September 2013 consultation paper M4 Corridor around Newport, takes no account of the impact of rail electrification or the Metro. The paper says it does not take account of public transport measures "because the Welsh Government has commissioned a separate study and report on proposals to develop a Metro system for south east Wales". Yet these separate proposals cannot be considered in isolation. Each will have a significant impact on the other… [**4-237**]

125. The National Assembly for Wales Sustainability and Environment Committee *Inquiry Into Welsh Government Proposals for the M4 Around Newport* of *July 2014* made essentially the same point.

> 18. We note that the Minister for Economy, Science and Transport"s letter of 20 December 2013 states "traffic modelling during the draft plan development identified that a highly significant increase in public transport usage in the Newport area would not solve the problems on the M4 around Newport" and that "a **dedicated separate task group**" is taking forward public transport improvements.
>
> 19. We understand that the *M4 Corridor Enhancement Measures Public Transport Overview*, referenced in the Minister for Economy, Science and Transport"s letter dated 20 December 2013, considered illustrative measures with an estimated capital cost of around £300m. Evidence provided to us suggests that this work was undertaken before the scale of the Metro proposals, which estimates total investment of £2bn, became clear.

20. We note that in its response to the Environmental Report NRW Operations South Directorate recommends that findings from the Metro study, may influence the evidence presented relating to problems, aims and goals for the M4 around Newport consultations and inform decisions made on sustainable options".

21. We also heard evidence suggesting that integrated transport policy should consider the effect of all interventions together, and that the combined effect of sustainable / public transport and highway interventions can have a greater impact on travel behaviour than public transport investment alone. It has been suggested that the appraisal of the M4 highway schemes should consider all public transport and sustainable transport options.

Conclusion

We conclude that the potential impact of the public transport and electrification proposals, particularly the South Wales Metro, proposal have not been given sufficient consideration. [4-303]

126. The failure to take account of these highly significant public transport measures at the stage of *strategic* environmental assessment and further as part of the analysis of reasonable alternatives is not only a failure of common sense, it is a legal failure. As Professor Cole further states:

> "The objective [of The South East Wales Transport Alliance (Sewta) Rail Strategy Final Report (2013)] is to attract car commuters away from the M4, A470 and other key routes and onto the railway. As the Report concludes:
>
> " ...several of its recommendations should be packaged to form an M4 corridor corporate strategy to provide realistic alternatives to car use in this congested corridor".

127. Thus, on the one hand Sewta's Rail Strategy suggests that its recommendations should be packaged as "realistic alternatives" while at the same time, the SEA report declines to do so for no good reason than that those alternatives are being considered somewhere else.

128. In the SAACC of July 2014 [**4-358**], the Welsh Government purports to reject Professor Coles' analysis of the impact of rail electrification on the basis of the confidential Arup Comments (see page 29) (albeit the Defendant denies the existence of any such document). This after-the-event approach, incomprehensible to the public, is not consistent with the intentions of the SEA Directive: this is far from the equal and fair appraisal of the preferred options and reasonable alternatives in the context of the effect of public transport measures and rail electrification to be expected at an early stage in the SEA process.

129. The failure to consider these potential measures as part of the SEA process strikes at the heart of the assumptions made in the consultation and SEA Report. As Professor Cole explains

> The *M4 Corridor around Newport* consultation paper forecasts a 20 per cent increase in traffic by 2035. However, it is estimated that the Black/Purple motorway proposal would divert up to 40 per cent of traffic away from the existing M4. This is in excess of the capacity required to address the problem. [**4-230**]

130. In other words, the preferred option, when seen in the light of the proposed public transport solutions might be argued to be offering excessive capacity. That, if correct, has knock-on implications as to whether the environmental harm is justified; whether it is consistent with an overall strategy to reduce dependence on the car, and whether the expenditure on a three-lane motorway is justified. This analysis is apparently disputed by the Welsh Government's contractors Arup, but its reasons are not proper or adequate and such debate should be undertaken as part of the statutory consultation process.

131. The Defendant's response to this ground at paragraph 97 of the DGD is that its officers had recommended in previous WelTAG appraisals that public transport measures would be "likely to have only minimal impact with respect to reducing traffic". Again, this ignores the Welsh Government's own prominence given to public transport measures in its previous purported SEA consultation. The Defendant seeks to assert that even where an Authority has treated an alternative as reasonable, it can then exclude it from evaluation on a comparable basis against, or as part of, the assessment of its preferred option in the SEA because it takes a view in anticipation that it will not meet its objectives of traffic reduction. Again, this puts the cart before the horse and leads to measures being excluded on the basis of reports not themselves subject to the Assessment processes envisaged by SEA.

132. Further, the exclusion of public transport measures from the SEA analysis manifests not only as a failure to consider alternatives, but as a failure to properly consider the impacts, the pros and cons of the alternatives which have been analysed. High-cost transport improvements - such as electrification of the main line, the south Wales metro, and dualling of the A465 are important to consider not just as reasonable alternatives, but also in assessing the robustness of the assumptions made about the preferred options (since they impact significantly upon them).

Information on the uncertainty inherent in current traffic forecasting models

133. As identified above, the failure to take proper account of public transport measures also impacts on the traffic forecasting, a matter central to consideration of the Plan.

134. Furthermore, the traffic forecasting methodology deployed in taking the decision is flawed. This is summarised in The National Assembly for Wales Sustainability and Environment Committee *Inquiry Into Welsh Government Proposals for the M4 Around Newport* of *July 2014*

> 22. We note that M4 forecasts are produced using the Department for Transport‟s (DfT‟s) forecasting methodology, and that the Welsh Government has referred to observations contained in DfT‟s Command Paper *Action for Roads* and research by Prof Jones and Dr Le Vine.
>
> 23. However, we have heard evidence, including academic evidence from Dr Le Vine, which suggests that DfT‟s methodology has consistently predicted significant traffic growth while actual traffic data shows the trend to be broadly flat. Weaknesses in the model have been suggested, including an assumption of increasing future car ownership which has been described as difficult to justify given actual trends. Witnesses emphasised significant uncertainty in future traffic trends, and that the factors underlying the recent levelling in traffic trends are currently poorly understood.
>
> 24. Given this uncertainty we have been advised that planners should consider a "scenario approach" to assess the impact of schemes under various "alternative futures".
>
> 25. Finally, while the validity of the forecasting model has been questioned in evidence, it has also been suggested by Prof Goodwin that if the forecasts on which the M4 proposals are based are correct, the options considered will be insufficient to improve traffic conditions. [**4-304**]

135. Thus, the SEA did not use "current knowledge and methods of assessment" as required under SEA Directive 5(2). Specifically, and as pointed out in FoE Cymru's submission, the Welsh Government has no congestion statistics (point 8 in FoE Cymru's submission [**2-26**]) even though those 'methods of assessment' were being trialled in England, and other data were wrongfully interpreted (points 18-26 [**2-28, 29**]). The contention at DGD 99 [**1-130**] that it is not "appropriate" to factor uncertain future programmes at an early stage of development" into its considerations (whether related to traffic forecasting or otherwise) displays the misunderstanding of the stage at which, and the openness with which SEA is intended to be undertaken.

Ground 1

The Defendant's decision to adopt the Plan on 16 July 2014 was unlawful in that:

(a) The Defendant failed to consider the (acknowledged) harm the Plan will cause to Sites of Special Scientific Interest on the basis of a proper, lawful and rational understanding or application of its statutory duties to take reasonable steps to conserve and enhance those sites and to conserve their bio-diversity;

(b) The Defendant's assessment that the Plan and the identified reasonable alternatives would cause "minor adverse" harm to the SSSIs was *Wednesbury* unreasonable. The Defendant's justification for the downgrading of its assessment of the harm is inconsistent with the documentary history and rests on an irrational and unlawful assumption as to the success of an unprecedented scale of mitigation and compensation.

136. SSSIs are afforded a high level of protection within the applicable statutory and policy framework. Sections 28-28S of the Wildlife and Countryside Act 1981 ("WCA 1981") govern the designation and subsequent management and control of sites of special scientific interest. Section 28G of the WCA 1981 provides a statutory duty upon all public authorities, expressly including the National Assembly for Wales, "to take reasonable steps, consistent with the proper exercise of the authority's functions, to further the conservation and enhancement of the flora, fauna or geological or physiographical features by reason of which the site is of special scientific interest". This positive duty to take steps to preserve or enhance the SSSIs is an exceptional duty which recognises the particular ecological value of sites so designated.

137. In *R (Western Power Distribution Investments Ltd v Cardiff City Council* [2013] EWHC 1407 Burton J held at §34 that the failure by officers to properly apprise a committee of relevant information such that the committee was deprived of an opportunity of complying with its section 28G duty amounted to an error of law vitiating the decision.

138. Under section 40 of the Natural Environment and Rural Communities Act 2006 (NERCA) there is a duty to have regard to the purpose of conserving bio-diversity. These duties are imposed upon every public authority in the exercise of their functions.

Failure to Take Reasonable Steps

139. Section 28G obliged the Welsh Government and still does- to take reasonable steps to further the conservation and enhancement of the fauna etc by which the SSSIs are SSSIs. In this context, in order to ascertain how to comply with its duty, it needed to examine options which were not destructive of the SSSI environment so as to fully inform itself about the options open to it for conserving or enhancing the SSSIs, including implicitly to act as far as possible not to harm the SSSIs.

140. Natural Resources Wales is one of two statutory consultees designated under regulation 4(1) of the SEA Regulations[27] and is required to be consulted on the scope and content of environmental reports produced for SEA purposes[28]. In its consultation response of 16 December 2013, Natural Resources Wales repeated earlier expressed concerns about the approach taken in the draft plan and the consultation documentation to the impacts on the SSSIs. It stated:

[27] Environmental Assessment of Plans and Programmes (Wales) Regulations 2004
[28] See regulation 12(5) and (6) and 13(2)(a) of the SEA Regs.

> We remind the Welsh Government, as the statutory undertaker with respect to any M4 related road scheme around Newport, of its responsibility under the Wildlife and Countryside Act 1981 (as amended) and carried through to Welsh policy through Planning Policy Wales and Technical Advice Note 5 (TAN 5) on Nature Conservation and Planning to ensure that effects on SSSIs are avoided, or at least minimised and that in addition, reasonable steps should be taken to further the conservation and enhancement of SSSIs.
>
> These will be crucial considerations should a road scheme be promoted, in any detailed routing and design phase, but we recommend that these principles are considered now, given the appraisal of biodiversity impacts being **large adverse**
>
> Whilst we acknowledge that other, much smaller scale developments have been allowed to proceed within the Gwent Levels SSSIs, the levels of mitigation and compensation which would be required in taking forward any of the three new road alignment cases is unprecedented. We are therefore unable to advise at this stage whether sufficient mitigation or compensatory measures could be provided to satisfy us with respect to adverse impacts on the Gwent Levels SSSIs"

Even on the Defendant's (flawed) analysis of the harm of the proposed road, each of the routes (all taking the same path across the SSSIs) was assessed by the environmental report [**4-118**] to be "minor negative".

141. The duties imposed on the Defendant not to harm, and to take reasonable steps to further the conservation and enhancement of the SSSIs did not permit harm to the SSSIs to be treated simply as one among numerous material considerations. Section 28G requires that public authorities take reasonable steps to further the conservation and enhancement of SSSIs and this statutory language requires more than simply having regard to another material consideration. This is illustrated by analogy with the duty under section 66(1) of the Planning (Listed Building and Conservation Areas) Act 1990 which imposes a duty to have special regard to the desirability of preserving or enhancing listed buildings (a duty to "have special regard" being *less* exacting than the section 28G which positively requires reasonable steps to be taken to preserve and enhance) which has been held by Ouseley J at first instance[29] to have the following effect:

> "Section 66 does not permit a local planning authority to treat the desirability of preserving the setting of a listed building as a mere material consideration to which it can simply attach what weight it sees fit in its judgment. The statutory language goes beyond that and treats the preservation of the setting of a listed building as presumptively desirable. So if a development would harm the setting of a listed building, there has to be something of sufficient strength in the merits of the development to outweigh that harm. The language of presumption against permission

[29] Approved implicitly by the Court of Appeal at para 7 of the judgment in *Garner & Ors v Elmbridge Borough Council & Ors* [2011] EWCA Civ 891)

> or strong countervailing reasons for its grant is appropriate. It is the obvious consequence of the statutory language, rather than an illegitimate substitute for it." [30]

The Defendant's duties in relation to SSSIs operate similarly. The corollary of those duties is that where, as here, the public authority proposes to take steps which *do not* further the conservation and enhancement of a SSSI, they must acknowledge and engage with the implications of so doing, including the question whether, given the specific nature of the section 28G duty, a departure from its obligations is lawful and justified. Compliance with section 28G is not achieved by simply weighing biodiversity considerations in the balance with every other material consideration. The Defendant failed to properly understand or engage with that statutory framework. Neither the Defendant's decision to adopt the Plan, nor the steps taken to reach that decision (none of which engaged with options of not damaging the SSSIs) accord with the duty to take reasonable steps to conserve the SSSIs.

Irrational/Unlawful approach to assessment of harm

142. The Defendant's failure to take its decision in the proper statutory context was compounded by its irrational and unlawful approach to the asserted assessment of the impacts of the proposals.

143. The Defendant's assessment of the impacts of the Plan [**4-315]** on the environment, especially in relation to the adverse impacts on the Gwent Levels' SSSIs irrationally, improperly and unlawfully minimised the impact of the development on the SSSIs. The 2012 SEA identified major adverse impacts of building a two-lane road across the Gwent Levels on biodiversity, soil, water, material assets, cultural heritage and landscape and townscape. Indeed the WelTAG report of March 2013 adopted that assessment (page 26).

144. The September 2013 SEA report (page 91) adopted a more optimistic view and further upgraded the assessment of impacts on material assets and biodiversity. The Defendant's response to this matter is that this change can be justified by the "potential additional mitigation measures… identified that would deliver benefits" [**3-52]** at para 78 and DGD para [50] [**1-116]**. However, the mitigation that is identified in the 2013 SEA Report (which emerges from the Habitats assessment) is substantively the same as that identified in the 2012 SEA. This is said because none of the four supposedly additional points mentioned by Martin Bates and cited

[30] See also *East Northamptonshire DC v Secretary of State for Communities and Local Government* [2013] EWHC 473 (Admin) at para 39; *Forest of Dean DC v Secretary of State for Communities and Local Government* [2013] EWHC 4052 (Admin) paragraph 38; *North Norfolk District Council v Secretary of State for Communities and Local Government* [2014] EWHC 279 (Admin) paragraph 82

in the DGD at [50] were capable to changing the Defendant's assessment. The water treatment areas are plainly the same as the "water treatment ponds in the 2012 SEA [**6-67**] (contrast with **[4-158**]; the management plan for the SSSIs is not properly a form of project specific mitigation as it relates to the wider system for running the SSSIs and should be included within the Do Minimum Scenario [**4-142** makes it plain that it is principally about addressing the Water Framework Directive objectives**]**; the additional reen and on site provision of contamination remediation are both issues which are expressly reserved for consideration at the project/EIA stage [**4-119**] and **[4-136**].

145. Furthermore the asserted justification rests on an assumption that unprecedented mitigation and compensation measures will be implemented and effective. Yet, a precautionary approach was required in relation to the Usk SAC given the Habitats Directive context and the lack of any proper analysis of combinatorial impacts of this development. At this preliminary stage, NRW were right to contend that it was improper to treat mitigation measures as capable of such significance in the assessment of likely environmental harm: see *R (Hart District Council) v Secretary of State for Communities & Local Government & Ors* [2008] EWHC 1204 (Admin) at paras 59, 76.

Ground 3: Failure to adequately take account of policies regarding reduction in carbon emissions

146. The Plan acknowledges the reduction of greenhouse gases as an environmental objective. The SEA report identifies that the Plan (and reasonable alternatives) will increase greenhouse gases. However, neither the Plan nor supporting documents puts this within its proper policy context by engaging with the interaction of the failure of the options to meet this objective with (a) the Defendant's climate change policies and (b) national carbon emissions targets. The Defendant was obliged to consider the significance of an increase of carbon emissions related to the Plan in the light of the wider policies and targets relating to climate change.

147. Welsh Government policy, *One Wales: One Planet* (May 2009), in seeking to describe the content of the Welsh Government's view of sustainable development, states that within the lifetime of one generation, "we must … organise the way we live and work so we can travel less by car wherever possible" (page 18). Accordingly, the stated policy of the Welsh Government is to reduce travel by car over the next generation.

148. The Defendant also has a major role in helping to deliver carbon emissions targets by consultation with the Secretary of State for Environment as the relevant national authority under the Climate Change Act 2008.[31]

[31] The Welsh Ministers are a "national authority" in the terms of the Act, see s.97.

149. Given that this policy remains a definitive statement of the Defendant's understanding of sustainable development, it is plainly irrational for the Defendant to evaluate the costs and implications of policies which will (on its own case) lead to substantial increases in carbon emissions without at the minimum engaging with or considering the implications of such policies for those climate change policies.

150. Yet this is precisely what the Defendant has done. The three proposed options were each evaluated against environmental objectives 2a and 2b within the SEA report [**4-108 and seq]**. That analysis concludes in respect of the net effect of each option that "In the short to medium term, there could be a reduction in greenhouse gas emissions. In the longer term, net traffic is predicted to increase therefore resulting in increased emissions of greenhouse gases. However, technological improvements over this timescale to vehicle engines and exhausts are anticipated to aid reductions in emissions but could be unlikely to counter net increase unless there was also a large shift to electric vehicles". In relation to the impacts on the existing M4 route itself it is said that "initial studies suggest increased traffic and more long journeys are offset (either partially or wholly) by reduced emissions resulting from improved operating conditions."

151. The centrality of the M4 to the south Wales transport system makes it an important driver of carbon emissions across Wales. when the Defendant identified that each of the three alternatives would be likely to increase net emissions it was obliged to consider/address the extent to which this factual conclusion meant that the Plan was inconsistent with *One Wales: One Planet* and with the climate change targets which they had a role in delivering under the 2008 Act. However, the Defendant gave no such consideration to the problem, thereby omitting to take account of material considerations and failed to identify it for the benefit of consultees.

152. The consequences of this omission are that the Defendant has not assessed the significance of the acknowledged increase in carbon emissions against the policy backdrop. This failure to take adequate account of the policy framework amounts to a public law error. Put another way, the failure to take account of a material consideration is an error vitiating the adoption of the Plan because the Plan has the potential to significantly impair the ability of the Defendant to deliver its policy objectives or assist with national carbon targets.

Conclusion

153. For all the above reasons, the adoption of the Plan should be quashed so as to allow the Defendant to undertake a lawful consultation process in accordance with the SEA D and its public law duties.

Alex Goodman

Matthew Dale-Harris

Landmark Chambers
180 Fleet Street
London EC4A 2HG

23 February 2015