



**Ymgyrch Diogelu Cymru Wledig
The Campaign for the Protection of Rural Wales**

ADDENDUM TO FURTHER EVIDENCE SUBMITTED BY CPRW TO THE M4
PUBLIC LOCAL INQUIRY - ADDENDUM
1 March 2018

Grus grus (PID 187)

The WG paper entitled "Bird Protection and Mitigation Plan" acknowledges that the proposed Black Route will destroy the only breeding site of *Grus grus* in Wales - a site on Tata land so confidential that its location is (rightly) not disclosed in the published version of PID 187. The WG's proposals revolve around trying to mitigate for this loss by trying to persuade the breeding pair of cranes, named Lofty and Gibble, to move to a new, artificial nest site to be created in the same vicinity with the advice of ornithological experts.

However there is no guarantee that the lure of an alternative nesting site will succeed. Although this is the only pair of cranes in the Levels or in Wales, the Wales Government have not suggested that the Precautionary Principle should be fully applied, which would surely require WG not to route the motorway through their nest-site. The Precautionary Principle is enshrined in the existing EU Treaties, although the current UK Government have so far not included it in its proposals for post-Brexit legislation.

The UK is also a Party to two important international treaties on migratory species which cover *Grus grus*, the Convention on the Conservation Migratory Species (CMS) and its associated, and also legally binding Agreement on the Conservation of African-Eurasian Migratory Waterbirds (AEWA). The combined effect of these Treaties¹ for a species of acute conservation status such as *Grus grus* in Wales (one nesting pair) has not been properly recognised. The route for a new motorway should be planned to comply with the UK's treaty obligations, not to break them and then make mitigation proposals, which have a very mixed

¹ CMS and AEWA are completely independent of Brexit

record of delivery ², including mitigation attempted in the past to compensate for other modern development on the Gwent Levels. **The WG approach of destroying the only known nest site for this species in Wales to build a motorway is about as clear a breach of those obligations as could be imagined.** The fact that WG are offering mitigation via the provision of alternative nesting habitat is clearly insufficient when it is possible at this stage either to stop the road proposal or to amend its route to avoid the nest site.

That is a considered view after a review of the text of the Treaty documents, undertaken by an expert with unique, direct and senior experience of the implementation of CMS in the UK and the United Nations³. If the WG continues to believe and act otherwise, then it will be open to legal challenge as well as public disdain for taking such a reckless and unlawful approach to the UK's international obligations towards wildlife.

CPRW also believes these observations about the WG's proposals, which would destroy our unique and precious crane nest in Wales, reinforce the criticisms of the M4 Black Route already made by the Future Generations Commissioner for Wales.

² See extensive published literature on the limitations and failure of mitigation measures notably *Toward an Era of Restoration in Ecology: Success, Failures and Opportunities Ahead*, Katharine N. Suding Department of Environmental Science, Policy, and Management, University of California, Berkeley,

³ The writer was the senior UK Government officer formerly responsible for the implementation of CMS from 1991- 2000; a previous Chair of the CMS Conference of Parties and Standing Committee of Parties; and the senior United Nations director in charge of the administration of the Convention's Secretariat from 2004 until 2009.

Adran yr Economi a'r Seilwaith
Department for Economy and Infrastructure



Objection Ref OBJ0144

File Ref WG/REB/OBJ0144-4 – CPRW

Llywodraeth Cymru
Welsh Government

**Response to Objector's Evidence: The Campaign for the Protection of
Rural Wales**

1. GROUNDS FOR OBJECTION

1.1. Details

- 1.1.1. Peter Ogden and Victor Warren have submitted Statements of Evidence dated 6th February 2017 in relation to the draft statutory Orders associated with the Welsh Government's proposals for the M4 Corridor around Newport. The Welsh Government has published separate rebuttals to their evidence¹.
- 1.1.2. A further submission from Robert Hepworth for and behalf of CPRW has been received in correspondence dated 28 February 2018. The Welsh Government has published separate rebuttals to cover this further evidence².
- 1.1.3. An addendum to the further submission from Robert Hepworth outlined above has also been received in correspondence dated 2 March 2018.
- 1.1.4. The Welsh Government understands the evidence submitted within this latest Statement to be based on the following:
1. Concerns regarding the loss of the breeding site of the common crane (*Grus grus*) and mitigation;
 2. Implications of this loss in respect of the Convention on the Conservation Migratory Species (CMS) and its associated, and also legally binding Agreement on the Conservation of African-Eurasian Migratory Waterbirds (AEWA);

¹ WG-REB-OBJ0144-1 - Campaign for the Protection of Rural Wales (Peter Ogden)

WG-REB-OBJ0144-2 - Campaign for the Protection of Rural Wales (Victor Warren)

² WG-REB-OBJ0144-3 – Campaign for the Protection of Rural Wales (Robert Hepworth)

2. REBUTTAL

2.1. Points Raised

2.1.1. For ease of reference the places where the above points are addressed in this Rebuttal are listed in the table below:

Objector's point reference	Rebuttal paragraph reference
1	2.2.1
2	2.2.2

2.2. Simon Zisman (Ecology - Ornithology)

2.2.1. Response to **Point 1** (Concerns regarding the loss of the breeding site of common crane (*Grus grus*));

1. The impact of the Scheme on cranes was assessed in the Environmental Statement (ES) Supplement December 2016 (paragraphs 4.4.12 to 4.4.18). The assessment took account of survey findings reported in the 2016 Confidential Crane Report (Appendix SS10.8) and the proposed creation of alternative habitat at Caldicot Moor, included in the revised SSSI Mitigation Strategy also published as part of the December 2016 ES Supplement (as Appendix SR10.35).
2. For the impact assessment, cranes were assigned National (High) Value and a precautionary approach was adopted throughout. The residual impact of land take was assessed as significant in the short term, and it was acknowledged that the cranes may not necessarily colonise the new nesting pond at Caldicot Moor, and therefore even in the medium to long term, the potential predicted impact remained significant.
3. In order to reduce this impact, and to enhance the likelihood of the cranes colonising the alternative nesting areas, considerable further work has been undertaken to advance the mitigation proposals for the cranes. There has been constructive liaison with NRW and RSPB on this issue, and the Welsh Government has up-dated its proposals for crane mitigation. These are set out in the Bird Protection and Mitigation Plan, and comprise creation of crane nesting habitat at Tata and Newport Wetlands Reserve. Both had an advantage over Caldicot as suitable habitat would evolve more quickly, or is in place already.

4. Contrary to the assertion by Mr. Hepworth therefore, the Welsh Government has taken a precautionary approach in its assessment of the Scheme's impact on cranes, and has continued to progress mitigation measures for this species.
5. Specifically in relation to Mr. Hepworth's point on mitigation success, the techniques for the creation of wetland habitat for birds is well developed, with a number of specialist contractors providing design and implementation services, and a successful track record of large and small scale habitat creation projects by organisations including RSPB and the Wildfowl and Wetlands Trust. The habitat creation at the Newport Wetlands Reserve itself has for example, met its compensatory objectives according to the monitoring evaluation previously commissioned by NRW. The measures themselves, such as pond creation, visitor management, grazing management, screening with reedbeds, scrub, fencing or embankments (or combination thereof) are tried and tested in reserve management. There is no reason to believe therefore that the proposed pool and foraging prescriptions required for the crane mitigation areas cannot be successfully delivered.
6. It is acknowledged that the adoption of the alternative nesting areas by the cranes cannot be absolutely guaranteed. However, the provision of suitable nesting and foraging habitat, within the area already used by the cranes, has increased the chance of them doing so. In particular, provision of two separate locations for nesting pools adds to the likelihood of adoption; the Tata site (subject to confirmation of supplemental side roads and compulsory purchase Orders) and the Newport Wetlands Reserve (owned by Natural Resources Wales who support its use for mitigation). Furthermore, commitments have already been provided that works at both locations would be started in advance of construction, so that they are available for colonisation as soon as possible.
7. There are a number of commitments in the Register of Environmental Commitments (e.g. Commitments 138, 204, 205) that require Welsh Government to prepare the necessary detailed plans, to develop and manage the area for cranes, and in addition implement longer term management plans to ensure that the necessary mitigation is maintained. Those commitments require the involvement of NRW, RSPB, and others.

8. The final mechanism that has been added is the commitment to monitor the use of the mitigation areas by the cranes: specifically, as recorded in Commitment 187 the 'Bird Mitigation & Protection Plan will be prepared, agreed with NRW and RSPB' and (last bullet point) ' will include measures to *inter alia* 'Monitor the distribution and breeding success of cranes, to ensure mitigation measures have been successful in achieving the predicted mitigation benefits, and to inform remedial measures if these outcomes have not been achieved'.
 9. Through the development of mitigation measures for cranes, and through the associated commitments, the precautionary principle has been followed, and reasonable measures put in place to ensure the continuity of suitable nesting habitat for the cranes.
- 2.2.2. Response to **Point 2** (Concerns Implications of this loss of the current nesting site in respect of the Convention on the Conservation Migratory Species (CMS) and its associated, and also legally binding Agreement on the Conservation of African-Eurasian Migratory Waterbirds (AEWA));
10. The full title of the CMS is The Convention on the Conservation of Migratory Species of Wild Animals, and is more commonly known as the Bonn Convention. The CMS is an environmental treaty under the aegis of The United Nations Environment Programme, providing "a global platform for the conservation and sustainable use of migratory animals and their habitats".
 11. The United Kingdom has been party to the CMS since 1985. The fundamental principles of the CMS are found in Article II. Article II(1) states that the Parties acknowledge the importance of migratory species being conserved and of Range States (i.e. those countries through which migratory species pass or spend part of their lives) agreeing to take action to this end whenever possible and appropriate, paying special attention to migratory species the conservation status of such is unfavourable, and taking individually or in co-operation appropriate and necessary steps to conserve such species and their habitat. Further Article II(2) states that the Parties acknowledge the need to take action to avoid migratory species becoming endangered. Article II(3c) states that the Parties shall

endeavour to conclude agreements covering the conservation and management of migratory species included in Appendix II.

12. The common crane (“grus grus grus NW Europe”) is listed as a species in Appendix II of the CMS and has been listed as such since 1979. Species in Appendix II “cover migratory species that have an unfavourable conservation status and that require international agreements for their conservation and management, as well as those that have a conservation status which would significantly benefit from the international cooperation that could be achieved by an international agreement”. Given that the CMS encourages the parties to conclude global or regional agreements for the conservation and management of individual species or groups of related species (Article II(3c) and Article IV), the CMS is said to act “as a framework convention from which separate instruments evolve”. The object of each agreement shall be to “restore the migratory species concerned to a favourable conservation status or to maintain it in such a status” (Article V).
13. The Agreement on the Conservation of African-Eurasian Migratory Waterbirds (AEWA), to which CPRW refers, is one such agreement that has been made under the CMS. The UK is a contracting party to the AEWA (it being ratified by the UK in 1999).
14. The geographical scope of the AEWA encompasses the United Kingdom (see Annexe 1 of AEWA) and applies to the common crane (Annexe 2 of AEWA). The fundamental principles are contained in Article II of the AEWA :
15. Parties shall take co-ordinated measures to maintain migratory waterbird species in a favourable conservation status or to restore them to such a status. To this end, they shall apply within the limits of their national jurisdiction the measures prescribed in Article III, together with the specific actions determined in the Action Plan provided for in Article IV of this Agreement. (Art.2(1))
16. In implementing the measures prescribed in paragraph 1 above, Parties should take into account the precautionary principle. (Art 2(2))
17. Article III contains a detailed list of the general conservation measures. Parties shall identify sites and habitats for migratory waterbirds occurring

within their territory and encourage the protection, management, rehabilitation and restoration of these sites (Article III(2c)); coordinate their efforts to ensure that a network of suitable habitats is maintained or, where appropriate, re-established throughout the entire range of each migratory waterbird species concerned (Article III(2d)); investigate problems that are posed or are likely to be posed by human activities and endeavour to implement remedial measures, including habitat rehabilitation and restoration, and compensatory measures for loss of habitat (Article III(2e)).

18. The original Whitson SSSI designation (where the cranes currently nest and feed) did include migratory wildfowl and waders as qualifying features, but these were transferred to be features of the Newport Wetlands SSSI in 2010, following boundary changes. The Newport Wetlands SSSI therefore helps protect migratory waders and wildfowl, and would host the additional crane mitigation area.
19. In this case, there has been extensive investigation of the problems for the crane nesting site likely to be posed by the proposed line of the motorway via the ESS December 2016 (reflecting the arrival of the cranes during the 2016 breeding season), followed by extensive engagement with NRW and RSPB to work up remedial measures comprising compensation for loss of habitat in suitable locations nearby. The proposals for the pair of cranes currently nesting at the Tata site are detailed in the Bird Protection and Mitigation Plan.
20. The Action Plan is at Annexe 3 of the AEWA and is legally binding. That sets out specific actions required according to the level of populations (Table 1 of Annexe 3). Common cranes are a Category C species in this table, i.e. a species whose population number more than around 100,000 individuals but which could significantly benefit from international cooperation.
21. In terms of compliance with the AEWA there is a reliance upon self-reporting as a means of gathering the information necessary to review national implementation. Implementation is also monitored via a series of international reviews using information compiled from stakeholder responses, scientific literature and national legislation. In terms of cases

of non-compliance the Meeting of the Parties in 2008 established an implementation review process whereby the AEWA's Standing Committee may, "upon receiving information concerning human activities with adverse effects/potential adverse effects on migratory waterbirds or the habitat thereof, notify the party in whose territory these activities occur, request a response from this party, and offer to arrange an on-site assessment as a basis for recommendations". Information on possible cases of non-compliance may be submitted by NGOs; however the process under the implementation review is entirely voluntary and a party cannot be coerced into compliance. There do not appear to be any punitive measures for non-compliance with the AEWA itself.

22. Habitats on which cranes depend are, notably coastal and floodplain grazing marsh, reedbeds, lowland fens, ponds and open mosaic habitats on previously developed land. Through the survey and assessment of such habitats, and of the cranes (referred to at paragraph 19 above), the Scheme's impact on the cranes' habitat has therefore been fully considered.

23. Drawing on this information, the mitigation proposed comprises the creation of two alternative nesting ponds to the south of the Scheme. The first is in relative proximity to the current nesting location, and the second is within the Newport Wetlands Reserve, which given its designation features migratory wildfowl and waders, and the fact that cranes have been recorded in this Reserve at the start of the last three breeding seasons, indicate its potential suitability for this species. Mitigation proposals have therefore been formulated to reduce the risk of impacts from land take, construction and operation on this species and its habitats, taking account of the duties under the Environment (Wales) Act 2016, in turn, the requirements of the Bonn Convention and the Agreement on the Conservation of African-Eurasian Migratory Waterbirds. The measures are straightforward to deliver, and not technically demanding as noted above. Specifically, they comprise small scale excavation works, to create a small low nesting island, that has screening from disturbance.

2.2.3. I confirm that the statement of truth and professional obligations to the inquiry from my main proof still applies.

2.3. John Davies (Planning and Sustainable Development)

2.3.1. Mr Hepworth claims that the precautionary principle requires the Welsh Government not to route the new section of motorway through the cranes nest site. The precautionary principle is part of Welsh Government policy set out in Planning Policy Wales Edition 9 (PPW). Section 4.3 of PPW refers to the sustainable development principle established by the Well-being of Future Generations (Wales) Act 2015 and sets out how this principle is to be interpreted as part of the planning system. It states

2.3.2. “applying the precautionary principle. Cost-effective measures to prevent possibly serious environmental damage should not be postponed just because of scientific uncertainty about how serious the risk is”

2.3.3. As outlined by Dr Zisman above, the Welsh Government has applied the best scientific principles and current knowledge by working with NRW, the government’s advisers on environmental matters, and RSPB, the leading ornithological society, to establish mitigation proposals for the loss of the existing cranes’ nest site. These mitigation measures are specifically designed to address the impact of the published Scheme and draw on the experience of successful wetland creation elsewhere by organisations such as NRW, the RSPB and the Wildfowl and Wetlands Trust. It is not simply a repeat of mitigation carried out in the past to compensate for other development on the Gwent Levels. The mitigation proposed is a proportionate and cost effective response that would mitigate the impact of loss of the existing crane nest site, as required by PPW.

2.3.4. Mr Hepworth asserts that the mitigation is insufficient since the Scheme could be abandoned or the route amended to avoid the cranes’ nest site. This would not be a proportionate response or a correct application of the precautionary principle. It should be remembered that the line of the new section of motorway was reviewed and moved as far north as possible in 2006 to minimise impact on the SSSIs and Gwent Levels landscape. This illustrates how the numerous different considerations have been taken into account and balanced by the Welsh Government in the process of adopting the published Scheme. The approach adopted by Mr Hepworth of

abandoning the Scheme or moving the published line ignores the other considerations that need to be taken into account. The precautionary principle must be applied in a balanced manner that takes account of all relevant duties, legislative requirements and policies, together with the benefits and impacts of the particular development, in this case the published Scheme.

- 2.3.5. Mr Hepworth asserts that the loss of the crane nest reinforces the criticisms by the Future Generations Commissioner. These criticisms have been comprehensively addressed³. The Well-being of Future Generations (Wales) Act 2015 (WFG Act) does not require the environment to be given precedence. As I have explained in my evidence, all aspects of sustainable development must be considered as part of a balanced decision-making process. To move the road or abandon the published Scheme would fail to take account of its economic, social, cultural and environmental benefits and ignores the carefully designed mitigation proposals that would provide suitable replacement habitat for nesting cranes. I have considered the Scheme in the light of the WFG Act and conclude that the Welsh Government has acted according to its duties under the Act.
- 2.3.6. I confirm that the statement of truth and professional obligations to the inquiry from my main proof still applies.

³ WG/REB/ISU0024 & WG/REB/ISU0024-2