

## **RE: East West Rail 2 Inquiry**

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### **CLOSING SUBMISSIONS ON BEHALF OF NATURAL ENGLAND at Public Inquiry 11-12 April 2019**

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#### **Introduction and Summary of Objection**

1. These submissions set out Natural England's ("NE") case on ecological matters in respect of the EWR2 Order Scheme following the conclusion of the ecology session at the public inquiry on 11-12 April 2019. These should be read together with the written evidence (Suzanne Crutchley Proof of Evidence ("PoE") and the Updated Position Statement 9 April 2019 ("PS")) and in light of the oral evidence provided at the inquiry.
2. As explained at the inquiry, NE and Network Rail ("NR") have been and are continuing to exchange further information requests and ecological evidence to progress and, where possible, resolve NE's outstanding objections. Prior to the conclusion of the public inquiry, the parties intend to submit an agreed Statement of Common Ground and Issues. If progress has been made on any of the matters set out below NE will notify the Inspector and/or the Secretary of State of this.
3. At the outset NE wishes to reiterate that it does not oppose the EWR Phase 2 scheme in principle and wants the railway to be realised. However, we maintain an objection to the proposed Order Scheme on ecological grounds. At the heart of NE's objection is a concern that the true extent of unmitigated impacts of the proposed Scheme on important species and their habitats - particularly on bats, great crested newts, otter and badgers - may not be fully understood. Consequently, NE lacks confidence that NR's proposed ecological mitigation would be capable of resolving those impacts within the scheme as currently proposed.
4. On the information currently presented to the inquiry, the central issue is an inadequate understanding of the baseline position (i.e. the nature and extent of the protected ecology and how species are using the impacted area). Instead of

undertaking further surveys to inform the baseline position (most notably for bats, GCN and otter) NR has assumed, for the most part (although not in all cases) a “reasonably precautionary” approach (see ES 9.3.4) and proposed a suite of mitigation measures which it says is capable of compensating for the potential impacts which may arise under such an assumption.

5. The problem with such an overall approach is that it may mean: (a) the *actual* impacts on species and habitats are not properly understood; (b) it undermines the mitigation hierarchy – which requires NR to first avoid impacts before mitigating or compensating for them and (c) as a result of such an approach it is not possible (or certainly much more difficult) to compare results of post–development monitoring to a baseline to identify if mitigation measures are functioning as predicted, favourable conservation status (FCS) is being maintained and whether additional remedial measures need to be taken. For example, in the case of bats, the apparent paucity of roost survey coverage means that there is a limited baseline understanding of the bat populations in the Scheme Area and how they are using the wider foraging/commuting habitat. The lack of survey means that potentially important ecological features, such as hibernation or maternity roosts, may have been missed. For bats, as for other species, the mitigation proposed is non-specific and general in nature rather than targeted. NE thus currently lacks confidence that the mitigation would be capable of resolving those impacts within the existing scheme design and constraints. This is a concern which is shared by Buckinghamshire County Council and Aylesbury Vale District Council (“the Councils”))
6. These ecological concerns need to be addressed now, at the planning stage, before the outline design of the project, including environmental design and the provision of ecological compensation sites within the red-line boundary, becomes fixed. NR suggested at the inquiry that further survey to inform the ecological baseline and much of the detailed design of the ecological mitigation/compensation sites could be left over to a later stage, following the making of any Order to the discharge of planning conditions and the formal licensing stage. NR suggested in its cross-examination of NE’s witness (“XX”), that at that later stage, if it transpired that there

were unanticipated significant impacts NR would bear the risk of a species licence being refused or delayed. However, that is not a sound or appropriate way to approach the proceed. The reason for seeking NE's view at this juncture, prior to the making of the Order, is precisely to avoid a situation whereby the scheme is consented through the planning process but then cannot be delivered as planned because it is not possible to satisfy the licensing tests within the determined scheme boundary (Crutchley, XX).

7. NE has engaged in dialogue with NR's ecology team throughout the planning process (and continues to do so) in an effort to understand the ecological information that has been presented in the Environmental Statement ("ES") and Further Environmental Information ("FEI") and to narrow the areas of dispute (for example, hazel dormice and the impacts on Sheephouse Wood SSSI are now matters of common ground). It has, however, been challenging for NE to understand the ecological baseline for protected species (particularly for bats, GCN, and otter) and whether the impacts on the same can be mitigated where the baseline presented has been constantly shifting and the mitigation proposals altered through a piecemeal, drip-feed of strategy documents and data (PS1.3-1.5, most of which are not before the inquiry). Whilst, NE have been provided with a large volume ecological information there remain significant gaps in survey data and, in many cases, this data has not been presented in a transparent and easy to follow manner. Raw data and conclusions have, been presented without the corresponding analysis and justification for those conclusions.
8. NE's witness was asked repeatedly at the inquiry in XX about what information NE now requires. NE has through its Proof of Evidence, Position Statement, meetings with NR and recently through a series of detailed Further Information Requests in respect of the draft licence applications submitted by NR explained what further information NE needs to see before it can conclude there is no impediment to granting the requisite licences at the appropriate time; in some cases it has been requesting the necessary information for months. It may be possible through the provision of further information, the clarification and explanation of the existing data (e.g. bat radiotracking data, bat collision risk analysis) to overcome some (or maybe even all)

of NE's concerns (see, in due course, the Statement of Common Ground and Issues). However, until the matters below are addressed, NE is not in a position to issue a letter of no impediment and withdraw its objection in relation to the scheme.

## Legal Framework

### ***Legal test for removal of NE's objection***

9. The Supreme Court in R (Morge) v Hampshire County Council [2011] 1 WLR 268 addressed the distinct responsibilities of the planning authority and NE in considering ecological impacts on European Protected Species, where the determination of planning consent precedes the decision on whether to grant a species licence pursuant to the derogation powers under reg 55 of the Conservation of Habitats and Species Regulations 2017 ("2017 Regs").
10. The relevant question for the Inspector to consider in his report to the Secretary of State is whether the works to be authorised by the Order would be *likely* to be licenced by NE. That is based on the test laid down in Morge (see Lord Brown at [29]):  
*"Now, however, I cannot see why a planning permission (and, indeed, a full planning permission save only as to conditions necessary to secure any required mitigating measures) should not ordinarily be granted save only in cases where the Planning Committee conclude that the proposed development would both (a) be likely to offend article 12(1) and (b) be unlikely to be licensed pursuant to the derogation powers."*
11. In Morge NE had withdrawn its objection to a busway scheme having concluded that the proposal would not offend article 12 of the Habitats Directive. In those circumstances Lord Brown held that the planning authority was entitled to presume that the development complied with article 12 where that was NE's view. Unlike in Morge, NR accepts that the proposed development will offend article 12 for bats, GCN and otter. The test for the Secretary of State is whether or not it is unlikely (i.e. probable) that the licensing tests would be satisfied. It is accepted, as was put to NE's witness in XX, that the test is not whether it is "uncertain" that a licence could be granted. However, NE's substantial uncertainties regarding the baseline of existing ecology (particularly in the case of bats), the extent and nature of impacts and the

sufficiency and provision of compensation are relevant to its assessment of whether it is *likely* that a licence could be granted for the Order scheme as proposed.

12. The licensing tests in reg. 55 2017 Regs are familiar. NE cannot grant a licence unless it is satisfied that the licence is for:
  - (i) imperative reasons of overriding public interest;
  - (ii) that there is no satisfactory alternative to the proposed works; and
  - (iii) the action authorised will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range .
  
13. As the appropriate nature conservation and licensing body under the regulations, the Inspector should attach significant weight to NE's carefully considered objections and stated position that, on the current information, it is unlikely that it would grant the relevant species licences (see R (Prideaux) v Buckinghamshire CC [2013] EWHC 1054 (Admin), Lindblom J at [116]).

***Burden of proof?***

14. The task of the Inspector is to reach a conclusion on the likelihood of a licence being granted on the basis of all the available information currently before him.
  
15. NR has sought to introduce the concept of a "burden of proof" which it says lies with NE to demonstrate and bring forward positive reasons to show why the requisite licences are unlikely to be granted in the event that the Order is made (see NR 255; XX of NE's witness). Such a concept is unhelpful and inapposite in this context.
  
16. The Court of Appeal rejected the concept of a "burden of proof" in the context of assessing ecological impacts of a project which was likely to have significant effects on a protected European site (see R (Mynydd y Gwynt Ltd) v Secretary of State for Business, Energy and Industrial Strategy [2018] EWCA Civ 231, Peter Jackson LJ at [31]). As in that case, NR as the promoter of railway, must provide such information as the regulator (NE) and planning authority may reasonably require for the purposes

of the assessment to enable to determine whether a licence is required. Ultimately, it is for the Inspector to conclude on the balance of the expert evidence he has received from NE, NR and other parties whether the scheme as proposed is unlikely to be licensed.

17. In any event, and as set out below, NE has clearly explained in both its written and oral evidence why it considers it is unlikely that licences could be granted for the impacts on bats, GCN and otter.

## **Principal ecological issues**

### **Bats**

#### *Introduction*

18. It is common ground that the scheme as presented will have very significant impacts on bat species and bat habitats of principal importance (NR54 3.12.14-37). The scheme involves the reinstatement of large sections of a rural railway corridor which has mothballed for many years. As a consequence, the scheme and its wider area currently provides a substantial quantity of high quality linear commuting and foraging habitat for bats, including some of the rarest species in the UK. Without mitigation the scheme “will have a negative effect significant at up to a Regional scale” (ES 9.5.102).
19. As set out above, the key issue in respect of bats is in relation to the survey effort and the inadequate understanding of the ecological baseline position for bats (Crutchley PoE 6.2.15). This concern relates to (a) the roost survey and survey of the existing populations (PS 3.1.13-16) (b) the survey of foraging and commuting habitats and consideration of how local bat populations are using the existing habitat (PS 3.1.17-21); and (c) the inadequacies in the interpretation of the crossing point data and the risk of operational impacts considered against the baseline population (PS 3.1.22-33). Due to the current insufficiency of baseline information, NE cannot be

confident about the adequacy of the proposed mitigation strategy for bats and is not able to conclude, when the impacts on bats are considered as a whole, that it is likely that bat licences could be issued (PS 3.1.60). Indeed, Dr Wray herself stated in XIC that she accepted that NE “could not issue a bat licence today”, although in her view she considered NE would be able to do so in future.

20. NE’s objection on the bat issue is supported by the Councils who share the view that a bat licence is unlikely to be granted under the reg. 55 tests. The Councils’ evidence is that the information before the Inspector on the baseline position for bats is inadequate and that the proposed mitigation cannot be said to maintain the favourable conservation status of the species (including for the rarest species of bat) (Dr Cox PoE paras. 4.12-4.14, 4.23-4.32, 5.18-5.27).

#### *Inadequacies in survey effort*

21. The importance of surveys lies in establishing an adequate baseline for being able to predict what the *actual* impacts of the proposed development will be. This is in order to avoid such impacts and where that is not possible to mitigate and/or compensate for those impacts in a targeted way to the requisite extent and in the right locations. A precautionary approach which assumes a certain bat presence and proposes a generic range of mitigation strategies based on those assumptions is not a substitute for sufficient survey which show what the actual impacts will be and therefore enable the right mitigation to be targeted in the right places (Crutchley PoE, PS).
22. NE recognises the practical constraints on carrying out survey in a scheme of this nature. Contrary to the suggestions put by NR to NE’s witness in XX, NE is not seeking a complete survey effort or a counsel of perfection. The adequacy of the survey effort is a question of degree which must be commensurate to the quality of the ecological features impacted (here a Regional assemblage of bats containing some of the rarest species in the UK, NR54 5.1.4). There is a conflict of expert opinion – Dr Wray for NR considers the survey effort is adequate and typical of this stage in the planning process for a scheme of this nature (XX), Ms Crutchley and Dr Cox consider that it is not (by

reference to both best practice guidance and their professional experience of nationally significant infrastructure projects) (XX). For the reasons elaborated on below, the Inspector is invited to prefer the evidence of NE and the Council's witnesses.

*(a) Roost surveys*

23. NE considers that NR has failed to provide adequate roost survey to inform the baseline (Crutchley XX survey effort "way below what would normally be expected" for comparable infrastructure scheme; Cox XX). In particular:
- i. Large sections of the Scheme area are completely unsurveyed. For example, for two of the most important route sections 2A and 2B (NR54 5.1.4), the unsurveyed area (i.e. the area where no preliminary roost assessment has been carried out) accounts for nearly half and two thirds of the route area respectively. (This paucity of even basic survey coverage is most readily apparent from the draft licence documents provided to NE which are not before the inquiry). Where such large areas of potentially critical habitat are un-surveyed, NE would expect a clear justification for the absence of survey and clear evidence from NR that all reasonable steps to obtain access and complete the preliminary survey had been taken. NR's explanation for its lack of survey is inadequate. In some cases the lack of survey is (as is to be expected) attributed to no land access being given. However, where NR's failure to survey is due to landowners not having been identified (so-called "white-land") or where it has failed to arrange access with known landowners to conduct the necessary survey work, before bringing forward the Order scheme, that has not been adequately explained or justified;
  - ii. Even where there has been preliminary roost survey and potential roost features have been identified the surveys on some of those features are incomplete. For several features there has been no characterisation survey to ascertain the type and conservation status of the roosts. In other cases, where roosts identified by radio tracking these have not been followed up by emergence and re-entry surveys (PS 3.1.14).

24. Consequently, NE considers that there is an incomplete baseline understanding of the bat populations, the size of particular populations, what species of populations are located where along the line and how they are using the existing railway corridor, what the home ranges of identified maternity colonies are and which areas of vegetation are of greatest value to the existing populations. Given the lack of survey clear analysis and interpretation of the data, it is not possible to know whether the avoidance and mitigation measures can be targeted in the right places to ensure FCS.
25. NR accepts that its survey effort is “partial” and incomplete (e.g. ES 9.4.77; Wray XIC “would have better to have comprehensive [survey] information] but that is not possible), however it maintains that the survey level is sufficient in the circumstances. NR contends that the gaps in the survey data can be overcome in two ways (a) by undertaking further survey in future to continue to inform its baseline and its mitigation proposals (NR’s Strategic Bat Mitigation Approach para. 3.5.1, quoted at PS 3.1.15) and (b) by the fact that it has adopted a “reasonable precautionary approach” in the unsurveyed areas and assumed a certain bat presence there. NR says it could mitigate for this reasonably precautionary assumption within red line boundary and therefore it does not matter that the baseline survey is lacking at this stage.
26. A reasonable precautionary approach is not, by definition, the same as a worse case scenario. It assumes a likely ecological scenario. A worse case scenario would require NR to assume that every suitable roosting feature contains the roosts of the rarest species. That is not the assumption which has been applied here (Wray XIC, “it is not inconceivable that an important bat colony could be found...but there won’t be hundreds throughout the un-surveyed areas”).
27. In terms of further survey, NE’s view is that such survey is likely to be necessary now to fill substantial gaps in a baseline which is not yet fully understood. NE does not expect NR to carry out complete survey but considers there needs to be more survey at this stage to understand the actual impacts that are likely to require a licence.

28. The reason why a reasonable survey effort is required in the first place is that a reasonable precautionary assumption for the large un-surveyed areas, is inherently limited. What such a high level precautionary approach cannot demonstrate is what actual impacts are likely to occur, for which bat populations, whether there are maternity/hibernation roosts present (see ES 9.5.83), for which species and where along the scheme roosts exist. If it were possible (which is not suggested by NR) simply to rely on a reasonable precautionary approach then there would be no need for actual survey at all. That is why the adequacy of the survey effort and justification of the data gaps matters. Whilst a precautionary approach can help inform the generic mitigation proposed what it does not do is enable adequately targeted mitigation, which needs to be specifically adapted to different roosts types for different bat species with different behaviours, in the places where the bat populations actually are. This is important for licensable and unlicensable impacts.

29. NR's particular "precautionary approach" assumes, at a high level, the presence of moderate numbers of roosts for common species and small numbers of roosts of rarer species. Most of the assumed roosts are treated as being of low conservation significance, with some of higher significance (ES 9.4.80). Besides a few general paragraphs in the ES which describe the "reasonable precautionary approach" (ES 9.3, 9.3.70-73, 9.5.82-84, 9.5.106-9.5.111), a proper explanation of the rationale behind NR's precautionary assumptions, the professional judgements applied to the likely bat presence and the sampling strategy (if there is one) and the sufficiency of the sample (for example, for trees) is lacking (Crutchley XIC). This makes it difficult to understand the likely presence of bats in the scheme area.

*(b) Commuting and Foraging habitat*

30. In addition to the lack of roost survey, NE considers that NR has provided insufficient information, in a clearly explained form, to enable it to understand the impacts of the de-vegetation of key commuting and foraging habitats and the direct and indirect

disturbance impacts that could have on bats on their roosts (see ES 9.5.97) (PS3 3.1.17-3.1.21).

31. Once again, it is necessary to have an adequate understanding of the baseline bat populations in order to ensure that sufficient, targeted mitigation and/or compensation can be provided within the red-line boundary. Given the loss of vegetation in what are likely to be key foraging and commuting areas for local bat populations (NR54 5.1.4), NR has not yet demonstrated that proposed mitigation will be sufficient to maintain FCS (PS 3.1.43). In particular, NE is concerned that it is not clear how the generic proposed mitigation measures tie up or apply in the locations of the most critical foraging and commuting habitats. Nor have NR clearly shown that alternative flight paths have been identified in areas where there will be complete vegetation loss. Whilst NR maintain that vegetation will be in place at all times on one side of the railway corridor, NR has not demonstrated clearly and convincingly how this connecting provision will be secured in key areas. Replacement planting could take several years to mature and in these areas there will potentially be a temporary period in which FCS could be negatively affected (Crutchley PoE, 6.2.52-6.2.56).

*(c) Operational impacts*

32. In assessing the scheme's overall impacts on FCS, the mortality risks to bats from operational impacts need to be adequately understood against the baseline of existing bat presence within the scheme area (which is currently inadequate, see above).

33. Survey on crossing points took place during one year in 2018. NR aimed to survey four times between April – Sept but did not fulfil that aim. As a result, NR accept that bat foraging behavior, which requires crossing the railway line, may have been under-recorded (NR 54 3.12.7).

34. NR's conclusion on the collision risk to *Myotis* bats has shifted. In the ES, NR indicated that without mitigation, the operational collision impacts "would be significant at a

Regional scale” and that this could be reduced to a “Local or County scale” with mitigation, even though the efficacy of the proposed mitigation to address these adverse impacts is “unproven” (ES 9.6.45-46). Dr Wray’s PoE concluded that the impact on Myotis bats would be “at a population level” but that this could be reduced to an “incidental level” with mitigation (NR 54 3.12.36). In oral evidence Dr Wray stated her revised view that the operational impacts on bats would be “incidental” with or without mitigation.

35. NE’s point is that this conclusion has not been properly justified. At the stage when NE gave evidence at the inquiry NE’s witness had only seen the raw crossing point data. Without any meaningful collision risk analysis to explain NR’s conclusion it is not possible to know how that conclusion has been reached and whether it is robust. The crossing point data (and therefore the collision risk) has not been mapped against the actual baseline presence of bat roosts and bat populations and thus the operational impacts are not understood in their proper context. The presentation of the raw data is illustrative of NR’s wider failure to present (what may be sufficient ecological information) in a clear, transparent manner.

36. Since the ecology session, NE has had the opportunity to review a Collision Risk Analysis (CRA) which it has requested for some months and which NR provided to it on 8 April 2019. Unfortunately this has not (yet) addressed NE’s objection. NE continues to struggle to understand the information which has been presented and the conclusions drawn from it. At the inquiry NR offered to meet NE to explain its CRA in order to justify its revised conclusion that the impacts will be incidental, with or without mitigation (Dr Wray XX). Whilst such a meeting is welcomed, it will need to address the NE’s concerns set out in its PoE 6.2.32-33 and PS 3.1.22-33 before NE can withdraw its objection on this point.

#### *Conclusion on bats*

37. Until each of these concerns has been addressed, individually and collectively, it is unlikely that NE could conclude that FCS for all the bat species will be maintained and unlikely that a bat licence could be granted.

## Great Crested Newts

38. NE's main concern in respect of GCN relates to the adequacy of the (a) impact assessment and (b) the sufficiency of compensation to be provided in the ecological compensation sites ("ECS") for the potential impacts on GCN. Generally, in respect of the ECS, NE considers:

- there is a lack of detail about the existing ecological quality, condition and functioning (in terms of the location and relationship to the known populations) of the proposed ECSs;
- there is a lack of information about the functional connectivity of the ECSs;
- there remain significant uncertainties about the final size and/or shape of certain ECSs (and what alternatives are proposed) which could affect the overall compensation provision (PS 3.2.18).

39. NE's most pressing concern is with Route Sections 2D and 2E where the cumulative impacts of other proposed developments on the GCN metapopulations have not been fully considered in the impact assessment (PS 3.2.7). As a result, NE cannot be confident that proposed quantum and location of compensation on these route sections is sufficient (PS 3.2.2, 3.2.6, 3.2.9).

40. In terms of the calculation of overall losses and gains for GCN habitat for the proposed scheme, this calculation needs to take into account the existing suitability of the proposed compensation habitats for GCN (and therefore the extent to which the sites are, in fact, additional and compensatory), their location and distance from known GCN metapopulations and the extent to which ECSs are able to maintain connectivity throughout the landscape. At present, such information is missing.

41. NR has said it intends to recalculate the overall losses and gains for GCN habitat for the proposed scheme (in XX of Ms Crutchley). Clearly, its calculation of a net gain of 33 ponds (NR 54 3.6.26) is no longer correct and has been superseded. However, an overall scheme-wide calculation of net gains/losses is not the only or even the most

relevant consideration when considering whether it is likely that the GCN impacts could be licensed. More relevant is whether adequate compensation is provided for the impacts on the various metapopulations in each of the different route sections.

42. On the basis of the information currently provided, NE is not satisfied that an appropriate quantity of terrestrial compensation habitat has been provided in Route Sections 2D and 2E (PS 3.2.14). Due to the fact that the permanent and terrestrial habitat losses have not been mapped by NR, it is not possible to see how significant some of the impacts to meta-populations will be and how the proximity of the optimal new habitat relates to the location of the known populations. Without such information it is not possible to conclude that the compensatory habitat in these areas is sufficient or located in the right places.
43. It is acknowledged that Route Sections 2A and 2B perform better in terms of the provision and appropriateness of the location of ECSs but even here further clarity on impacts and habitats is required (see PS 3.2.15).
44. These are not mere points of detail or a counsel of perfection. Establishing that sufficient compensatory habitat can be provided in the right locations is necessary to meet the licensing tests. This is particularly so in circumstances where NR wishes to make use of NE's Licensing Policies which allow for a reduction in the trapping, capture and exclusion effort but only provided a benefit to the conservation status of GCN can be demonstrated. NE is not satisfied that on the evidence before the inquiry that such a benefit has been demonstrated.
45. In XX, Ms Crutchley provided some specific examples of ECS (specifically ECS E4, B26, D3) where the level of provision and choice of location did not appear to be justified given the proposed impact on local GCN populations (in XX and 3.2.12, 3.2.16, 3.2.18). Those were examples only and do not represent the entirety of the NE's concerns about the sufficiency and landscape design of the compensation for GCN which go far wider than those individual sites. Those detailed concerns have been set out in a Further Information Requests to NR.

46. In XX of Ms Crutchley, the suggestion was made that NE should have raised its objections in respect of specific ECS earlier when first presented with proposals for EWR 2 in July 2018. In fact, NE did raise an objection on the sufficiency of GCN compensation during consultation. At that stage NE had not been provided with the detail to comment on specific ECSs and the overall robustness of the compensation provision since the majority of survey results for GCN were not presented until November 2018.

47. NE is not suggesting that NR must provide, at this stage, full detailed design of every ECS. However, NR's approach to its compensation strategy is flawed. Essential baseline information about the impacts on GCN and the suitability (both in terms of quality and quantity) of the compensatory habitat is lacking and needs to be provided now. It would not be reasonable to leave over such matters to after the Order is made as there is then a risk that the compensation will not be capable of delivery in the right locations once suitable alternative compensation sites have been excluded from consideration and are no longer available. Overall, NE lacks confidence that the suite of ECSs proposed for this purpose will be able to adequately mitigate for the impacts on GCN. On that basis, NE is not able to say that it is likely to grant a licence for GCN (Crutchley XIC).

#### *Moco Farm alternative proposal*

48. NE considers that the Moco Farm proposal (NR 238) – which would substitute ECSs B9, B10 and B17 for B28 – is problematic for the reasons set out at PS 3.2.24-25.

49. NE is not alone in this view which is shared by the Councils (Cox PS 3.21) and NR (Wray rebuttal NR 54/1 para. 1.1.11 in which Dr Wray notes that B28 is over 2km from affected GCN populations and disease screening would be required – making this “a less desirable solution than ECS B10).

50. The Moco Farm proposal illustrates the wider problem with the ECS strategy for GCN, which on close review, is less than robust. It evidences real difficulties in ascertaining the sufficiency of the the quantum of compensation provision, how what is being proposed relates to other ECSs and known metapopulations of GCN and the actual deliverability of the ECSs which are proposed.

### **Water Vole**

51. NE have raised concerns around water vole and the lack of clarity in relation to the applied methodology for water vole habitat surveying (PS 3.4). NE have, to date, maintained an objection on those grounds.

52. If NR are able to formally address NE's methodological queries then NE expects to be in a position to withdraw its objection in relation to water vole.

### **Otter**

53. In the case of otter, the problem once again is with the adequacy of the baseline survey information. Where suitable habitat has been identified within the red-line boundary that requires more than a single survey in line with good practice (PS 3.3.4-5). This is required in order to demonstrate that the impacts on otter can be avoided and/or mitigated in the right areas.

54. NE sent a Further Information Request in respect of otter on 16 April 2019 which sets out the detail of the objection outlined in PS 3.3.3-3.39. NR will need to demonstrate that the mitigation hierarchy can be followed under its proposal and/or provide ecological justification for the current level of survey provided. Unless that information is provided, further otter survey will be required. Until such time as the points in the further information request are addressed, NE cannot say that it is likely that a licence would be granted for the impacts.

### **Badger**

55. NE has received an initial disease risk assessment by the Animal and Plant Health Agency in respect of badgers which does not rule out disease risk as a result of the proposed sett closures. Before NE is able to conclude it could licence the Order scheme's extensive impacts on badgers the following points must be addressed: (1) confirmation that an artificial sett can be located within the corresponding social group's territory in Route Section E within the red-line boundary (or a suitable equivalent alternative sett can be provided) (2) missing bait marking results for route section 2B must be provided (3) NR must provide a written commitment that suitable mitigation can and will be provided where required as informed by the disease risk assessment (this includes a commitment to enable vaccination of badgers, the ability to advise landowners of relevant biosecurity measures and place the necessary artificial setts in the territory of the existing social group).

56. NR again contends that these are points of detail and that the provision of the artificial sett in route E can be the subject of detailed design at later stage (XX Crutchley). However, NR needs to demonstrate, at least in outline terms, that an artificial sett could be delivered is capable of delivery (in engineering and design terms) within Route Section E now. If this is left over to the post-Order stage it may not be possible to accommodate the artificial sett in the right location.

57. NR indicated at the inquiry that written assurances on the sett location and the survey results could be provided to NE. Until NE receives written confirmation of the satisfactory results of the bait marking and specific assurance that the mitigation for sett losses can be accommodated within in Route Section E, it is not in a position to remove its objection in relation to badgers.

### **Net Gain**

58. It is now common ground that the scheme is to achieve a biodiversity net gain of 10% using the Defra metric 2.0 (NR 207).

59. That reversion to the original proposal in 2017 is welcomed by NE. It will need to demonstrated that the delivery of the net gain target, within a reasonable time frame,

can be secured by planning condition. Draft condition 11 (NR 256), which will be subject to further discussions, will be need to be revised to secure the timely delivery of the Net Gain commitment made by NR.

### **Enforcement and Safeguarding mechanisms**

60. Given the magnitude and long term nature of the impacts on protected species, there will need to be adequate safeguarding measures put in place to monitor, maintain and manage the compensation measures, and in particular the ECSs, for all impacted species. Draft planning condition 11 (NR 256) and the requirement at (a) for an ecological management plan is a starting point but the draft condition requires amendment in line with NE's written submission on condition 11. One of NE's primary concerns is that the current draft condition does not sufficiently engage NE, as the specialist conservation body, with the requisite expertise, in the monitoring and enforcement of the safeguarding measures. There was a suggestion during NR's XX of NE's witness that provision could be made for a form of reporting obligation to NE as part of the ecological condition. However, that has not materialised and, as things stand, it is not clear whether or how NE's involvement in the ongoing monitoring and environmental management of the Order scheme, which includes unlicensable ecological impacts, is to be secured and enforced.

61. NE considers that a more conventional and effective approach in a scheme of this nature and complexity would be to require a route wide agreement between NR (and successor land owners) and NE under the Natural Environment and Rural Communities Act 2006 to make detailed provision for safeguarding the habitat compensation.

### **Conclusion**

62. NE respectfully asks the Inspector, and in turn the Secretary of State, to have regard to its concerns in deciding whether or not to make the Order and if so in what form. NE is aware of the practical effects of Order being refused. However, NE can only base

its judgement on whether the scheme should be consented in its current form on the information available to it and the Inspector at this point in time.

63. The most challenging aspect of the proposal relates to the inadequacies of the baseline survey, particularly for bats for which NE considers that insufficient information and analysis has been provided in relation to roosts, populations, foraging and commuting activity. That may be capable of resolution but possibly not without undertaking further survey work and potentially reviewing the scheme proposals to ensure that adequate mitigation can be provided in the right places.

64. NE's position is that on the information currently before the Inspector the scheme should not be permitted as proposed. NE's expert view is that it is unlikely, on the basis of the the current information before the inquiry, to grant licences for the proposed scheme's impacts on bats, GCN, and otters and until such time as requisite information and assurances are received NE also maintains its objection on badgers. NE will keep the Inspector (and Secretary of State) updated if the position changes (whether before the the conclusion of the inquiry, the publication of the Inspector's report or the Secretary of State's final decision).

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**26 April 2019**