



Natural Resources Wales
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To the Board Members and Chief Executive Officer of Natural Resources Wales

Re Black Brook Pastures Site of Special Scientific Interest

INCC has serious concerns with the way Natural Resources Wales (NRW) considered and responded to the proposed development of 6 holiday pods and associated works (including the formation of access tracks and installation of a sewage treatment plant) in Upper Dolau, Nantmel, Llandrindod Wells LD6 5DY (Planning Reference no. 18/0967/FUL), situated within the Black Brook Pastures SSSI (the Application).

Whilst INCC understands the Application has now been withdrawn, it nonetheless considers it prudent to raise these concerns with NRW, particularly as NRW may be minded to take a similar approach to other planning applications in the future.

INCC has sought legal advice on this matter and counsel has advised that, for the reasons given below, there is a real risk that NRW has acted unlawfully in its response to the Application.

NRW's Response to the Application

INCC is concerned that NRW did not maintain an objection to the Application, notwithstanding that it would cause loss and damage to the SSSI¹ and its protected features.

In NRW's initial response to the Application, dated 15 March 2019 (NRW Ref: SO32/GB/CAS-72794-G9J5), NRW stated that it had "significant concerns" with the proposed development and that it would object unless three requirements were met and various conditions imposed.

The first requirement was that a construction method statement (CMS) be agreed in consultation with NRW. NRW noted that the underlying Ecology report submitted by the applicant had recognised that "it will be difficult to avoid causing damage to the neutral/acid grassland SSSI features" and that "[t]he development will result in a small loss of some acid and neutral

¹ The SSSI was notified on 8 November 2018 and this was subsequently confirmed, subject to a small deletion at the southern end of the site, on 25 July 2019.

grassland which is a SSSI feature”. This led NRW to require that the CMS detail *inter alia* how construction would be undertaken “to minimise damage” to the swards on site. The CMS (subsequently accepted by NRW in its consultation response, dated 20 May 2019²) set out “how construction including excavation works will be undertaken to ensure that the damage to SSSI features during the construction period is kept to a minimum”³ (para 1.3). But it provided no guarantee that damage/loss to the SSSI features would be avoided altogether, nor did NRW seek any such guarantee.

The second requirement was that a Site Management Plan (SMP) be submitted, but NRW stated, in this regard, that:

Inevitably there will be some loss of neutral or grassland as part of the construction. The remainder of the SSSI should be managed in a way which compensates for this loss, and the best location for this is the area of land to the north of the Type A pods which is also within the SSSI boundary. This area contains a mosaic of semi-improved grassland and neutral and acid grassland. This should be detailed [in] this plan i.e. we are seeking compensation for the development impacts.

The SMP (also accepted by NRW) simply stated (at para 2.5) that:

An area, approximately shown in green on the attached plan will be agreed with NRW for compensation management due to loss of habitat from this development. The management of this area will be aimed at encouraging the spread and development of a more species-rich sward in this area.

What is not clear to INCC is whether the proposed “compensation” would have fully outweighed the expected loss/harm to the SSSI features caused by the development (both at the construction and operational phases).

Furthermore, the more recent “Report on the notification of a SSSI under Section 28 (1) of the Wildlife and Countryside Act 1981 as amended” prepared by a Senior Conservation Officer of the Radnorshire NRM Team, has not allayed INCC’s concerns. It states (at paragraph 9.8):

Officers have worked with the owners to try to minimise the impact of the development on the SSSI grassland features and to seek mitigation. We are trying to seek translocation of any species rich turf from impacted areas onto areas of disturbed ground created where the owners removed all scrub from this area prior to SSSI designation. Officers consider that it is crucial that this area remains within the SSSI to best safeguard what remains of the SSSI feature if and when the development is granted planning permission and implemented.

INCC can see no guarantee from this statement that NRW was satisfied that there would be no net loss to the SSSI features as a result of the development.

² NRW Ref: SO32/GB/CAS-84829-Z2L3.

³ Emphasis added throughout.

Unlawfulness of NRW's Response

Overall, INCC seeks clarification from NRW as to whether it withdrew its conditional objection to the Application (see further consultation response, dated 20 May 2019) notwithstanding that the development would cause net loss/harm to the SSSI features.

If NRW concluded that there would be net loss/harm to the SSSI features but nonetheless failed to object to the Application, INCC considers it to have acted in breach of a number of statutory duties, as specified below.

If, on the contrary, NRW concluded that the proposed development would not have caused net loss/harm, INCC requests that NRW explain in detail how it reached this conclusion. It is far from clear – using publicly-available documentation – how the compensation measures proposed in the SMP could outweigh the recognised loss to SSSI features that would be caused by the proposed development. In particular, did NRW have regard to the inherent risks and uncertainties associated with the proposed “translocation of any species rich turf from impacted areas...” referred to at para 9.8 of the Officer’s Report?

Statutory Duties

Section 28G, Wildlife and Countryside Act 1981

Section 28G of the Wildlife and Countryside Act 1981 (WCA) provides that NRW, acting as a “public body” (s28G(3)(f)) in exercising its functions so far as their exercise is likely to affect the flora, fauna or geological or physiographical features by reason of which a SSSI is of special interest:

...shall have the duty...to take reasonable steps, consistent with the proper exercise of [NRW'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.

In R (oao Friends of the Earth) v The Welsh Ministers [2015] EWHC 776 (Admin) Hickinbottom J (as he then was) considered this duty, noting in that case that it was “rightly” common ground that “conserve and enhance” includes “not damage” the features (para 133).

It follows from this that section 28G requires NRW to take reasonable steps not to damage SSSI features through the exercise of their functions. Where a development proposal would result in damage, or a net loss, to SSSI features, NRW must object to that proposal. To do otherwise would fall foul of breaching the duty. It would be unreasonable to accept avoidable damage to the SSSI features in a context where NRW is under a duty to further that SSSI’s conservation and enhancement.

INCC requests clarification from NRW as to if/how it considered the section 28G duty in responding to the Application. If NRW considers that it has complied with the section 28G duty, INCC requests clarification as to why NRW takes that view.

Article 4, Natural Resource Body for Wales (Establishment) Order 2012

Following section 5 of the Environment (Wales) Act 2016 (EWA), NRW must operate in compliance with its revised “general purpose” set out in article 4 of the Natural Resource Body for Wales (Establishment) Order 2012 (2012 Order). This states that NRW, in the exercise of its functions (so far as consistent with their proper exercise) must:

- (a) pursue sustainable management of natural resources in relation to Wales; and*
- (b) apply the principles of sustainable management of natural resources*

Section 3 of the EWA defines “sustainable management of natural resources” as meaning *inter alia* taking action that promotes (and not taking action that hinders) the achievement of the objective to “maintain and enhance the resilience of ecosystems and the benefits they provide”.⁴

Furthermore, section 4 of the EWA specifies that the “principles of sustainable management of natural resources” include:

- (f) take account of the benefits and intrinsic value of natural resources and ecosystems;*
- (g) take account of the short, medium and long term consequences of actions;*
- (h) take action to prevent significant damage to ecosystems;*
- (i) take account of the resilience of ecosystems, in particular the following aspects-*
 - (i) diversity between and within ecosystems;*
 - (ii) the connections between and within ecosystems;*
 - (iii) the scale of ecosystems;*
 - (iv) the conditions of ecosystems (including their structure and functioning);*
 - (v) the adaptability of ecosystems.*

The article 4 duties further support the section 28G duty. If NRW considers that a proposed development would result in loss/harm to SSSI features, it should object to it in order to “take action” to maintain and enhance the resilience of the SSSI ecosystems. Were it to not object to such a development, there is a real risk of it breaching its duties under article 4 by essentially acting in a way that hinders achieving the objective of maintaining and enhancing the resilience of those ecosystems (and, thereby, failing to “pursue sustainable management of natural resources in relation to Wales”). Furthermore, in considering whether or not to object to such a development, NRW must actively have regard to the factors listed in section 4 of the EWA.

INCC requests clarification from NRW as to if/how it considered its duties under article 4 of the 2012 Order when responding to the Application. If NRW considers that it has complied with the article 4 duties in its consideration of the Application, INCC requests clarification as to why NRW takes that view.

Section 6, Environment (Wales) Act 2016

⁴ And, in so doing, to (a) meet the needs of present generations of people without compromising the ability of future generations to meet their needs and (b) contribute to the achievement of the well-being goals in section 4 of the Well-being of Future Generations (Wales) Act 2015 (anaw 2) (see section 3(2) EWA).

NRW will be well aware of the biodiversity and resilience of ecosystems duty in section 6 of the EWA. This replaced and enhanced the duty in section 40 of the Natural Environment and Rural Communities Act 2006 (which had only required NRW to “have regard” to the purpose of conserving biodiversity). Section 6 requires NRW, as a public authority to “seek to maintain and enhance biodiversity in the exercise of functions in relation to Wales, and in so doing promote the resilience of ecosystems, so far as consistent with the proper exercise of those functions”. The Explanatory Notes to section 6 clarify that the duty requires public authorities to exercise their functions “in a way that aims to improve and not reduce biodiversity and that in doing [*sic*] they must seek to further the resilience of ecosystems”.

INCC has real concerns that NRW failed to comply with this duty in its response to the Application, in which it seemingly accepted that loss/harm to the SSSI features would result. Where there was a real risk of damage to the SSSI features, NRW should have objected to the application.

Again, INCC requests clarification from NRW as to if/how it considered its section 6 duty when responding to the Application. If NRW considers that it has complied with the section 6 duty in its consideration of the Application, INCC requests clarification as to why NRW takes that view.

Planning policy

In addition to INCC’s concerns that NRW breached the statutory duties referred to above, INCC is also concerned by NRW’s failure to consider and comply with relevant national planning policy on the management and protection of SSSIs.

NRW failed to cite *any* of the relevant planning policies in its consultation response to the Application, nor appropriately apply them. Most notably, NRW failed to consider relevant paragraphs of Planning Policy Wales, including the presumption against development likely to damage SSSIs set out in paragraph 6.4.17 and the “step-wise approach” to maintaining and enhancing biodiversity and building resilient ecological networks set out in paragraph 6.4.21.

The latter (paragraph 6.4.21) places a burden on local planning authorities to be satisfied that any “reasonable alternative sites” that would result in less harm/no harm or gain have been fully considered before accepting harmful environmental effects from development (sub-paragraph 1). Furthermore, “offsite compensation for unavoidable damage” must be sought but only when “all other options have been exhausted, and where modifications, alternative sites, conditions or obligations are not sufficient to secure biodiversity outcomes” (sub-paragraph 4).

In stark contrast to this approach, NRW’s consultation responses regarding the Application sought “compensation for the development impacts” (through the SMP) without first considering if any reasonable alternative sites were available, nor prompting the planning authority to do so. INCC, therefore, seeks clarification from NRW as to if/how it considered the PPW when responding to the Application. If NRW considers that its approach to the Application complied with the PPW, INCC requests clarification as to why that is so.

Furthermore, in TAN 5, national policy provides at 5.4.4 that:

The Assembly Government expects all section 28G authorities, including local planning authorities, to:

- apply strict tests when carrying out functions within or affecting SSSIs, to ensure that they avoid, or at least minimise, adverse effects;*
- adopt the highest standards of management in relation to SSSIs which they own; and*
- as owners, or otherwise, take positive steps, wherever possible, to enhance the special interest features of a SSSI where their activities may be affecting it, or where opportunities arise in the exercise of their functions.*

INCC considers that NRW failed to apply any such “strict tests” to ensure that, in carrying out its functions affecting SSSIs, adverse effects were avoided where possible. INCC also seeks clarification as to whether NRW considers it took any positive steps to “enhance” the special interest features of Black Brook Pastures SSSI and, if so, how.

In addition, in relation to the Application specifically, policy DM2 of Powys County Council’s Local Plan 2018 provides:

...Development proposals likely to have an adverse effect on the conservation value of national protected sites, habitats of species, either directly, indirectly or in combination, will only be permitted where it can be demonstrated that:

- i. The proposal contributes to the protection, enhancement or positive management of the site, habitat or species; or*
- ii. There is no suitable alternative to the proposed development; and*
 - a) It can be demonstrated that the benefits from the development clearly outweigh the special interest of the site, habitat or species; and*
 - b) Appropriate compensatory measures are secured; and*
 - c) The population or range and distribution of the habitat or species will not be adversely impacted.*

NRW fails to cite to DM2 in its consultation responses. INCC requests clarification from NRW as to whether it considered DM2 and, if so, how it did so – particularly having regard to the requirement in DM2(ii) that the proposed development should only be permitted if there are no suitable alternatives.

Protected species – Otters

Finally, INCC has concerns over NRW’s consideration of the Application’s impacts on protected species and considers it appropriate to also raise these with NRW by way of this letter.

In particular, Otters are listed in the SSSI citation as frequenting Black Brook and the ecology assessment underlying the application (produced by Star Ecology, dated 8 November 2018) notes that there are eight records of Otter within 1km of the application site. However, in terms of any assessment of the proposed development’s potential impacts on Otter, the report simply states at paragraph 7.1 that “it is not envisaged that development of The Site would negatively affect the

conservation status of the Otter identified within the Desk Study”. No explanation is given as to how this conclusion is reached and there appears to have been no assessment of the impacts on Otter in section 6 (detailing the site assessment results for relevant species). Moreover, there appears to have been no substantive assessment of whether the proposed development could lead to damage or destruction of Otter breeding sites/resting places or whether deliberate disturbance to Otter could result (regulation 43, Conservation of Habitats and Species Regulations 2017).

INCC is, therefore, concerned that the development’s potential impacts on Otter, as a protected species, were overlooked and seeks clarification from NRW as to how it assessed the potential impact of the development on protected species.

Conclusion

INCC reiterates its serious concerns with how NRW considered and responded to the Application. In the interests of openness and transparency, INCC seeks through this letter to notify NRW of these issues, including the very real risk that NRW has acted unlawfully. INCC also seeks clarification on the various matters set out above in order to fully understand NRW’s position on the scope and application of its legal duties. From the limited information available to INCC, it considers there to be a real risk of legal challenge were NRW to respond to any future proposal in the same way it has dealt with the Application.

We look forward to receiving a response to this letter as soon as possible.

Yours sincerely,



Robert Jones Parry

Chief Executive Officer – Initiative for Nature Conservation Cymru (INCC)