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Mr Martin Bates
Project Director
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Department for Economy, Science and Transport
Welsh Government
Cathay's Park
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14 December 2013

Dear Mr Bates

M4 Corridor around Newport - Consideration of the options in relation to the requirements of the Habitats Regulations.

Thank you for giving the Strategic Assessment Team of Natural Resources Wales' Governance Directorate the opportunity to comment on the M4 Corridor around Newport: Consideration of the options in relation to the requirements of the Habitats Regulations. Our comments are made in the context of our responsibilities under the Conservation of Habitats and Species Regulations 2010 (as amended) and as statutory advisers to Welsh government on the natural heritage and resources of Wales and its coastal waters. It is not the role of the Strategic Assessment Team to comment on the M4 Corridor proposals themselves. These matters will be considered by our South Operations Directorate in a separate response. Our comments in relation to sites identified are restricted to those wholly or partially within Wales. For those sites wholly or partially in England, we would refer you to Natural England as the appropriate nature conservation body.

Our specific comments on the report are contained within Annex 1 to this letter. Comments on key issues follow below.

Given the title of the document "Consideration of the Options in Relation to the requirements of the Habitats Regulations", we request clarification as to whether this is to be taken as formal consultation under Regulation 61 of the Habitats Regulations. We note from Section 1.1 that these consultation responses will be used to finalise an HRA Screening report and statement to inform an appropriate

assessment, which we take to mean that we will be further consulted as the appropriate nature conservation body for Wales?

We would suggest that a number of additional and important elements of the Habitats Regulations Assessment process should be included. Unlike the SEA Directive, which clearly sets out an assessment procedure, the Habitats Directive simply creates a requirement for an assessment process to be undertaken where a plan or project may affect a European Site. The framework for the Habitats Regulations Assessment process is set out in the Conservation of Habitats and Species Regulations 2010 (as amended) and has evolved alongside legal challenge and caselaw throughout Europe. HRA, in requiring specific consideration of a plan's effects on European Site integrity, is a highly focused process relating solely to European Sites.

HRA is a four stage process. For a plan or project to be approved it is necessary to clearly demonstrate that it will not have significant adverse effects on a European Site. A potentially damaging plan/project cannot be agreed to if there are alternative solutions. It must either be changed or amended so as to avoid adverse effects or it should be refused. It is the responsibility of the plan maker/project applicant to identify alternative solutions that would achieve the overall objective of the plan/programme. Alternative solutions may include changes in scale, location, route and timing and include 'alternatives' that can be delivered elsewhere and by other plans and projects.

Where the HRA process has established that a plan/project would have an adverse effect on the integrity of any European site and there are no alternatives which would achieve the overall objective of the plan/programme, it can only proceed for Imperative Reasons of Overriding Public Interest (IROPI) and if compensatory measures can be secured. IROPI may be of a social or economic nature except where the proposed plan/project affects European priority habitats or species. If priority habitats and species are affected then IROPI can only be claimed for reasons of public health, public safety, primary environmental benefits or following an opinion from the European Commission. Imperative means it is essential that the plan/project proceeds. 'Overriding' means that harm to European Sites must be outweighed by plan/project benefits. In the exceptional circumstances of a damaging plan/project being approved where there are no alternative solutions and IROPI, the competent authority must secure compensatory measures to ensure that the overall coherence of the Natura 2000 network of sites across Europe is secure. If no compensatory measures are available, it is unlikely to be open to Government to allow the plan/project to be adopted/approved. Compensatory Measures should



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create, recreate or restore comparable habitat and fulfil the same ecological functions.

We are unable to agree with some of the assessments findings with respect to likely significant effects on European Sites. Please refer to Annex 1 to this letter.

Should you have any queries regarding these comments, please do not hesitate to contact Alison Brown at our Maes y Ffynnon office in Bangor.

Yours sincerely

Clive Thomas
Director of Governance & Communications

Annex 1:

M4 Corridor around Newport - Consideration of the options in relations to the requirements of the Habitats Regulations

1: Introduction

We note the statement that ‘the main element of the draft Plan is the provision of a three lane motorway...shown as the black route’. As written, this implies that the preferred route has already been ‘selected’ and that other alternative routes (Red and Purple Routes), and options have been discounted from the draft Plan. Clarification would be welcomed given that the aim of the required assessment processes for this Plan (including Strategic Environmental Assessment and Habitats Regulations Assessment) is to ‘inform’ the decision making process.

We note and welcome the intention to undertake a separate study on proposals for public transport measures. It is disappointing that these public transport issues therefore cannot be included within this assessment process, either in the context of ‘reasonable alternatives’ or as potential mitigation measures in terms of significant adverse effects.

1.2: We would suggest that a number of additional and important elements of the Habitats Regulations Assessment process should be included. Unlike the SEA Directive, which clearly sets out an assessment procedure, the Habitats Directive simply creates a requirement for an assessment process to be undertaken where a plan or project may affect a European Site. The framework for the Habitats Regulations Assessment process is set out in the Conservation of Habitats and Species Regulations 2010 (as amended), and has evolved alongside legal challenge and caselaw throughout Europe. HRA, in requiring specific consideration of a plan’s effects on European Site integrity, is a highly focused process relating solely to European Sites.

HRA is a four stage process. For a plan or project to be approved it is necessary to clearly demonstrate that it will not have significant adverse effects on a European Site. Ideally, the HRA process should be undertaken in parallel with the development of a plan/project. This allows for adjustment and adaptation of the plan/project itself so as to avoid significant adverse effects and consider alternatives which may have either no or less damaging effects on European Sites. Retrofitting an HRA to a fully developed plan/project is difficult and compromises the ability to consider less damaging options and alternatives.

Alternative Solutions

A potentially damaging plan/project cannot be agreed to if there are alternative solutions. It must either be changed or amended so as to avoid adverse effects or it should be refused. It is the responsibility of the plan maker/project applicant to identify alternative

solutions that would achieve the overall objective of the plan/programme. Alternative solutions may include changes in scale, location, route and timing and include 'alternatives' that can be delivered elsewhere and by other plans and projects.

Exceptional Cases and Imperative Reasons of Overriding Public Interest (IROPI) and Compensatory Measures

Where the HRA process has established that a plan/project would have an adverse effect on the integrity of any European site and there are no alternatives which would achieve the overall objective of the plan/programme, it can only proceed for Imperative Reasons of Overriding Public Interest (IROPI) and if compensatory measures can be secured.

IROPI may be of a social or economic nature except where the proposed plan/project affects European priority habitats or species. If priority habitats and species are affected then IROPI can only be claimed for reasons of public health, public safety, primary environmental benefits or following an opinion from the European Commission. Imperative means it is essential that the plan/project proceeds. 'Overriding' means that harm to European Sites must be outweighed by plan/project benefits.

In the exceptional circumstances of a damaging plan/project being approved where there are no alternative solutions and IROPI, the competent authority must secure compensatory measures to ensure that the overall coherence of the Natura 2000 network of sites across Europe is secure. If no compensatory measures are available, it is unlikely to be open to Government to allow the plan/project to be adopted/approved. Compensatory Measures should create, recreate or restore comparable habitat and fulfil the same ecological functions.

1.3: Specific reference should be made to the consideration of 'in combination' effects.

2: We note the reference to congestion during 'weekday peak periods'. Clarification would be welcomed as to whether congestion is restricted to these time periods.

3.1: We note the statement that the problems relating to the M4 CEM programme 'have not changed' and have therefore not been 'revisited'. This statement appears somewhat contradictory given the stated intention of initiating studies into public transport measures.

5.1.1: We note the intention to 'investigate' a junction strategy in the event that the 'Black Route' is adopted. The intention of the HRA process is to consider the likely significant effects of plan proposals on the integrity of European Sites and it seems inappropriate for a component part of this plan to be deferred for future 'investigation'. The failure to include junction strategies within the Black Route proposals compromises the ability of this assessment process to consider all the potential significant effects, at the strategic level.

5.2.1: Clarification would be welcomed as to why interchange and junction measures (as proposed for the Black Route) have not been included within the complementary measures for the Red Route.

6: It is recommended that consultation on the Habitats Regulations Assessment includes relevant authorities and organisations as well as the statutory nature conservation body.

Clarification would be welcomed as to whether the Design Manual for Roads and Bridges, Volume 11, Section 4 HD44.09 has been reviewed and updated in the light of recent caselaw and amendments to the Birds Directive and the Conservation of Habitats and Species Regulations 2010 (as amended).

6.4.1: We welcome the acknowledgement that mobile species which are features of Natura 2000 sites can be found outside the designated boundary of the SAC/SPA/ Ramsar site. We note however that the requirement, under the Habitats Regulations, is for the Competent Authority to determine whether or not the plan (in this case) is likely to have a significant effect on a European site – this test is not distance related but must be made in relation to there being a mechanism or pathway for a significant effect. However, in this case we are satisfied that the 30km radius from the plan route is sufficiently precautionary to ensure that all potentially affected sites have been screened in.

6.4.3: We would suggest that the strategies and plans for Dwr Cymru/Welsh Water should be included within the ‘in combination’ effects assessment.

6.4.4: Clarification is required as to what is understood by ‘damage’ to flightlines.

We agree that the assessment of impacts of all three route alignments should be the same for all River Usk crossing details, given the strategic nature of this consultation, and that there are no design details for the river crossing at this stage

7: We agree that the correct sites have been screened in, as detailed in Table 5, and that the correct interest features have been identified. However we recommend that for completeness the site names are corrected to those used in the legal designation e.g. Usk Bat Sites/ Safleoedd Ystlumod Wysg. Correct names can be found on the Joint Nature Conservation Committee website.

8: A number of the plans and projects identified have been updated or reviewed. It is suggested that this list be updated. The HRA process requires consideration of both plans

and projects - however, no projects have been identified within Section 8. Further information is required.

9: Table 7

We agree with the view of likely significant effect presented in Table 7 i.e. that there are likely to be significant effects arising from the taking forward of one of the new road options on the River Usk SAC, the Severn Estuary SAC, SPA and Ramsar site, the Wye Valley and Forest of Dean Bat Sites SAC, and that significant effects are unlikely on all other European sites listed in this table either in or partly within Wales. However, for those sites wholly or partially in England, we refer you to Natural England as the appropriate nature conservation body for these sites.

8: Table 8.

We are interested to note the following text made with respect to the River Usk SAC and the Severn Estuary SAC and Ramsar site, in the context of a potential effect – “*Barrier to migration caused by piers within river channel*”. This statement suggests some thinking about road and bridge design which has not been shared with us, although we would agree that there would be a likely significant effect if the bridge were to be designed in this way. We are also confused in relation to the reference to two Usk crossings and request clarification of this point. Our further comments with respect to Table 8 are:

River Usk SAC

We agree with the assessment of effects with respect to Atlantic salmon, allis and twaite shad, sea and river lamprey. We agree with the screening out of the bullhead, brook lamprey and water courses features. With respect to otters, there is the potential for habitat loss (both temporary and permanent) as well as temporary and potentially permanent restriction in movement during construction and operational phase - in the absence of any design, these factors cannot be ruled out at the plan phase. We are, however, disappointed that no effect has been indicated with relation to European Eel within the Usk SAC. Whilst eel are not a feature of the Usk SAC, they are present in this site and are a Ramsar feature of the Severn Estuary Ramsar

Severn Estuary SAC

We agree with the assessment of potential effects on features, noting our comment made with respect to in-river piers above, and also on the assumption that good construction practice has been factored in to avoid pollution issues and will be rigorously applied.

Severn Estuary SPA

We disagree with the assessment in relation to the individually qualifying bird features. Whilst we acknowledge that there has historically been little evidence of these species using the Gwent Levels, this situation may now have changed particularly due to changes

in habitats management associated with the Newport Wetlands National Nature Reserve. In addition, the SPA individually qualifying wader populations (dunlin and redshank), as well as those in the bird assemblage, are likely to be present in the tidal reaches of the River Usk. We therefore consider it premature to make an assessment that there is unlikely to be a significant effect at this stage. We would expect survey work to be undertaken as part of any project level work to increase the evidence base. With regard to the bird assemblage we agree with the assessment, but recommend it be extended to include likely use of the River Usk, as well as the Gwent Levels, as outlined above.

We also note that no consideration has been given to displacement of bird populations, for example during construction works, and the potential effects of species displacement on the Severn Estuary SPA.

Severn Estuary Ramsar site (bird features):

Our comments are the same as for the Severn Estuary SPA above. Notwithstanding our comment above regarding river piers, we cannot wholly agree with your comment regarding the migratory fish assemblage for the Severn Estuary Ramsar. Consideration should be given to potential effects on European Eel in the context of their movement within the Usk SAC and smaller water courses within the Gwent levels. We agree with the screening out of the Atlantic Salt meadows and Estuary features.

Wye Valley and Forest of Dean Bat Sites SAC

We agree with the assessment in relation to lesser horseshoe bats. With respect to greater horseshoe bats, we consider it premature to rule out likely significant effects at this stage, in the absence of any monitoring work between the Wye Valley and Forest of Dean Bat sites SAC and Ruperra Castle.

10: Given that this report is titled 'Consideration of the options in relation to the requirements of the Habitats Regulations', the discussion in Section 10 of likely effects on Conservation Objectives is confusing and we would welcome clarification of which aspect of the HRA this covers. We assume it is the work to inform a future appropriate assessment but this is unclear.

10.1.1 River Usk SAC: Notwithstanding our comments on Table 8 above, given the absence of detail of the structure of any bridge (which we acknowledge would be the case at this strategic level), we feel it is premature to be able to rule out adverse effects on the migratory fish features at this stage

10.1.2 River Usk SAC: We agree that it could be possible to avoid adverse effects on the otter feature of the River Usk SAC through ways of working during the construction phase and the retention of suitable breeding/resting habitat where appropriate.

10.2.1 Severn Estuary SAC, SPA and Ramsar: We refer you to our comments made in relation to 10.1.1 above. Further consideration of the potential effects on the proposals is required in the context of European Eel.

10.2.2 Severn Estuary SAC, SPA and Ramsar: We refer you to our comments made in relation to Section 8 above. This combined with our agreement that there is some use of the Gwent Levels by SPA assemblage birds means that we consider it premature to rule out adverse effects at this stage in the absence of detailed survey information and road design.

10.3 Wye Valley and Forest of Dean Bat Sites SAC: We note and agree with much of the reasoning given here. However, in the absence of detailed design, we cannot give a view on the significance in relation to flight line loss. We therefore consider it premature to rule out adverse effects at this strategic plan level.