

**SECTION 94 PLANNING ACT 2008**

**THE INFRASTRUCTURE PLANNING (EXAMINATION  
PROCEDURE) RULES 2010, RULE 14**

**RE: AN APPLICATION FOR DEVELOPMENT CONSENT BY  
Mynydd y Gwynt**

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**WRITTEN SUMMARY OF ORAL CASE  
AT ISSUE SPECIFIC HEARING  
On behalf of the Applicant**

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**INTRODUCTION**

1. This is a summary document. It seeks to set out the essence and key features of the oral case as advanced during the course of the issue specific hearings in respect of:
  - (i) Policy considerations;
  - (ii) Landscape and visual impact assessment;
  - (iii) Cultural heritage;
  - (iv) Ecology (River Wye SAC, Red Kite, peat)
  - (v) Grid connection;
  - (vi) Public rights of way;
  - (vii) Other matters.

(i) **POLICY**

2. By reason of Section 104(3) of the Planning Act 2008, the Secretary of State must decide the application in accordance with any relevant national policy statement, except to the extent that one of the other subsections in paragraph 104 applies. Hence, the decision is to be made in accordance with the overarching National Policy Statement for Energy (EN-1) and the National Policy Statement for Renewable Energy Infrastructure (EN-3).
3. This legal requirement also finds expression in EN-1 in paragraph 1.12.
4. EN-1 explains how applications for NSIPS should be approached<sup>1</sup>, explaining that given the level and urgency of need for infrastructure of the types covered by the energy NPSs set out in Part 3 of EN-1, the IPC should start with a presumption in favour of granting consent to applications for energy NSIPs.
5. The Applicant wishes to emphasise both the primacy of the NPS and the presumption in favour of granting consent. The Applicant does so in the context of those who object relying primarily upon TAN8. The Applicant's case is that objectors have placed TAN8 in a position in the decision making framework which is not warranted and have attributed weight to it which cannot, on analysis, be justified. For this reason, the Applicant firstly drew attention to key parts of EN-1 and EN-3 and then turned to an analysis of the weight to be attached to TAN8. That same structure is adopted here.

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<sup>1</sup> See Part 4 "*Assessment Principles*", in particular at paragraphs 4.12 and 4.15

### **National Policy for Energy, and Particularly Renewables**

6. The Applicant drew attention to EN-1 and EN-3 as being the primary basis for ExA's report and recommendations<sup>2</sup>. That primacy is a foundation for the presumption referred to above<sup>3</sup>. Further, it is plain that the national policy statements have primacy because in the event of a conflict between the policies in the NPS and those policies in other documents, it is the NPS which prevails for the purposes of IPC decision making<sup>4</sup>.

7. Moreover, the Applicant has emphasised that the NPSs have themselves already taken account of TAN8 and so much is clearly stated:

*“The energy NPSs have taken account of relevant Planning Policy Statements (PPSs) and older-style Planning Policy Guidance notes (PPGs) in England and Technical Advice Notes (TANs) in Wales where appropriate.”<sup>5</sup>*

8. Of course, it remains necessary to take TAN8 into account, but whether the application conforms to either the guidance or the targets within TAN8 will not, in itself, be a reason for approving or rejecting the application<sup>6</sup>.

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<sup>2</sup> See EN-1, paragraph 1.1.1

<sup>3</sup> See EN-1, paragraph 4.1.2, *ibid*

<sup>4</sup> See EN-1, paragraph 4.1.5

<sup>5</sup> See EN-1, para 4.1.6, *ibid* (emphasis added)

<sup>6</sup> See EN-3, at 2.2.1

**TAN8**

9. TAN8 is old. It is five years older than the NPSs. In consequence, TAN8 does not refer to the following key features of the NPSs:

- (a) The urgent need for new electricity NSIPS<sup>7</sup>;
- (b) The need to bring forward such NSIPS “*as soon as possible*” so as to decarbonise the energy sector<sup>8</sup>;
- (c) The commitment by the Government to a dramatic increase in the amount of renewable energy generation capacity and the acknowledgment that much of that new capacity will come from onshore wind<sup>9</sup>;
- (d) The up to date scope of government energy infrastructure and wider energy policy objectives<sup>10</sup>;
- (e) The acceptance that it is impossible to achieve the above objectives without some significant residual adverse impacts<sup>11</sup>;

10. However, regard is to be had to Welsh renewable policies, including TAN8 and hence it is necessary to identify their purpose and intended effect. The Applicant suggests that the purpose of designation was three-fold:

- (i) To encourage onshore wind farm development in order to meet Welsh national targets;

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<sup>7</sup> Seen EN-1, para 3.3.1

<sup>8</sup> See EN-1, para 3.3.15

<sup>9</sup> See EN-1, para 3.3.10

<sup>10</sup> See EN-1, para 3.2.3

<sup>11</sup> See EN-1, para 3.2.3

- (ii) For efficiency reasons, particularly with grid infrastructure, but not confined to such;
- (iii) To avoid proliferation of onshore wind farms across Wales<sup>12</sup>.

***TAN 8 A policy of concentration and not confinement***

11. There is ample material upon which to find that TAN8 is not the policy that PCC, NRW and CMS contend for. They say, in effect, that strategic scale renewable energy development outside of SSAs is precluded. That position failed to take account of the following:

- (i) Neither EN-1 nor EN-3 make any such suggestion;
- (ii) PPW does not articulate any such preclusion, but rather leaves the option open;
- (iii) It is PPW which sets out the land use planning policies for Wales, supplemented by TANS (PPW at §1.1.1).
- (iv) PPW expressly does not seek to confine strategic scale wind farms to SSAs - see:
  - (a) §12.9.5 “Policies for strategic renewable energy development in areas outside SSAs, if appropriate, should be included in development plans...”, which envisages proposals of exactly this sort;
  - (b) §12.8.13 – third line – “the most” - could have said the “the only”, but does not. “the most” is consistent with the view that it is a strategy of concentration not confinement;

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<sup>12</sup> See the ‘Griffiths Letter’ of July 2011 [Core Document Bundle 1, Tab 7] at the third paragraph

- (c) §12.8.5 is, again, consistent with the anticipation that proposals for large scale wind projects might come forward outside of the SSAs or there would be no purpose in the language. Hence, this does not exclude large scale wind farms to within SSAs.
  - (v) TAN8 does not, on its own terms, say as much (§2.13 - ‘Most areas outside SSAs should remain free of large wind power schemes.’
  - (vi) Turning to the language of TAN 8:
    - (a) §2.2 – the term used is “concentrated” not “confined”. This does not mean exclusively.
    - (b) §2.3 “within and outside” is a clear reference to the possibility of development other than in SSAs
    - (c) Then §2.13 - When considering “Onshore Wind in Other Areas”, the TAN refers to “most areas” and does not say “all”. Then in the “other” areas there is a balance to be struck.
12. It follows from the above that §8.4 of Annex D, which is central to the points relied upon by PCC, NRW and CMS, must be read in the primary context of EN-1 and EN-3 (in particular that it is recognised that strategic scale wind farms will inevitably give rise to significant landscape change), and in the context of the general approach of concentration and not confinement which is evident from the text of the documents as summarised above. Hence, the phrase in §8.4 Annex D ‘*no significant change in landscape character from wind turbine development,*’ cannot have the preclusive effect which other parties contend for.

**Weight to be Given to TAN8**

13. In addition to the points made as to the primacy of the NPSs, there are several points drawn out by the Applicant which go to the weight to be given to TAN8, in any event. These are:
- (i) TAN 8, like other Technical Advice Notes, supplements PPW 2014 rather than being the land use planning policy for Wales, as expressed in PPW<sup>13</sup>. The planning policy is contained in PPW 2014, the TAN supplements it and it is notable that PPW contemplates large scale energy developments outside SSAs<sup>14</sup> and advises on the approaches to be taken by LPAs in respect of strategic renewable energy development outside of SSAs;
  - (ii) TAN8 was drafted on the basis of a materially different target for renewable energy. It contemplated an installed capacity of 800 megawatts from those wind farms that are over 25 megawatts in size. However, that target is well below the present target for 2015/2017 of 2GW;
  - (iii) TAN8 is not delivering. There are no consented wind farms in SSA D, after 10 years of a policy which seeks to encourage such development in such a location. A similar situation prevails in respect of SSA C. 0.5 GW of

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<sup>13</sup> See PPW (2014) at §1.1.1 [Core Document Bundle 1, Tab 3 and p9]

<sup>14</sup> See paragraph 12.9.5 of PPW 2014

renewable energy production has been achieved against a target of 2 GW.

(iv) Compliance or conflict with TAN 8 will not be a reason for granting or refusing permission (EN-3 at §2.2.1).

14. These issues were raised before you at the Issue Specific Hearing, but no response or answer was given, because they are factually accurate and not capable of being rebutted. They are important issues which go to the weight to be given to TAN8.
15. It follows that TAN8 is not consistent with the NPSs for the reasons set out at §9 above, and moreover, TAN8 is not consistent with Wales' own energy policy and target.
16. If the thrust of the Applicant's case as to the relationship between policy in the NPSs and in Wales is accepted, then it follows that: (i) the primary decision-making framework is in the NPSs; (ii) TAN8 is far from preclusive and does not confine strategic scale wind farm development to the SSAs, and (iii) the weight to be given to TAN8 is, in any event, limited, for the reasons given.

## **(ii) LANDSCAPE AND VISUAL IMPACT ASSESSMENT**

17. There is very limited disagreement between the parties as to the location and the lateral extent of visual impacts and effects upon landscape character. This Written Summary is to be read in that

context, and necessarily focuses on those differences that there are between the parties as to the significance of those impacts.

18. The Applicant drew particular attention to the landform in the vicinity of the application site. In particular, the land to the northwest provides for a highly effective means of containing the visual impacts, as the ZTV shows<sup>15</sup>.
19. Moreover, forestry to the north and northeast effectively shields and limits views of the wind farm to a high degree.
20. Moreover, such forestry is, overall, a detractor in landscape character terms. For these reasons, the site is well located in order to minimise its effects. The benefits of the location are also shown by the absence of any significant effect on an independent residential dwelling. Still further, there are no nationally designated landscapes, nor many effects upon views from highways.
21. The effect upon views from Plynlimon is acknowledged. However, the Applicant has emphasised that the prime views (as confirmed by the visual and sensory analysis) are to the northwest, over Nant y Moch. While there are indeed areas of landscape which are shown by Landmap to be outstanding, the views from Plynlimon over the application site are not, primarily, over land of such outstanding value.
22. Moreover, there will not be any wider change in landscape character, not least because the landscape already contains wind farms, in the form of Cefn Croes and Bryn Titli. That said, the landscape with the

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<sup>15</sup> See Figure 8.8 in Volume 4 (Figures) of the ES

inclusion of MYG would not become a wind farm landscape, and nobody contends for that position.

### **Designation as a National Park?**

23. This point was discussed, arising out of representations made by the CMS and CCC. It was confirmed by NRW that reliance on national park status was not part of its case. On its behalf, it was said that there would need to be a further review of the latest evidence and whether or not it would fulfil the relevant criteria. It was confirmed that, so far as there is presently a review underway, that is not looking at new areas of national park and AONB but is looking at the existing national parks etc in the current planning context.

### **TAN 8**

24. The ExA raised the question of whether the proposal would result in significant change of landscape character and thus offend TAN 8, Annex D, paragraph 8.4. The ExA summarised the Applicant's approach as recognising that there would be significant change to landscape character but that it would not be in more than the local context in terms of the overall assessment of the proposal.

25. This position was confirmed on behalf of the Applicant. The ZTV shows the extent of visual effects to be contained to within an area which is already affected by views of turbines. However, that change would not result in a wind farm landscape.

**Cumulative Effects**

26. There are two issues in this regard. Firstly, there is the question of whether to include Nant y Moch within the scope of an assessment of cumulative effects. Secondly, there is the need to include the application now made for Bryn Blaen.
27. So far as Nant y Moch is concerned, it is evident that there is no scheme to assess. So far as a scheme has, in the past, been contemplated, it was roundly criticised by many public bodies and interested parties, including, notably, the participants to this inquiry. However, that scheme has been withdrawn and so there is presently no scheme in the planning system to be assessed as part of any cumulative assessment.
28. During the decade of the currency of TAN 8, no scheme has even approached being consented within SSAD. It is therefore wholly unrealistic to expect MYG to incorporate cumulative effects with respect to an unidentified and unparticularised scheme.
29. In respect of Bryn Blaen, the Applicant has updated its assessment of cumulative effects to incorporate Bryn Blaen. Nothing further arises.

**Plynlimon**

30. There is disagreement between the parties as to the level of harm in landscape and visual terms, arising from views from the summit and ridge of Plynlimon.
31. While there was a significant degree of evocative material deployed during the hearing, this does not change the fact that as one ascends over

the first 2 kilometres towards the high points which make up Plynlimon, one does not readily appreciate a mounting summit, until close to it. Rather, it is a rounded continuum rather than a distinct peak.

32. The predominant views over landscape of outstanding quality are not over the application site, but are in other directions towards the north and west, namely the area in which SSAD and any proposal for a Nant y Moch scheme would be located.
33. So far as the MYG scheme is concerned, it is not disputed that the tips of all of the turbines would be below the Plynlimon ridge and would not dominate the ridge.

#### **Assessment of Effects**

34. An issue has arisen as to what constitutes the worst case. MYG accepts that there may properly be a range of views about which combination of hub height and turbine blade constitutes the worst case. In this context it was emphasised at the ISH that:

- (i) The project to be assessed was for 27 turbines up to 125 metres to tip<sup>16</sup>;
- (ii) The turbines would be up to 80 metres to hub height and the blades would have a swept diameter of between 90 metres and 105 metres<sup>17</sup>;
- (iii) A range of four candidate turbines was considered and their key characteristics set out in the ES<sup>18</sup>;

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<sup>16</sup> See paragraph 2.4 of the ES

<sup>17</sup> See paragraph 2.7 of the ES

<sup>18</sup> See Table 2.6, page 9 of the ES

- (iv) In accordance with the key guidance in this area<sup>19</sup>, it can be difficult for wind turbine developers to specify the actual model of turbine to be used because of market availability, costs, and the turbine technology may change. The LVIA and EIA should assess, as far as is possible, impacts of the model within the shortlist that represents the “*worst case scenario*”.

35. In that regard, a number of properties are important in choosing the most appropriate model for the site, and for determining which to assess. These include the turbine’s dynamic impact, resulting from rotation of its blades, the proportion of blade length to tower height and the overall height to blade tip.

36. In the context of the above, the ES assesses the worst case and Anne Priscott expressly confirmed that she had considered the effects of the various scenarios and combinations. NRW addressed the matter in the following way in its Deadline III ‘Response to the Applicant’s Response to the examining Authority’s First round of Written Questions’,<sup>20</sup>

*“A larger blade (105m diameter) is likely to have a greater visual effect than a smaller blade (90m diameter). This is because of its much larger sweep area and also because of the relative proportions of the tower and blade. The 105m blades would only be 20m from the ground at their lowest point. It is regretted that this has not been illustrated as a worst case visual scenario. However, both scenarios have been taken into account in the NRW response and the broad magnitude of effects is considered to be the same. If given permission, the smaller blade option would be preferred.”*

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<sup>19</sup> Scottish Natural Heritage “*Siting and Designing Windfarms in the Landscape*”, Version 2, May 2014, particularly paragraphs 2.5 and 2.6

<sup>20</sup> Response to Examining Authority’s Question 2.17, p.18

37. Thus it can be seen that the absence of visual material for the larger blade length did not hinder NRW's assessment of the overall visual impact of the scheme which considered the broad magnitude of effects to be the same with either blade in any event.
38. So far as further material is of assistance, that has been provided as has an offer to provide any such visualisations as any party should desire to receive which show an alternative combination of hub height and blade length. However, the overall Rochdale envelope remains for a turbine with a height of no more than 125 metres to tip. That is what has been assessed.

### **(iii) CULTURAL HERITAGE**

39. While the scheme would have some direct impact on a known heritage asset (peat) and may potentially affect as yet unknown archaeological features underlying peat, the central issue for consideration is the harm, if any, to the significance of nearby heritage assets by reason of a change in their setting. As was explained by Melissa Conway at the ISH, that change in the setting of an asset may or may not harm the significance of an individual asset- it entirely depends on what the setting contributes to the significance, and whether the change brought about by the development impacts on that significance.
40. It is not enough to say that development in the setting of an asset equates to harm because setting itself is not a heritage asset, but rather is

*'the surroundings in which [the asset] is experienced . Its extent is not fixed and may change as the asset and its surroundings evolve. Elements of a setting may make a positive or negative contribution to the significance of an asset, may affect the ability to appreciate that significance or may be neutral.'*<sup>21</sup>

41. It is therefore necessary to understand the relationship between the setting and the contribution that it makes to significance for conclusions to be drawn as to any harm that might arise from a proposed development. The Applicant does not say that harm cannot be caused to significance through a change in the setting, indeed it has identified harm where it arises, but that process requires a much more sophisticated approach than saying - you can see it and it is therefore harmful. The point was dealt with in the Javelin Park decision [App/T1600/A/13/2200210].<sup>22</sup> At page 207 of the IR, the Inspector commented on the Council's approach as follows

*"1177. Mr Grover also described where he judges the in tandem views to be available and from where within the churchyard the proposed EfW building would be seen. However, although he says that 'The proposed development would affect the collective setting of the Church and its associated group of listed churchyard monuments.....' he does not say how this affects the significance of the heritage asset. He simply says that the proposed development would be visible without explaining why that matters.*

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<sup>21</sup> Core Documents - File 3, Tab 5, EH Guidance on the Setting of Heritage Assets p4

<sup>22</sup> *ibid*, Tab 6

*1181. A further example of what I consider to be the flawed approach is that taken to Haresfield Hillcamp and Ring Hill Earthworks . Here as Mr Gover himself records... the asset commands a wide view over the Severn Valley at its western end from these elevated positions. This commanding view is a major factor in the significance of the location and setting of the hillfort given its defensive role over the surrounding landscape. The commanding view is thus an important factor in the significance of the heritage asset. The fact that the appeal proposal may be seen from this point (and that has been reviewed under the previous issue) has, in my judgement, no effect on the significance of the heritage asset. That would only be affected if the views itself was blocked by the proposed development which would not be the case. The commanding view would be unaffected; only what may be seen in that view...”*

42. PCC has fallen into the same error in respect of the harm it identifies to different heritage assets. For example, the Council contend that it is important for the cairns to remain in an open, essentially rural landscape where the relationships between them, the topography and water courses are all readily apparent without saying why the proposal will interfere with those relationships. It will not in fact alter the topography, or the relationship between the assets’ and the landscape or each other – those interactions will all remain legible. What it will do is introduce a new element into the landscape.

43. At the ISH and through the written material, the Applicant identifies that the value of the cairns lies primarily in their historical and evidential values and that in the majority of cases, their significance will remain unaffected by the development. The exceptions are the unscheduled cairn at Waun Goch and the three scheduled cairns on the Pumlumon summit;

(i) In respect of the Pumlumon summit cairns, the presence of the scheme would impact on the visual relationship between them and the Pen Lluest-y-Cairn. That relationship is one element of significance and all other aspects of the cairns' setting which contribute to their heritage significance would remain unaffected. As such, the harm is less than substantial;

(ii) So far as the Waun Goch cairn is concerned, it is of demonstrably lower importance than the scheduled cairns on Pumlumon, is smaller and less well preserved. It may well be a clearance cairn of negligible value, but in the absence of definitive evidence on the matter, a precautionary approach has been taken. The scheme would cause extensive change in the setting of the cairn and will affect views out from the cairn to the wider landscape. If the cairn is a Bronze Age cairn, then that impact bears on its significance because views to the wider landscape are likely to have been important in its siting. However, other important aspects of the setting that contribute to its significance – its relationship to the crest of the watershed between the Severn and Wye and the source of the Nant Y Gwrddy will remain unaffected. The same relationships are identified largely by PCC<sup>23</sup> but the Council does not go on to explain how the change to views out from the cairns gives rise to substantial

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<sup>23</sup> PCC Deadline V submission 'Note on Matters Relating to Cultural Heritage' para 4.14, page 9

harm, particularly when the majority of these interactions will remain.

44. A further point to note in respect of the Pumlumon Cairns is the change that has already taken place in the landscape surrounding the cairns including the introduction of modern elements such as stiles and fences running along the ridgeline. The cairns themselves have been subject to alteration by walkers seeking to shelter in them. Moreover, there is extensive forestry to the east and south east and modern farming communities have an impact; to assert that this is an unspoiled Bronze Age landscape is mistaken.
45. A disagreement remains between PCC and the Applicant as to the contribution the setting of the mines makes to their significance. Melissa Conway explained at the ISH that the value of the mines is chiefly historic and evidential. The mines were positioned where they were, not to command views or aid inter-visibility, but because there was a resource there to be exploited. The presence of the mines within the wider landscape doesn't tell you why they failed; the isolation of the mines might be a factor in their decline but it is not one that is obvious from observing the mines in their present setting – an understanding of that would come from historical information gained from other sources, such as contemporary documentation. Remoteness might be a feature of the immediate context of the mines but many resources are remote and continue to be successfully exploited. Accordingly, although there may be extensive visual change in setting in some cases, this does not change the significance of those assets, because it doesn't affect where their significance came from.
46. So far as the Cae Gaer Roman Fort is concerned, the significance of it derives primarily from its historic and evidential value. The presence of a

wind farm at distance from the asset in views from or to the fort will not affect its relationship to routes it was sited on to monitor, or restrict the views that can be had from the fort to the wider landscape. Accordingly there will be no impact on those elements of the setting that contribute to the significance of the asset, and accordingly there will be no harm.

47. The Applicant acknowledges some harm to the adjacent Upland Ceredigion Landscape of Outstanding Historic Interest through visual encroachment on the nearby Pumlumon HCA. The scheme would affect the cairns on the ridge which are a key feature of the HCA and as such there is a harmful effect to an element of the historic landscape. However the scheme would not affect the reason that Upland Ceredigion was registered and accordingly, the harm would be less than substantial.

48. NRW's assessment of the impact on the RHL proceeds almost entirely on the basis that if the scheme is visible, then it is harmful.<sup>24</sup> Again, a much more sophisticated exercise is involved in assessing the impact of development on the HCAs, which involves considering their key characteristics, and how they will be affected by the development and it is this approach that is enunciated in the ASIDOHL2 guidance for assessing effects to such assets<sup>25</sup>. In respect of the most affected HCA, Pumlumon, the key characteristic that is affected is the Bronze Age cairns along the ridges and summits. The remaining characteristics of the HCA, and those of the Register Landscape as a whole will remain unaffected. Indeed, at the time Upland Ceredigion was registered as a historic landscape, the Rheidol wind farm was operational and Mynydd Gorddu was also

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<sup>24</sup> Deadline II , NRW Written Reps, Appendix B3

<sup>25</sup> Core Documents, File 3, Cultural Heritage, Tab 4, page 12 part 6, page 15 Table 1, and page 21

approaching operational status. These both lie within the Register Landscape so it appears that their presence was not considered so harmful to the key characteristics of the area that it no longer warranted designation. This is particularly relevant when the position of Mynydd Gorddu scheme is considered. Mynydd Gorddu lies right at the northeastern tip of the Register Landscape so could have easily been excluded from the designated area as the boundaries were being drawn if it was considered inherently harmful or counter to the key characteristics of Upland Ceredigion.

49. PCC expressed continuing concerns at the ISH in respect of the cumulative assessment, and in particular, the exclusion of NYM from the assessment. However for the reasons given above at paras 26-29 of this Summary, it is neither useful nor appropriate to assess a scheme that currently has no design parameters associated with it.
50. So far as matters of cultural heritage are concerned, there is no established way of doing a cumulative heritage assessment. No cumulative impact has been identified with the schemes that have been covered because they do not have an impact over and above that which the scheme on its own would give rise to. In other words there are no other schemes that would affect other aspects of the setting beyond that which arises from MYG.
51. Any harm that is identified will be reversed once the wind farm is decommissioned when there will no longer be any impact on the identified heritage assets. Accordingly, when assessing harm arising from

development within the settings of heritage assets, the time limited nature of the project is likely to be an important consideration.<sup>26</sup>

**(iv) ECOLOGY (PEAT/BATS/RIVER WYE SAC/REDKITE/OTTER)**

**Peat**

52. In its written representation, NRW said<sup>27</sup>:

*“The limits of deviation include areas of blanket bog and deep peat which means that turbines could be micro-sited onto these areas of greater sensitivity. The limits of deviation should be amended to exclude these areas or a requirement should be included in the DCO for micro-siting to be undertaken in agreement with the LPA and NRW. This micro-siting would need to be informed by further post-consent habitat and peat mapping by the Applicant. It should be confirmed by the Applicant that the ES has considered the worst case scenario within the limits of deviation.”*

53. The issues in respect of peat arise in the context of the above.

54. Firstly, the Applicant confirmed that the ES has considered the worst case scenario within the limits of deviation. That statement is made in the context of agreeing that movement of any turbine in order to micro-site would only be to an area which had an equivalent or lower thickness of peat associated with it.

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<sup>26</sup> EN-3 2.7.43

<sup>27</sup> Deadline II, NRW Submission Page 19 of 70 at paragraph C1.11

55. Hence, the Applicant is content to say that the requirement included on the DCO for micro-siting, pursuant to the CEMP, is one which would result in the greater protection of the peat resource than has been assessed. That is a true worst case assessment.

56. So far as the assessment is concerned, the hearing was provided with a “*peat comparison*”. That document demonstrated that the average depth of peat beneath turbines would be considerably less than at any of: Carnedd Wen; Llanbrynmair, or Clocaenog. Moreover, the total volume of peat to be extracted would be very much less than at any of the foregoing wind farm proposals being some 17,000 m<sup>3</sup>, compared to sums which are uniformly in excess of 100,000m<sup>3</sup> of peat. In other words, the impact upon peat from the wind farm is significantly less than to be found in respect of other strategic scale wind farm proposals, albeit that they are within SSAs.

57. These figures are based upon detailed peat surveys. In summary<sup>28</sup>, in 2010, 1,642 peat depth measurements were taken. A further 450 measurements were taken to address scheme amendments during 2011. Then, in 2013 further detailed surveys were undertaken around turbine 16 to address comments from NRW on their Section 42 consultation response.

58. Areas of peat and peat habitat have been a key constraint in locating turbines and wind farm infrastructure<sup>29</sup>. Hence, MYG’s case is:

- (i) The survey data is substantial and robust;
- (ii) The design of the wind farm has been optimised using peat as a key constraint;

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<sup>28</sup> See the Applicant’s Deadline V material at Appendix 24, starting at paragraph 3

<sup>29</sup> See paragraph 8 of the Deadline V material at Appendix 24

- (iii) The peat impact is relatively low, and;
- (iv) So far as micro-siting is required, such will reduce peat impact still further, in accordance with a requirement secured via the CEMP, which would be required to be agreed with NRW.

59. For these reasons, the Applicant considers that the concerns in respect of peat have been fully addressed and the impact is both low and acceptable.

### **Bats**

60. In its written representation, NRW said<sup>30</sup>:

*“Overall NRW consider that some of the turbines are located in areas where there is a risk to bats. Should the Secretary of State be minded to grant development consent for the application we consider that a Requirement should be included in any DCO to minimise the impacts of the windfarm on bats and to ensure there is no likely detriment to the favourable conservation status of the species in its natural range. The Requirement should state:*

*1. No development, vegetation clearance or tree felling shall commence until a Bat Protection Plan has been submitted to and approved in writing by the Local Planning Authority. The plan should be implemented as approved and include but not be limited to details of:*

*a) Pre-commencement surveys to be undertaken for bats, and if necessary mitigation measures detailed to ensure the protection of the species during felling and site clearance works and construction of the wind farm and associated infrastructure;*

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<sup>30</sup> See page 24 of 70 at paragraph C1.35

- b) A monitoring procedure to record bat activity and weather conditions;*
- c) A monitoring procedure to record bat mortality at wind turbines;*
- d) Annual reporting of the results of monitoring, and where necessary details of any remedial action to reduce bat mortality;*
- e) A procedure for agreeing and implementing remedial measures aimed at reducing or avoiding bat mortality. Such measures may include, but not be limited to, turbine curtailment, and or land management changes; and*
- f) An agreed timeframe for monitoring, sufficient to determine the impact of the operation of the wind farm on bats and the efficacy of any remedial measures to be implemented. Where surveys are required, the methods and scope of them shall be submitted to and agreed in writing with the LPA prior to them being undertaken.”*

61. The Applicant is content to agree to a requirement in the terms set out above. The Applicant draws particular attention to part e) of the requirement as to turbine curtailment. This had initially been a sticking point for the Applicant to which it was resistant to agree. However, on further consideration and as a result of further discussion, that requirement is accepted.
62. It was a surprise for NRW to further indicate that compliance with this requirement would be insufficient. Whatever the reasons for those further requirements might be, the Applicant does not agree them. It is plain that the requirement adequately addresses the residual risk in the event that monitoring were to demonstrate that bats were in fact an issue on the site, notwithstanding the existing survey data.

## **River Wye SAC**

63. A number of measures are proposed within the dDCO and the section 106 Agreement to address what would otherwise be a likely significant effect on the River Wye SAC as a result of the development.

64. The measures are as follows;

- i. Requirements 9 and 27 of the dDCO that require the approval by NRW of the CEMP and the surface water drainage system plan prior to development, giving NRW complete control of the measures proposed;
- ii. No turbines or hardstanding will be within 50m of any watercourse;
- iii. A section 106 Agreement in respect of the access tracks that:
  - a) prevents use of the new tracks other than for the purpose of the Development;
  - b) secures the removal of the new tracks from the Site following the cessation of the Development;
  - c) ensures that during the construction phase the existing tracks to the east of the Wye Valley Walk will not be used for rallying purposes;
  - d) provides for the maintenance of all tracks and drainage systems during the Operational Phase; and
  - e) ensures that, upon the completion of the construction phase, rallying will not recommence on the existing tracks to the east of

the Wye Valley Walk until the Council, in consultation with Natural Resources Wales, has agreed mitigation measures which will provide further protection to the River Wye from this activity.

65. The Applicant has sought to eliminate the solus and in combination effects arising from the scheme and by those measures, secures an outcome that is a benefit over the current position.
66. It has not been suggested by anyone that it is not possible to design measures that can deal with the effect of run off and at the ISH, NRW agreed that the measures proposed were acceptable. Accordingly, the ExA can be confident that there would be no likely significant effect on the SAC as a result of the scheme.
67. In respect of Bryn Blaen, matters have been explored with the developers of that scheme. No new site infrastructure is proposed to be within the Wye catchment area which leaves the matter of the existing access. That is within the Wye catchment, but again, there is no reason why equivalent protections could not be put in place as are offered in respect of MYG scheme that will similarly avoid effects on the SAC. The measures proposed in the Bryn Blaen ES are discussed further at paragraph 145 of the HRASR v4.

68. The impact arising from grid infrastructure is addressed at paragraph 94 of this summary which concludes that such activity could not, on any view, be likely to give rise to a significant effect.

### **Red Kite**

69. The key issue in respect of red kite is the connectivity between the SPA and the application site.

70. NRW are in possession of information (gathered by the Red Kite Trust) that shows where in the SPA Red Kite are nesting, and which may provide some assistance as to the issue of connectivity. However, that information has not been shared with the Applicant and it does not appear to have informed NRW's assessment of the effects of the scheme.

71. NRW do not advance a positive case based on the data they have, which they could if there were a positive case to advance. Rather, they invite the Examining Authority to accept the proposition that all of the birds observed on the application site originate from the SPA – a position that is plainly untenable.

72. It was unfortunate that at the ISH hearing NRW continued in the same vein of reluctance to assist more specifically on the matter of connectivity between the SPA and the application site.

73. In any event, the SPA covers a large area and 100% of the SPA is further than 4km from the nearest turbine and less than 1% of its buffer is within 4km from the nearest turbine. Less than 3.5% of the SPA and its buffer

lies within 6km of the nearest turbine. Without the buffer, that becomes 0.5% of the SPA that is within 6km of the site.

74. Those distances are relevant, because the core foraging range for Red Kite is 4km, and that is the range which according to guidance “should be used when determining whether there is connectivity” between the site and the SPA.<sup>31</sup>
75. The guidance also directs that it is only in exceptional cases that distances up to the maximum foraging range of 6km may be considered. It has not been suggested that there is any other relevant guidance, or that there are any reasons why the interaction between the SPA and the application site should be considered to be “exceptional.”
76. To the contrary, it is extremely unlikely that in this area, Red Kite would fly 6km to the application site when there is an abundance of intervening foraging habitat. Red Kite are generalist feeders, and will feed on invertebrates and carrion; most forage within 1 km of the breeding area because outside of their home territory they would be competing against individuals who derive from much closer breeding populations.
77. Having regard to the context outlined above it was perfectly appropriate for NRW in February of last year, to agree that it is “unlikely” that there is any connectivity between the population of birds using the wind farm site and SPA<sup>32</sup>. In light of the evidence, and on any reasonable assumption, the more recent contention that it should be assumed that all Red Kite on site originate from the SPA is wholly unrealistic.

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<sup>31</sup> Core Documents, File 5, Tab 7, SNH Guidance (July 2013)

<sup>32</sup> MYG Deadline V Submission HRASR, App4

78. It is salient to note that the numbers of Red Kite in mid wales have risen exponentially and significantly since the SPA was designated. However, while the population of Red Kite generally has been increasing, the population in the SPA has fallen to just 18 pairs. Given the mortality rate anticipated from the scheme, the likelihood of those affected birds all deriving from the tiny proportion of the SPA that lies within the 6km range is infinitesimally small.

### **Otter**

79. So far as any otter may be found in pre-construction surveys, there is no reason to expect that an EPS licence would not be forthcoming.

80. NRW requested<sup>33</sup> that additional survey work and a draft licence application should be submitted in early 2014; this was submitted on the 7<sup>th</sup> of May 2014. No response has been received. The application postulated that as otter never form significant groups<sup>34</sup> apart from when breeding and no signs of breeding otter have been found on site, there would be no disturbance.

81. It is instructive to consider the case of *The Queen (oao David Gate on behalf of Transport Solutions For Lancaster and Morecambe) v The Secretary of State for Transport*<sup>35</sup> in this respect.

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<sup>33</sup> Letter 5<sup>th</sup> March 2014 to the applicant from NRW

<sup>34</sup> Disturbance and protected species: understanding and applying the law in England and Wales. Natural England and NRW 2007.

<sup>35</sup> [2013] EWHC 2937 (Admin)

82. In that case, a DCO was challenged, in respect of a link road from the M6 motorway to the port of Heysham on Morecambe Bay partly on the basis that inadequate consideration was given to otter welfare.
83. The proposed development involved building a new bridge across the River Lune and there was evidence that Otters may have resting sites in the vicinity of the bridge.
84. The Judge observed that;

*“The challenge facing the Examining Authority was that otters are a mobile species and that there was no telling where they would be (or what they would be doing there) by the time the bridge was about to be constructed. Natural England, as licensing authority, indicated, reasonably enough, that they would not consider granting a pre-emptive shadow licence application. Lancashire, however, undertook to carry out further detailed surveys before construction was to be carried out and indicated that, if necessary, a licence would be applied for at that stage.”<sup>36</sup>*

85. Moreover, Natural England had indicated that if surveys, undertaken prior to the development indicated the presence of otter resting places in the vicinity of the bridge, then a licence application would probably not be required, and so it was held that in those circumstances,

*“...it was open to the defendant to conclude that it was not likely that the proposed development would harm otters in*

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<sup>36</sup> see para 69

*those ways prohibited by the Regulations or that, even if it, did Natural England would be likely to issue a licence.*

<sup>37</sup>

and

*“the approach of the Examining Authority and the defendant on this issue was both pragmatic and in accordance with the Regulations.”<sup>38</sup>*

86. In this matter, the draft DCO requires pre-commencement surveys to identify and avoid harm to protected species at the time the development is begun so that an accurate assessment can be made of the presence of such species, and to inform avoidance and mitigation measures.

#### **(v) GRID CONNECTION**

87. NRW provided twelve pages of submissions in response to question 4.18 of the ExA’s second round of questions in respect of grid connection issues. The matters raised were directed at two principal issues, namely:

- (i) Section 4.9 of EN-1 as to the likelihood that a grid connection will be consented;

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<sup>37</sup> see para 71

<sup>38</sup> see para 72

- (ii) The relationship between EIA/HRA and assessment of in combination effects.

88. It is important that these two matters are dealt with in a way which is appropriately separated. The first is a policy consideration arising out of the NPS. The second point is a legal compliance question, which is principally focused on HRA issues. The two points are to some degree related, but they are fundamentally different in nature and for that reason they are treated separately here.

### **Grid Connection**

89. NRW correctly identify that the MYG wind farm would not be able to function without a grid connection. Plainly, a nationally significant piece of infrastructure would not be constructed if it was impossible to produce the electricity which would pay for its erection.
90. No applicant for a wind farm in Wales has control over the grid connection. In particular, for large scale wind farms, such as those promoted via the Section 36 Electricity Act procedure or via the 2008 Act, are reliant upon good connections which are to be provided by the distribution network operator (“DNO”). Occasionally, it may be possible for a wind farm to connect directly with the national grid and to contract with National Grid (“NG”), but that is relatively rare.
91. The DNO and NG have statutory responsibilities, pursuant to the Electricity Act 1989, to maintain and where necessary to improve the electricity distribution network. That system is indeed a “*network*”. It is not a single project linking one generating station to one consumer. Rather, it is a complex “*network*” which distributes power to all consumers.

92. So far as the connection of wind farms is concerned, the DNO has to seek to provide good connections to a wide variety of operating stations, some of which are wind farms and others of which are other forms of energy generation (for example, hydro and biomass).
93. The generating stations in the form of wind farms are not operated by the statutory undertakers in respect of the electricity network. Further, it is unknown which wind farms will be consented and in fact constructed. Hence, arising from the different consenting procedure, the different identity and statutory responsibilities of the network operator and the uncertainty which attaches to precisely what energy generating capacity at which locations will in fact come forward, there necessarily remains uncertainty as to the actual form of grid connection which will come forward and be constructed in mid-Wales and elsewhere in Wales.
94. These preliminary points are made in the context of NRW identifying three stages of grid connection and suggesting that each of those three stages of grid connection should be fully designed and assessed before consent is granted in respect of this DCO application. NRW identify the three stages as:
- (a) The 132kV connection from MYG to Carno substation, being some 18km long;
  - (b) A further 132kV connection from Carno to the National Grid substation, being approximately 10km;
  - (c) The 400kV connection from the National Grid substation to further grid connections in Shropshire, being some 50km.
95. It is accepted that it would be necessary, as a result of the MYG scheme, for a 132kV connection to be made from MYG to the Carno substation.

96. However, it is not accepted that the NRW stage 2 and stage 3 connections, as they term them, would be a consequence of the MYG proposal. This is because those parts of the DNO and NG network are proposed to be constructed in any event. They are proposals for the reinforcement and extension of the electricity network pursuant to those bodies' statutory duties and which arise out of a number of proposals which are unrelated to MYG.
97. MYG understands NRW to be contending for cumulative impact assessment and screening of the MYG proposal in combination with all three stages of the grid connection. MYG does not understand NRW to be contending that the wind farm and each stage of the grid connection comprises one project. In other words, it is understood to be NRW's position that there is no unlawful project splitting in this case, i.e. deliberately splitting a project so as to avoid EIA. Plainly, that cannot be the case because each project application will, as is clear from the consultation and scoping documents, be subject to its own EIA and HRA.

#### **A Short Answer**

98. MYG would not and could not (for financial reasons) construct the wind farm, absent a consented grid connection. However, MYG appreciates that such practical reality is better supplemented by a legally enforceable mechanism. Hence, MYG is content to agree to a requirement on the DCO which prevents the carrying out of works which might arguably have potential to affect European sites, until such time as a consent is in place for the grid connection.

99. In this manner, the ExA and the Secretary of State can be sure that no development will take place pursuant to the DCO unless and until an HRA has been undertaken in respect of the grid connection(s), in combination with the MYG scheme. Hence, in the event that likely significant effects were identified on a European site, either arising from an individual grid connection project, or in combination with other projects, then the MYG project could not be built.

### **The Facts Related to the MYG Grid Connection**

100. NRW correctly observe that option 1, as proposed by SP Manweb is referred to both in the ES and the HRA. This information is provided by way of accurate factual background and context. However, if it is said that the mere reference to option 1 creates uncertainty which cannot be overcome in HRA terms, then MYG is content for it to be excluded as an option. As a matter of fact, such is correct because it is plain that SP Manweb are not promoting option 1, having excluded it from their Section 42 consultation response.

101. The only European site that is within the scope of option 2 is the River Wye SAC. The grid line runs north from the site through the Wye catchment for about 2.1km<sup>39</sup>. This section of the cable route is principally alongside existing tracks enabling each pole to be sited without the need to construct new tracks for this purpose. Therefore, the only disturbance caused would be during the installation of each pole along this section of the route.

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<sup>39</sup> See paragraph 151 of the revised HRA (version 4)

102. Of course, the connection is not the part of this scheme and the Applicant cannot exercise control over it. However it seems to be eminently feasible to install 80 poles in a manner that doesn't give rise to any or any risk of harm to the SAC. It is assumed that poles will be installed using specialist boring machinery which creates a hole with a diameter of some 300mm. For the necessary 84 holes, a total of 6 square metres of land would be disturbed. MYG trust that it will be possible to reach agreement that such activity could not, on any view, be likely to give rise to a significant effect and so it would be reasonable to conclude:

- (i) In accordance with Section 4.9 of EN-1, that there is no reason to consider that a grid connection would be refused;
- (ii) There would be no likely significant effect arising from the works necessary for the installation of the grid connection.

**(vi) PROW**

103. Discussion between PCC and MYG is ongoing in relation to Public Rights of Way. Agreement has not yet been reached, but a draft section 106 Agreement was made available at the hearing that secures (before the first export date);

- (i) the provision of two off site car parks – one to the north of the A44 for the parking of horse boxes see figure 8.49C (Appendix 6 MYG Deadline V submission), and the other to the south of the A44 for walkers. Both are to be open to the public, free of charge;
- (ii) alternative bridleways; and
- (iii) an alternative footpath.

104. The Updated Figure 8.10e (Appendix 6 MYG Deadline VI submission) illustrates the proposals for additional footpath and bridleways and now includes a proposal that keeps bridleway 49 outside of 200m from all turbines.

105. MYG has also offered to a contribution toward the Access Improvement Fund and are confident that agreement will be reached shortly with PCC as to the suite of mitigation measures offered in respect of PROW.

**(vii) OTHER MATTERS**

106. Matters arising from the issue specific hearings that required clarification and/or the submission of further evidence and that have not been addressed in the foregoing text are dealt with in the remainder of MYGs deadline VI material.

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**26<sup>th</sup> March 2015**

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**SECTION 94 PLANNING ACT 2008**

**THE INFRASTRUCTURE PLANNING  
(EXAMINATION PROCEDURE) RULES  
2010, RULE 14**

**RE: AN APPLICATION FOR  
DEVELOPMENT CONSENT BY MYNYDD  
Y GWYNT**

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**WRITTEN SUMMARY OF ORAL CASE  
AT ISSUE SPECIFIC HEARING  
On behalf of the Applicant**

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