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BY E-MAIL to ██████████

22<sup>nd</sup> April 2025  
Our Ref: DW/E2259/HB-220425

Dear ██████████

### **White Cross Wind Farm – Onshore Infrastructure North Devon Council planning application 77576**

Thank you for instructing us to conduct a rapid review of the outstanding ecology matters relevant to the determination of the above planning application, which we understand is set to go before North Devon Council's planning committee in the coming weeks.

Due to extreme pressures on our time and capacity and given the volume of documentation on this project, we have as discussed restricted our comments to an analysis of the "outstanding" matters raised by Natural England (NE) in their consultation response of 21 February 2025. Our comments follow below using the same headings as in that NE letter:

#### **1. Bats**

It is clear from NE's comments of 21 February 2025 that there are substantial omissions in respect of the level and standard of supporting data on bats. Such information is clearly far short of what one would expect to be provided with an application that has clear potential to impact on foraging habitat and commuting routes for rare greater horseshoe bats and by extension to indirectly cause harm to the integrity of the Caen Valley Bats SSSI. According to Natural England, the majority of the cable route has simply not been surveyed. We note that Natural England consider that a commitment to an adjustment of working methods and timings might be sufficient to resolve NE's concerns, but we fail to see how such an approach would be aligned with planning practice requirements, or indeed lawful, in the context of the information vacuum around the type, level and significance of potential impacts, and NE's and North Devon Council's obligations under Section 28 of the Wildlife and Countryside Act 1981 (as amended) towards the SSSI. It is a combination of such obligations and relevant case law (*Hardy*) that underpins the requirement under planning practice guidance (Circular 06/2005, para 99) that:

***"It is essential that the presence or otherwise of protected species, and the extent that they may be affected by the proposed development, is established before the planning permission is granted, otherwise all relevant material considerations may not have been addressed in making the decision. The need to ensure ecological surveys are carried out should therefore only be left to coverage under planning conditions in exceptional circumstances, with the result that the surveys are carried out after planning permission has been granted. However, bearing in mind the delay and cost that may be involved, developers should not be required to undertake surveys for protected species unless there is a reasonable likelihood of the species being present and affected by the development."***

*Where this is the case, the survey should be completed and any necessary measures to protect the species should be in place, through conditions and/or planning obligations, before the permission is granted.*” (emphasis added)

The situation here is that the cable route passes through an area known to be used by greater horseshoe bats from the Caen Valley Bats SSSI and will impact on hedgerows and other habitat features likely to be of importance for those bats. It is thus beyond argument that “*there is a reasonable likelihood of the species being present and affected by the development*”. Such surveys should therefore have been carried out and their results made available to the decision-making authority and consultees as part of the supporting information supplied by the applicant. We fail to see how conditions can circumvent the above requirements in a situation where their likely or potential efficacy cannot be assessed because there is no understanding of the impacts they seek to secure avoidance or mitigation of. That would also undermine the legal basis for conditions which is that they must be enforceable – something which cannot be determined at this stage in the absence of evidence that they can or will be. This is a clear and present example of the territory which the High Court found to be unlawful in *Hardy* – a case which also involved horseshoe bats, and an attempt to defer requisite surveys to condition. The situation here is rendered more acute by the fact that in this case the unknown impacts also have potential implications for a statutory SSSI. In short, we believe that Natural England’s suggestion that determination can proceed with appropriate conditions is not legally robust.

## **2. Great crested newts**

Natural England’s comments on this matter are brief, but suggestive that similar concerns apply to the position as regards bats above. The implication of NE’s comments is that NDC should not progress the application to determination absent the applicant supplying NE with the “full draft GCN licence application” that they have requested, and their having had time to review it and provide NDC with a revised position.

## **3. Marine and Coastal Processes**

On this matter, we note NE’s discussion of the scope to use a risk-based decision with the inclusion of licensing conditions. We that note NE rightly emphasise that “*Natural England highlights this is not best practice*” but that this is something of an understatement is emphasised by their following comments which outline the risks inherent in such an approach of “*an increase [sic] likelihood of unpredicted impacts being identified*”. We would seek to remind the decision-maker here that the purpose of EIA is to identify impacts, where they can reasonably be predicted, and that an EIA that leaves the identification of impacts to a post-consent stage is fundamentally deficient and arguably unlawful.

## **4. Benthic**

We make the same comments under this category as under 3 – Marine and Coastal Processes above.

## **5. Onshore Ornithology**

We note NE’s comment that “*Natural England notes surveys of the fields south of the estuary did not cover a full winter and no mitigation measures have been adopted to address the potential displacement of birds using fields to the south of the estuary*”.

Given that any such displacement has the potential to cause indirect harm to the Taw Torridge Estuary SSSI, independently or in cumulatively with other plans or projects, via the ‘functional linkage’ mechanism, we believe this matter also engages the legal and procedural shortfalls related to EIA practice and regulation, and the duties

incumbent on decision-makers and other public bodies (including NE) under S28 of the Wildlife and Countryside Act 1981.

## **6. Fish**

Under the category of fish (and particularly concerns about impact on eels from EMF emanating from submerged cables), we note again a continuation of the theme common to all of the above points in that Natural England do not believe that the Applicant has provided sufficient evidence to address this issue. Given that addressing the fundamental deficiencies and shortfalls in evidence associated with points 1-5 above will require some time, we suggest that the applicant will have an opportunity to attempt to narrow this point of concern with further survey and/or research into this matter, and that there is no reason not to do this in advance of a decision, in accordance with best practice and established tenets such as the precautionary principle.

## **7. Marine mammals**

We again note that there appear to be deficiencies in the scope and adequacy of the submission information on this group and again make the point that the necessity for delay to determination to enable the applicant to address the information shortfalls at 1-5 above (and which potentially give cause for legal challenge of any decision to approve, if not so addressed) provides the applicant with time to improve the robustness of its case on this matter.

### **Other matters raised by local consultees/respondents**

We have not, in the time available, been able to get into the detail of the further concerns and issues raised by parties other than NE. However, we observe that concerns have been raised about the accuracy of the applicant's BNG assessment and the age of the surveys, and on matters such as the ecological implications of large-scale dewatering of cable trenches. In respect of the first of these issues (BNG) we would make the brief comment that in the course of professional practice over the last few years, we have been called upon to review numerous BNG assessments and have consistently found errors of the type that local interested parties are flagging. We therefore endorse the call for the applicant's BNG assessment not to be taken at face value but to be reviewed with extreme scrutiny if any weight is to be placed on claims of avoiding net loss and/or delivering net gain. Nor should silence from Natural England on this matter be taken as significant – they will simply not engage with review of an applicant's BNG calculations and/or the evidence (or lack of) behind them.

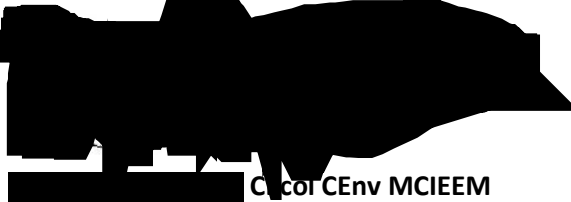
On the age of data point, there is established industry guidance that does support the complaint raised by third parties that if much of the survey data is in excess of three years old, it is 'out of date'. Where low grade habitats are impacted, this is often a minor or even moot point, but here there are potential impact vectors to a suite of statutory and non-statutory designated sites and important habitats and protected species. The issue is compounded and given much greater resonance here also due to the fact (as discussed at 1-7 above) that much of this survey data is deficient or incomplete in any event, and as such the robustness of any decision to approve based upon it (including in legal terms) would, we contend, be extremely shaky.

Finally, the S28 duties referenced above (and indeed implications under the Habitats Regulations in respect of the scope for effects on nearby SAC sites) apply to any as yet unaddressed concerns around dewatering of excavations. We note that one complaint of local individuals and interested parties is that the implications of the likely magnitude of dewatering and related matters such as the implications for local groundwater gradients, and by extension the supporting hydrological regimes of important (and groundwater dependent) habitats and nearby statutory sites, have

not been adequately considered or assessed in the applicant's EIA. If this is indeed the case, then we would agree that this is a further very substantive deficiency in the submission information that we would not suggest can be safely remedied by condition.

I hope these rapid and high-level observations are helpful. We suggest there are clear grounds for deferral of the decision on this application until the applicant has assembled sufficient baseline information to inform procedurally and legally adequate impact assessments and by extension to enable decisions about mitigation (and its efficacy and enforceability) and the appropriateness (in both planning and legal terms) of any deferral of detail to condition to be made on a more robust basis. We suggest that this letter and the comments within it ought to be brought to the attention of NDC, together with your own expert observations on the legal matters that are raised. Clearly this should happen asap – i.e. in advance of completion of their officer's report or at least in advance of committee.

Best regards

A large black rectangular redaction box covers the signature and name of the sender.

**Colin CEnv MCIEEM**

Director