City of BRADFORD
METROPOLITAN DISTRICT COUNCIL

PROOF OF EVIDENCE
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TOWN AND COUNTRY PLANNING ACT 1990
SECTION 78 APPEAL

Horn Crag Quarry, Fishbeck Lane, Silsden

Appeal by Andrew Calvert

Ref: APP/W4705/W/23/3332884

1.0 Introduction

1.1 I am David Campbell and I hold the position of Biodiversity Officer in the City of Bradford Metropolitan District Council's (CBMDC) Countryside Rights of Way Team in the Department of Place. My duties involve statutory work reviewing and commenting on planning applications from householder applications to large residential, commercial and infrastructure projects.

1.2 I have 16 years' experience as an ecologist initially as a consultant ecologist working for large consultancy firms on a variety of schemes including minerals and energy, infrastructure, transport and housing. I have been working for the Local Planning Authority for over 2 years.

I hold the following qualifications:

- Master of Science in Biodiversity & Conservation
- Bachelor of Science (Hons) in Environmental Biology
- Member of the Chartered Institute of Ecology and Environmental Management

1.3 The evidence I have prepared and provide for this Inquiry and in this Proof of Evidence is true and has been prepared and given in accordance with the guidance of my professional institute, the Chartered Institute of Ecology and Environmental Management. I confirm that the opinions expressed are my true and professional opinions.

1.4 This evidence is given in respect of an appeal made against the Council decision in relation to planning application 23/00829/MCF on the basis of concerns about loss of established habitats within a habitat network for an unacceptable length of time. Also that information provided with the application was insufficient for the council to be assured that there would be no illegal disturbance or damage to established badger setts.

2.0 Site Description

2.1 The site is just under 6ha and accessed from an unmade track off Fishbeck Lane. The site is a disused quarry site which is likely to have supported upland heathland historically but areas of worked quarry and probable associated disturbed land has naturally regenerated to upland heathland (a Habitat of Principal Importance listed in S41 of the NERC Act 2006) with gorse scrub, acid grassland (a Bradford Biodiversity Action Plan Habitat) with scattered trees and scattered bracken in some areas. The wider site, to the east, also contains areas of agriculturally improved acid grassland. A flush is present at the western extent of the site boundary. The distribution of habitats can be seen in Figure 2a of the Ecological Impact Assessment (Ref: ER-5064-13B; Brooks, 2023).

2.2 The ecological reports including the Preliminary Ecological Appraisal (Ref ER-5064-01; Brooks, 2021), Ecological Impact Assessment (Ref: ER-5064-13B; Brooks, 2023), Biodiversity Net Gain Assessment (Ref: ER-5064-08E; Brooks, 2022) and Detailed Vegetation Survey (Ref: ER-5064-09; Brooks, 2022) all describe the existing habitats as above with no other habitats identified by the ecologists who prepared the reports. No woodland is recorded present on site.

2.3 The site is entirely within the Wildlife Habitat Network, and it forms a connective section of the Network. It represents a valuable part of Bradford's network of habitats that provide connectivity throughout the district.

2.4 The site supports an extensive network of badger setts, used and disused and abundant evidence of badger activity as described in Badger Assessment and Report (Ref: ER-5064-04; Brooks, 2021) and Updating Badger Monitoring Report (Ref: ER-5064-12B; Brooks, 2023). Whilst badger activity is focussed in the west of the site, mostly amongst the gorse scrub, evidence of badger activity can be found elsewhere on the site.

2.5 The quarry face remains exposed rock displaying strata and offering potential for roosting bats and nesting birds in crevices and ledges.

3.0 Description of Proposed Scheme

3.1 The scheme proposes to open up a new quarry operation on the site which is intended to run for 20 years. Whilst it is clear the site has previously been quarried, the extent and maturity of the habitats which have developed over a long time period are akin to undisturbed semi-natural habitats.

3.2 As shown in Figure 5 of the Ecological Impact Assessment (Ref: ER-5064-13B; Brooks, 2023), the phased extraction of sandstone from the site will over time require the working of most of the site within the red line boundary. This will result in a loss of a majority of the upland heathland and acid grassland habitat and nearly a third of the gorse scrub habitat.

3.3 The scheme will require the creation of a car parking area, office/ facilities, turning loading and maintenance area as well as a haul road, as well as a new unsealed surfaced footpath diversion to the extreme east and north of the site. These elements will be retained and used throughout the life of the quarry.

3.4 The loss of existing exposed faces of approx. 15m will be replaced by 5m high faces following completion of quarrying is a substantial reduction in the rock face with associated losses of exposed rock habitat.

3.5 Habitat restoration is proposed to begin from Year 10, as described in the Biodiversity Net Gain Assessment report (Ref: ER-5064-08E; Brooks Ecological, 2022) in the southern sections of extraction phases 2, 3 and 4. According to the report and associated BNG Metric calculator, at this time 70% of the upland heathland will have been destroyed along with 55% of the acid grassland.

3.6 The Biodiversity Net Gain Assessment report shows that the scheme will result in on-going losses of habitat alongside restoration and BNG units with only minor

improvements overall from Year 22 when significant increases occur but do not provide an overall net gain:

Year 5 = Net Change from baseline of -16.50 Biodiversity Units
Year 10 = Net Change from baseline of -15.05 Biodiversity Units
Year 15 = Net Change from baseline of -14.67 Biodiversity Units
Year 20 = Net Change from baseline of -16.26 Biodiversity Units
Year 22 = Net Change from baseline of -7.90 Biodiversity Units
Year 27 = Net Change from baseline of -4.40 Biodiversity Units
Year 42 = Net Change from baseline of +8.34 Biodiversity Units

3.7 The restoration scheme, beginning at Year 10 will run beyond the completion of extraction, which is predicted to finish after 20 years, will complete, with all upland heathland habitats reaching their projected Moderate condition by Year 42. Upon reaching maturity the restored habitats will result in overall net gains for biodiversity, calculated to be equal to an increase of 8.34 habitat units (21.24%).

3.8 The final restoration scheme as detailed in Figure 17 and Figure 18 of Biodiversity Net Gain Assessment report Ref: ER-5064-08E (Brooks Ecological, 2022) includes the creation of new habitat types on the site including ponds, ephemeral waterbodies and mixed scrub as well as an overall increase in upland heathland, recreation of acid grassland and some areas of gorse scrub.

4.0 Scope of Evidence

4.1 My evidence covers nature conservation and ecology/ biodiversity matters and provides evidence in support of the reason for refusal on the basis of habitat loss, the unacceptable duration for habitat losses before any benefits to biodiversity are realised and the associated delay in reaching no net loss of biodiversity (in accordance with Policy EN9) and in achieving Biodiversity Net Gain, delivering biodiversity enhancements (in accordance with Policy EN2); appropriate compensation for harmful impacts and enhancement of biodiversity in order to comply with relevant policy (Core Strategy Policy EN2). My evidence will also describe how refusal of permission was justified on the basis of an absence of suitable evidence in relation to mitigation or compensation for impacts on badgers. It

is submitted on behalf of CBMDC as the Mineral Planning Authority responsible for planning decisions relating to mineral extraction and therefore relating to extraction of block stone from Horn Crag.

4.2 As Biodiversity Officer for CBMDC I am a statutory consultee for planning and minerals applications and responsible for providing technical advice to Development Management on ensuring planning decisions comply with environmental legislation and guidance and that the Council complies with the general Biodiversity Duty through planning.

4.3 My initial involvement with the Horn Crag minerals applications was in April 2022 when I provided a consultation response on the earlier application 22/01170/MAF. In my comment on that application I drew on comments from the previous Biodiversity Officer on pre-application 20/01844/PMJ for CBMDC from August 2020. In their response my predecessor stated:

> *"If assessments conclude and we accept a development is appropriate at the site, we will require a net gain for biodiversity to be delivered over a reasonable timescale and action plans to retain the maximum habitats and protect wildlife in the interim."*

Habitats

4.4 The Biodiversity Net Gain Assessment provided with application 22/01170/MAF showed that habitat restoration at the site would not commence until the final phase of extraction had been completed in 2042 and that the expected net loss for biodiversity, using Biodiversity Metric 3.0 would be 16.04 Biodiversity Units or 27.48%. It was my position that this was an unacceptable loss of habitat and in my comment of 25th April 2022 stated:

> *"This long-term loss of high and medium distinctiveness habitats, is not acceptable, particularly considering the strategic location of these habitats and their particular value in Bradford District."*

4.5 I reviewed the most recent documents to which this application to which this appeal relates; 23/00829/MCF in May 2023 and objected on the basis that the scheme would not return any net gain for biodiversity until around 30 years after commencement. In my comment on the application I concluded:

> *"In summary, we consider the scale and timeframes for habitat loss and restoration to be unacceptable. The opening of the quarry, which has not been worked legally or extensively since the 1800s and has naturally regenerated to priority heathland and Bradford BAP grassland habitats would result in unacceptable habitat loss to the area for an extended period with risks to restoration that may result in delays to restoration."*

4.6 My evidence will address why this timeframe represents an unacceptable delay in reaching no net loss of biodiversity and providing a net gain for biodiversity and that the proposal does not satisfy the requirements of the National Planning Policy Framework, CBMDC Core Strategy Policies EN2 and EN9 and that approval would put CBMDC in breach of its Biodiversity Duty.

4.7 It is my position that the upland heathland habitat found on the site and within the Wildlife Habitat Network (see paragraph 5.9) in a section of the Wildlife Habitat Network designated for its grassland is of significant importance as a resource supplying additional cover and nectar from heather for invertebrates and as connective habitat. Loss of the majority of this High Distinctiveness habitat (see paragraph 5.23) from the site and from the Habitat Network for the proposed duration would significantly weaken the Network in this location, reducing the connective areas to the south to a very narrow strip and removing most of the resource which makes the habitats in this location so valuable.

4.8 My evidence sits alongside that of Robert Masheder of West Yorkshire Ecology however, whilst my evidence focusses on the unacceptable delays to habitat gains, Robert Masheder will show that this loss of habitat from the Network is unacceptable due to long-term loss of biodiversity within the Network and that the proposals fail to comply with Policy EN2 and EN9.

Badgers

4.9 As shown in confidential report Updating Badger Monitoring Report (Ref: ER-5064-12B; Brooks, 2023) and Horn Crag Layout Plan (232/5-3) the proposed infrastructure works, to create a haul road and car parking area, are both located within 30m of an active badger sett. These features will require construction activity within the 30m buffer and will be retained and active for the duration of the proposed extraction. Current proposals as described in confidential report Updating Badger Survey Monitoring report (Brooks 2023) indicate that, despite this long-term disturbance, the sett would not require closing under Natural England licence. The Council has not been provided with sufficient information about mitigation of impacts on a retained badger sett. In the absence of this detailed information the Council believes the sett may require closing and a compensation sett created elsewhere. Considering the constraints on the site in relation to areas planned to be worked and the existing extent of badger setts in areas planned for retention, we do not believe this would be possible within the land available on the site.

4.10 In order to determine a planning application, the council needs to fully understand the implications for protected species in accordance with Paragraph 99 of ODPM Circular 06/2005 which states;

> "*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 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 permission is granted."

5.0 Legislative and Policy Background

Habitats and Biodiversity Net Gain

Legislation

5.1 In 2018's government publication Our Green Future: Our 25 Year Plan to Improve the Environment[1] the government set its goal of halting biodiversity loss by 2030 in line with the UN's Sustainable Development Goals[2]. As we enter 2024, we are just six years away from the target date to halt biodiversity loss.

5.2 In Chapter 1: Using and managing land sustainably the document establishes that government will:

"…seek to embed a 'net environmental gain' principle for development to deliver environmental improvements locally and nationally."

5.3 The intention of this being:

"*The new approach will recognise good practices that build up and bolster natural and heritage assets. It will also take account of the negative effects of a range of land uses and activities. It will require a balance of incentives and regulations – influencing decisions so that we use land in a way that supports cost-effective, sustainable growth."*

5.4 The Environmental Improvement Plan 2023[3] published by Defra in January 2023 restates the intention of the government to halt biodiversity loss by 2030 and also to reverse biodiversity loss to a point where there is an increase in abundance by

[1] Our Green Future: Our 25 Year Plan to Improve the Environment, Defra, London, 2018
[2] Transforming Our World The 2030 Agenda for Sustainable Development, United Nations, 2016
[3] Environmental Improvement Plan 2023, Defra, London, 2023

2042 of 10% over 2022 levels. It also restates the intention to implement mandatory Biodiversity Net Gain for most developments.

5.5 The Environment Act, 2021 creates a legally binding duty on government to halt species decline by 2030 and reduce the risk of species extinction by 2042 when compared to the risk of species extinction in 2022.

5.6 It is this intention that resulted in the development of Biodiversity Net Gain as mandated by the Environment Act, 2021 for all Town and Country Planning Act, 1990 (with some exemptions). The Environment Act established the general condition on planning applications that they must result in a 10% Biodiversity Net Gain. The secondary legislation that will mandate 10% Biodiversity Net Gain will be applicable to most planning applications, including minerals, submitted from 12th February 2024 however the National Planning Policy Framework imposes the requirement for developments to provide net gains for biodiversity and is discussed below.

5.7 In addition to the general condition of planning to provide a 10% Biodiversity Net Gain the Environment Act made amendments to the Natural Environment Rural Communities Act 2006. This amendment strengthened the general biodiversity objective on public bodies, changing the wording from “conserve biodiversity” to “conserve and enhance biodiversity”. Section 102 of the Environment Act states:

> “*102 General duty to conserve and enhance biodiversity*
> *(1) Section 40 of the Natural Environment and Rural Communities Act 2006 (duty to conserve biodiversity) is amended in accordance with subsections (2) to (7).*
> *(2) In the heading, after “conserve” insert “and enhance”.*
> *(3) For subsections (A1) and (1) substitute—*
> *“(A1) For the purposes of this section “the general biodiversity objective” is the conservation and enhancement of biodiversity in England through the exercise of functions in relation to England.*

(1) A public authority which has any functions exercisable in relation to England must from time to time consider what action the authority can properly take, consistently with the proper exercise of its functions, to further the general biodiversity objective.

(1A) After that consideration the authority must (unless it concludes there is no new action it can properly take)—

(a) determine such policies and specific objectives as it considers appropriate for taking action to further the general biodiversity objective, and

(b) take such action as it considers appropriate, in the light of those policies and objectives, to further that objective."

5.8 It is on this basis that the Council asserts that, in refusing the application, it has adhered to the general biodiversity objective.

Bradford Wildlife Habitat Network (BWHN)

5.9 The BWHN was created following the Government's report 'Making space for nature': a review of England's wildlife sites and whether they are capable of responding and adapting to the growing challenges of climate change, Prof Sir John Lawton (24/09/2010). This informed "A Green Future: Our 25 Year Plan to Improve the Environment" which refers to Lawton's recommendations requiring "more habitat; in better condition; in bigger patches that are more closely connected" (25-year-environment-plan.pdf (publishing.service.gov.uk) p58).

5.10 The BWHN takes designated nature conservation sites international (SPA/SAC), national (SSSI) and local (LWS) and provides better links between them using broad habitat types woodland, grassland, heathland and wetland. These links were mapped by experienced ecologists using a combination of habitats, species and aerial photography data. Wherever possible this maintained a continuous corridor aimed at helping a wide range of species from plants, fungi and lichens through to invertebrates, amphibians, reptiles, birds and mammals.

5.11 The Wildlife Habitat Network is covered by Policy EN2 of the Bradford Core Strategy which seeks to resist development which would cause serious fragmentation of habitats, wildlife corridors or have adverse impacts on biodiversity networks.

Habitats of Principal Importance, Priority Habitats, Biodiversity Action Plan Habitats

5.12 Section 41 of the Natural Environment Rural Communities Act, 2006 states the following:

> "*41 Biodiversity lists and action (England)*
> *(1)The Secretary of State must, as respects England, publish a list of the living organisms and types of habitat which in the Secretary of State's opinion are of principal importance for the purpose of conserving biodiversity."*

5.13 Habitats of Principal Importance were first identified as priority habitats in the UK Biodiversity Action Plan (UKBAP). The UKBAP was published in 1994 in response to the Convention on Biological Diversity which the government signed up to in 1992. The Convention called for creation and enforcement of national strategies and plans to identify, conserve and protect biodiversity and to enhance biodiversity.

5.14 Local Biodiversity Action Plans were developed by local authorities and identified locally significant priority habitats that may not have been included in the UKBAP but were considered of importance for local biodiversity.

National Planning Policy Framework (NPPF)

5.15 The NPPF provides the policy backing for CBMDC to require that developments result in improvements for biodiversity at this point prior to implementation of mandatory BNG.

"*180. Planning policies and decisions should contribute to and enhance the natural and local environment by:*

(d) minimising impacts on and providing net gains for biodiversity, including by establishing coherent ecological networks that are more resilient to current and future pressures;"

5.16 And

"*186. When determining planning applications, local planning authorities should apply the following principles:*

(a) if significant harm to biodiversity resulting from a development cannot be avoided (through locating on an alternative site with less harmful impacts), adequately mitigated, or, as a last resort, compensated for, then planning permission should be refused;

(d) development whose primary objective is to conserve or enhance biodiversity should be supported; while opportunities to improve biodiversity in and around developments should be integrated as part of their design, especially where this can secure measurable net gains for biodiversity or enhance public access to nature where this is appropriate."

5.17 It is on this basis that CBMDC, as Local Planning Authority requests a Biodiversity Net Gain Assessment for all eligible applications. Local Core Strategy Policy EN2 also requires that ecological enhancements are implemented as part of developments. Biodiversity Net Gain is a convenient and practical way to provide evidence of enhancements required by local policy.

Local Policy

5.18 The following policies from the CBMDC Core Strategy are relevant to the application and the reasons for refusal. The relevant sections of each policy are reproduced below.

5.19 "*Policy EN2: Biodiversity and Geodiversity*

Habitats and Species outside Designated Sites

D. Proposals that may have an adverse impact on important habitats and species outside designated sites need to be assessed according to the following criteria:

1. The potential for adverse impact on important/priority habitats that occur outside designated sites

2. The potential for adverse impact on species of international, national and local importance

3. The extent to which appropriate measures to mitigate any potentially harmful impacts can be identified and carried out

4. As a last resort, the extent to which appropriate measures to compensate any potentially harmful impacts can be identified and carried out."

"Enhancement

E. Plans, policies and proposals should contribute positively towards the overall enhancement of the District's biodiversity resource.

They should seek to protect and enhance species of local, national and international importance and to reverse the decline in these species.

The Council will seek to establish coherent ecological networks that are resilient to current and future pressures. Development which would cause serious fragmentation of habitats, wildlife corridors or have a significantly adverse impact on biodiversity networks or connectivity will be resisted. Habitats of the moorland will be enhanced and landowners or occupiers will be actively encouraged to manage important areas for bird foraging to ensure continued provision of suitable habitat."

5.20 "*Policy EN9: New and Extended Minerals Extraction Sites*

A. Proposals to open up a new minerals extraction site on previously undeveloped land will be supported in principle provided that all of the following criteria are met:
4. The development would not lead to a long-term net loss of biodiversity, to the loss or significant deterioration of any irreplaceable habitats, or to the permanent disruption of a significant ecological network,.."

"B. Proposals to open up a new minerals extraction site on previously developed
land, re-open a disused minerals extraction site, or extend an existing minerals extraction site, will be supported in principle provided that all of the following criteria are met:
4. The development would not lead to a long-term net loss of biodiversity, to the loss or significant deterioration of any irreplaceable habitats, or to the permanent disruption of a significant ecological network;…"

5.21 "*Policy EN10: Sandstone Supply*
E. The following criteria shall be used to identify areas of search for building, roofing and paving stone quarries
3. Locations outside of areas where further minerals extraction activities would be likely to lead to the loss or significant deterioration of any irreplaceable habitats, or to the permanent disruption of a significant ecological network;"

Biodiversity Net Gain

5.22 Biodiversity net gain (BNG) is an approach to development, and/or land management, that aims to leave the natural environment in a measurably better state than it was beforehand. It uses habitat as a proxy for ecological value as habitats are the basic elements of ecological communities and are essential when working to reduce species' population decline as they provide the homes for those species.

5.23 A BNG assessment uses survey data provided by ecologists on habitat distinctiveness (the rarity, species richness or habitat importance for species) and habitat condition (how close to its optimum state a habitat is) with desk-based information about the strategic significance of those habitats at a landscape scale (in relation to habitat connectivity or local value of habitats or Local Nature Recovery priorities). These factors are multiplied with the area coverage of the habitats within a site to calculate a baseline habitat score for a potential development site.

5.24 Once the details of the proposed development or operation are known, the planned distribution of post development habitats and their type and condition is used to calculate the biodiversity value of the post-development site in the same way as above. The post-development value is then taken from the pre-development value of the site habitats to come up with the overall biodiversity score for the development. If it is not possible to reach the required biodiversity score on site then developers are encouraged, providing they have exhausted all on-site options, to look to enhance or create habitats elsewhere, either within an LPA boundary or if necessary further away. Developers may also pay or enter into an agreement of some kind with landowners or managers of other land for them to implement habitat improvements and generate biodiversity units to offset losses on the development site. Developers may also use land within their control and implement habitat improvements themselves. This is a key element of Biodiversity Net Gain as it has the potential to fund habitat improvements at a large scale, in strategically significant locations.

5.26 The BNG process considers temporary impacts of habitat where habitats are restored within 2 years to constitute ‘retained habitat’. Clearly time between habitat loss and restoration is considered in the BNG process here.

5.27 The Biodiversity Metric 3.1 (the version of the metric used by the appellant’s ecologist for this application) includes fields that allows users to state if there will be delays to starting habitat creation. The metric increases the habitat time to condition and applies the ‘time to target condition’ multiplier which reduces the unit

value of the habitats to be created. This is explicitly intended as an incentive to begin habitat creation or enhancement in advance and a disincentive to delays in habitat creation post habitat degradation. This arises because there is a time constraint on Biodiversity Net Gain being provided by developments due to the urgency of the biodiversity crisis which drove its development.

5.28 Landowners and habitat banks are encouraged to begin habitat creation in advance of unit sale and the metric provides an incentive to do this. Developers are encouraged to avoid delays in habitat creation or enhancement through the opposite use of multipliers.

5.29 Biodiversity Metric 3.1 User Guide (Natural England, 21st April 2022) states the following:

> *"5.42. The 'Habitat created in advance' function enables biodiversity metric 3.1 to account for a reduction in both the time remaining to reach the target condition and the risk of delivery being successful. This occurs when work to create or enhance habitats is started in advance of an intervention/development occurring, including through 'habitat banks'. This function reduces the time to target condition by the number of years since habitat creation or enhancement began and applies an adjusted multiplier to recognise the reduced delivery risk."*

> *"5.45. When habitat creation is delayed significantly beyond the point at which the baseline losses occur the 'Delay in starting habitat creation' function enables biodiversity metric 3.1 to account for the resulting increase in the time remaining to reach the target condition. This function recognises that the risk of failure remains the same as when habitat creation begins concurrently with the loss, so the difficulty risk multiplier is applied."*

> *"5.46. The metric calculation tool increases the 'time to target condition' by the appropriate number of years that the habitat creation is delayed and applies the adjusted multiplier. If the length of delay combined with the*

'standard' time to target condition exceeds 30 years, then the 30+ years multiplier will be applied…"

5.30 When considering habitat enhancement or creation, the Biodiversity Net Gain metric (Metric 3.1 as used for the Horn Crag application, Metric 4.0 and now the Statutory Metric) asks the user to input if there will be delays in commencing the habitat or if habitat works have already begun. The metric then applies either a positive or negative multiplier to the biodiversity unit score to incentivise early commencement of habitat works and disincentivise delays. This is further evidence that time between habitat loss or damage and restoration is a consideration in the BNG process.

5.31 The Biodiversity Net Gain Good Practice Principles for Development[4] include ten good practice principles. Principle 4 states:

"Address risks.
Mitigate difficulty, uncertainty and other risks to achieving Net Gain. Apply well-accepted ways to add contingency when calculating biodiversity losses and gains in order to account for any remaining risks, ***as well as to compensate for the time between the losses occurring and the gains being fully realised."***

5.32 This principle clearly shows the importance of commencing habitat works to mitigate or compensate for the length of time taken from habitat loss or degradation to and habitat gains coming about.

5.33 Principle 6 states:

"Achieve the best outcomes for biodiversity.
Achieve the best outcomes for biodiversity by using robust, credible evidence and local knowledge to make clearly-justified choices when:

[4] Biodiversity Net Gain: Good practice principles for development, CIEEM, CIRIA, IEMA, 2016

- *Delivering compensation that is ecologically equivalent in type, amount and condition, and that* ***accounts for the location and timing of biodiversity losses***
- *Compensating for losses of one type of biodiversity by providing a different type that delivers greater benefits for nature conservation*
- *Achieving Net Gain locally to the development while also contributing towards nature conservation priorities at local, regional and national levels*
- *Enhancing existing or creating new habitat*
- *Enhancing ecological connectivity by creating more, bigger, better and joined areas for biodiversity."*

5.34 Again the principles clearly indicate that reducing the length of time between habitat loss and habitat gains should be a goal of habitat creation, enhancement or restoration plans.

The Mitigation Hierarchy

5.40 The mitigation hierarchy is system which ecologists working with developers are strongly advised to follow during design and implementation of development schemes. The hierarchy requires the prioritisation of avoidance of adverse ecological impacts before considering mitigation of those impacts. If avoidance is not possible and mitigation inadequate then the hierarchy permits consideration of remediation and finally compensation for habitat losses. The Biodiversity Net Gain Good Practice Principles for Development include application of the mitigation hierarchy as its first principle and states:

> "*Do everything possible to first avoid and then minimise impacts on biodiversity. Only as a last resort, and in agreement with external decision-makers where possible, compensate for losses that cannot be avoided. If compensating for losses within the development footprint is not possible or does not generate the most benefits for nature conservation, then offset biodiversity losses by gains elsewhere."*

5.41 The Biodiversity Metric 3.1 User Guide[5], the guide for the version of the Biodiversity Metric used by the Appellant's ecologist states:

> *"Applying the mitigation hierarchy when using the metric*
>
> *1.18 Biodiversity metric 3.1 supports and reinforces the application of the mitigation hierarchy which is an important principle of ecological good practice (see Figure 1- 1). Applying the mitigation hierarchy means aiming to retain habitats in situ and avoiding or minimising habitat damage so far as possible, before looking to enhance or recreate habitats. This sequential approach is encouraged by biodiversity metric 3.1 because it allows overall biodiversity gains to be achieved more easily through the avoidance of on-site habitat losses, rather than relying solely on the creation of new habitat or the enhancement of existing habitat. It works this way because the metric applies multipliers that are based on the risks inherent in creating or restoring habitat, which are not applicable when existing habitat is safeguarded."*

5.42 Consideration of the mitigation hierarchy is required by the NPPF in paragraph 186:

> "*186. When determining planning applications, local planning authorities should apply the following principles:*
>
> *(a) if significant harm to biodiversity resulting from a development cannot be avoided (through locating on an alternative site with less harmful impacts), adequately mitigated, or, as a last resort, compensated for, then planning permission should be refused;"*

The Biodiversity Gain Hierarchy

[5] STEPHEN PANKS A , NICK WHITE A , AMANDA NEWSOME A , MUNGO NASH A , JACK POTTER A , MATT HEYDON A , EDWARD MAYHEW A , MARIA ALVAREZ A , TRUDY RUSSELL A , CLARE CASHON A , FINN GODDARD A , SARAH J. SCOTT B , MAX HEAVER C , SARAH H. SCOTT C , JO TREWEEK D , BILL BUTCHER E AND DAVE STONE A 2022. Biodiversity metric 3.1: Auditing and accounting for biodiversity – User Guide. Natural England. 2022

5.43 The Biodiversity Gain Hierarchy is a version of the mitigation hierarchy developed for mandatory BNG and is discussed here to illustrate that consideration of the mitigation hierarchy remains an essential component of the mandatory BNG process, as it did in earlier versions of the process. It is described on the government BNG Draft Biodiversity Net Gain Planning Practice Guidance web pages[6] as:

> *"The biodiversity gain hierarchy for the purpose of the statutory framework for biodiversity net gain is set out in Article 30A of the Development Management Procedure Order. This hierarchy is distinct from the mitigation hierarchy set out in the National Planning Policy Framework.*
>
> *The biodiversity gain hierarchy means the following actions in the following order of priority:*
>
> - *avoiding adverse effects of the development on onsite habitat with a habitat distinctiveness score, applied in the biodiversity metric, equal to or higher than six;*
> - *so far as those adverse effects cannot be avoided, mitigating those effects;*
> - *so far as those adverse effects cannot be mitigated, habitat enhancement of onsite habitat;*
> - *so far as there cannot be that enhancement, creation of onsite habitat;*
> - *so far as there cannot be that creation, the availability of registered offsite biodiversity gain;*
> - *so far as that offsite habitat enhancement cannot be secured, purchasing biodiversity credits.*
> - *Developers are encouraged to follow the Biodiversity Gain Hierarchy from the earliest stage possible when selecting a site and considering development proposals.*
>
> *Local planning authorities must take into account the Biodiversity Gain Hierarchy when considering whether the biodiversity objective has been met and when determining whether to approve the Biodiversity Gain Plan."*

5.44 The NPPF, paragraph 186 interacts with the Mitigation and Biodiversity Hierarchies when it states:

[6] https://www.gov.uk/guidance/draft-biodiversity-net-gain-planning-practice-guidance

"186. When determining planning applications, local planning authorities should apply the following principles: a) if significant harm to biodiversity resulting from a development cannot be avoided (through locating on an alternative site with less harmful impacts), adequately mitigated, or, as a last resort, compensated for, then planning permission should be refused;"

Badgers

Legislation

5.45 Badgers are given legal protection under the Protection of Badgers Act 1992. The Act makes it an offence, either intentionally or recklessly to kill, injure or take badgers or damage, destroy, obstruct entry to a badger sett. The Act also makes it an offence to disturb a badger when occupying a badger sett. There are derogations and a licensing procedure which may permit disturbance providing it would cause abandonment of a sett, most commonly this would require implementation of some kind of mitigation. Licenses may also be obtained for the exclusion of badgers from a sett and the destruction of that sett once it can be ensured no badgers are present. Mitigation of resulting impacts from sett destruction would most commonly require the creation of a compensatory sett within the badger clan's territory.

5.46 Class licences can be granted to individuals to carry out work on badger setts based on their extensive experience and the registration of the site following granting of planning permission.

5.47 Whilst the Statutory Nature Conservation Organisation, Natural England will grant licenses or register sites for sett disturbance, the proposed mitigation must be robust enough to ensure the level of disturbance would not result in damage or destruction of the sett or cause the animals to abandon. If there is the potential for disturbance to result in damage, destruction or abandonment of the sett then a Natural England would require that, under license, a compensatory sett is created and badgers be excluded.

5.48 Conditions of the WML-CL35 licence issued by Natural England (Appendix 1) states:

"*Disturbance close to an occupied sett*

14. Prior to the start of operations, an area within a minimum distance of 20 metres of any known badger sett entrances that display signs indicating current use by a badger must be clearly marked using coloured tape, string, paint, or other markers. Any further setts which are discovered during the operation must be similarly marked as soon as their presence becomes known.

15. Within the marked area as above ('exclusion zone') no heavy machinery is to be used.

16. Vehicles must not drive directly over or park on top of badger sett entrances.

17. Trees/stumps/shrubs/hedges within 20 metres of the sett must not be uprooted.

18. Where works involve pile driving, rock boring, dynamic compaction or a similar activity with the potential to cause ground vibration that could disturb badgers occupying a sett or damage a sett by causing tunnel collapse, the impact on that sett must be evaluated.

19. If disturbance is reasonably expected to result in a longer term impact (eg more than four to six weeks) on the badgers occupying that sett or cause tunnel collapse, in accordance with Conditions 20-30, badgers must be excluded from the sett and the sett closed and proofed against re-entry by badgers before that operation begins and for its duration. Activities with the potential to cause such as level of disturbance must not be carried out between 1 December and 30 June."

Guidance

5.49 Standard guidance for the avoidance of disturbance of badgers in their setts can be found in English Nature's publication Badger's and Development[7] recommends that, without a licence heavy machinery is not used within 30m of a sett; lighter machinery including wheeled vehicles and digging activity should not take place within 20m. These activities are judged likely to cause disturbance which may result in damage to a sett or abandonment.

6.0 Reasons For Objection

Habitats

6.1 It is my position that consideration of the time span from habitat damage or loss to habitat restoration and the achievement of net gains for biodiversity, measured either through the Biodiversity Net Gain process or traditional qualitative means, is intrinsic to proper consideration of ecological impacts. I am of the opinion that the urgency of the Biodiversity Crisis is such that those temporal considerations have become more essential and consideration more important. The duty for public bodies to 'Protect and Enhance' biodiversity through their operations is mandatory, pursuant with the requirements of the amended Natural Environment and Rural Communities Act, 2006. It is my opinion that in meeting this duty, it is required to consider the longevity of adverse biodiversity impacts which may be caused through the approval of planning applications.

6.2 The approach to assessment of biodiversity impacts, employing the Biodiversity Net Gain process was agreed between the council and the Appellant and the application was progressed on this basis. The understanding implicit in this continued approach is that Biodiversity Net Gain process, principles and rules would be adhered to for this application.

6.3 The Appellant's statement of Case stated:

"The requirement to deliver biodiversity net gains in the BMDC LP does not contain a time restriction component, such an approach has been introduced by the

[7] Badgers and Development. English Nature, Peterborough, 2002.

Council and does not have a basis in the Development Plan. Moreover, the principle of delivering Net Gains is not time restricted."

6.4 This is incorrect as the wording of EN9 clearly includes consideration of time frames of biodiversity loss and Biodiversity Net Gain cannot be achieved until biodiversity loss has been regained:

> *"Policy EN9: New and Extended Minerals Extraction Sites*
> *A. Proposals to open up a new minerals extraction site on previously undeveloped land will be supported in principle provided that all of the following criteria are met:*
> *4.* ***The development would not lead to a long-term net loss of biodiversity****, to the loss or significant deterioration of any irreplaceable habitats, or to the permanent disruption of a significant ecological network..."*

6.5 As stated above, my position is that consideration of temporal delays to the achievement of Biodiversity Net Gain are integral to the approach and compliance with EN2 and that this approach was agreed between the Council and the Appellant. This is sustained in the body of the Statutory Biodiversity Metric and previous iterations of the metric, including version 3.1 which the Appellant's ecologist has used for this application.

6.6 The Appellant's most recent Biodiversity Net Gain Assessment report (Brooks Ecological, ER-5064-OBE, 30/11/22) permits the comparison of the 'standard approach' to BNG assessment with the 'Snap Shot' approach. The 'Snap Shot' is an approach to BNG assessment that has been used in other minerals applications in England such as *1/22/9005 An extension of the end date of extraction to 31st December 2032 for the continued working of a known mineral reserve, subsequent restoration infilling and ancillary aggregate recycling at Faugh Sandpit No.2.* It is not however, an approach to BNG assessment that has so far been approved or supported by Defra or Natural England, however CBMDC were minded to accept this approach as a pragmatic means of assessing BNG for minerals applications

which are understood to involve changes to habitats over lengthy periods of time after which valuable habitats are often created as part of a restoration plan. This was under the understanding that the BNG process and principles would be followed and as such that Biodiversity Net Gain could be delivered in a timely manner.

6.7 The biodiversity section of the report for the above application for a quarry extension, approved by Cumbria County Council in October 2023 states[8]:

> ***"7.59 What impacts are there in terms of protected species and does the proposal result in a biodiversity net gain?***
> *7.60 The site is not located within or partly within an statutory protected (European) sites, but it is located about 500 metres from a Site of Special Scientific Interest (SSSI) – Cairnbridge Sand Pit. European statutory designated protected sites are located around 3.3km from the site (River Eden SAC and North Pennine Moors SAC). The site itself contains mostly habitats of low distinctiveness.*
> *7.61 Two County Wildlife (CW) sites are located close to the site – in fact one (Faugh Moss County Wildlife Site), is located inside the site to the northern part of it, close to the exit road. Two other CW sites are located close by – Juniper Green and Cairbridge CW sites.*
> *7.62* ***The proposed scheme is not likely to result in any significant benefits in terms of biodiversity until final restoration of the site.*** *However, the application details that restoration will be progressive and as such****, part of the site will be subject to early restoration in 2024*** *– this will include the create of two additional small ponds close to the existing pond on the site and restoration of the area of the site between the site buildings and the working area.*

[8] DEVELOPMENT CONTROL AND REGULATION COMMITTEE A report by the Executive Director for Economy and Infrastructure 28 February 2023. Application Reference No. 1/22/9005 Application Type: Full Planning Permission Proposal: Proposed extension of time of the extraction of sand and gravel until 31 December 2032, subsequent restoration by infilling and ancillary aggregate recycling Location: Faugh Sand Pit no. 2 (Esk quarry), Faugh, Brampton Applicant: Eddie Wannop Date Valid: 19 October 2022 Reason for Committee Level Decision: Objections and representations received

This area is also identified as an area of high distractive habitat – neutral acid grassland.

7.63 During the continued operations at the site, ***working will mostly be restricted to the established working area, identified as areas of low habitat value and distinctiveness and areas of high value, such as the County Wildlife sites and areas of early restoration are unlikely to be adversely affected – this way existing habitats will be protected from the working activities of the site. Early restoration will provide an opportunity for biodiversity net gain, partly as a result of the creation of the new ponds, but also by the translocation of the high value acid grassland habitat that has established itself on the slope face between the site buildings and working area.*** *The translocation of this habitat will be carefully coordinated and is required in the early stages of the scheme to allow engineered fill to be used to stabilise this slope face.*

7.64 The final restoration scheme for the site has been designed to achieve maximum biodiversity net gains through a combination of retention and management of existing habitats on the site, the creation of acid grassland to areas of the site, creation of a varied mosaic of habitats to include hedgerows, management and removal of non-native species to protect the Faugh Moss CWS, retention of the existing pond on the site and retention of both neutral and acid grassland.

7.65 The final restoration scheme would also create areas of wet woodland to the eastern boundary of the site, area of mixed scrub would be retained and created, and an area of broadleaved woodland would be planted close to where the site buildings are located. The restoration scheme would be maintained by an extensive aftercare period of seven years to ensure good establishment of the created habitats and to reinforce those habitats found on site.

7.66 Policy DC16 of the CMWLP concerns biodiversity and geodiversity and states; 'Proposals for minerals and waste

developments, including ones for ROMP applications and time extensions, will be required to identify, where appropriate: any potential impacts on important biodiversity and geological conservation assets, as defined in the Strategic Policies, and on any functional ecological and green infrastructure networks; and, their potential to enhance, restore or add to these resources; and to contribute to national and local biodiversity and geodiversity objectives and targets. ***I consider that the information provided in terms of the restoration of the site and its affects during operation demonstrate that the proposed scheme will result in a significant biodiversity net gain over the long term and protect conservation assets during the operational phase****. In this case, strategic policy SP15 is not relevant as there are no internationally protected sites which would be materially affected by the scheme. I consider the requirements of policy DC16 are met, together with the wider objectives of paragraph 174 of the National Planning Policy Framework (NPPF).”*

6.8 It is clear from this report that consideration of the early commencement of biodiversity enhancements was a factor in Cumbria County Councils approval of the BNG plans and that the availability of suitable areas within the site for the restoration of habitats coupled with the low distinctiveness of the habitats to be affected means impacts on habitats would be adequately mitigated or compensated for early in the scheme.

6.9 Comparison of the Snap Shot metrics provided with the application in Biodiversity Net Gain Assessment report (Brooks Ecological, ER-5064-O8E, 30/11/22) (for years 5, 10, 15, 20, 22, 27 and 42) with associated metrics for the standard approach, also presented in the report shows that a significant gain in Biodiversity Units is made using the Snap Shot approach. This gain is a result of the removal of the negative multiplier for a delay in habitat creation and the inclusion of a positive multiplier, in later years, for habitats that were being restored. Despite this skewing of the temporal multipliers in favour of the proposals, a net gain for biodiversity is

not expected until approximately Year 30. Projected total gains are not expected until Year 42 after commencement.

6.10 All of the above timeframes exceed the date of the government's legal duty to halt biodiversity loss by 2030 by more than 20 years.

6.11 It is my opinion that this application fails to meet the requirements that minerals applications granted by other LPAs, which employ the same Snap Shot approach have been able to meet. Significantly, this relates availability of land where habitat enhancement or creation could commence before the completion of the first phase of extraction. This means that cases such as *1/22/9005 An extension of the end date of extraction to 31st December 2032 for the continued working of a known mineral reserve, subsequent restoration infilling and ancillary aggregate recycling at Faugh Sandpit No.2.* the applicant is able to begin creating new habitats without any significant delays. The limited extent of land associated with the Horn Crag quarry, available for habitat enhancement or creation and lack of any suitable land close by or elsewhere and under the control of the applicant means for that purpose means that there is no opportunity to begin creating habitats until the first phase of extraction has ended.

6.12 It is my opinion that the goals of the Snapshot approach are to minimise the negative multipliers applied in the metric by delaying habitat creation and therefore there is an implicit acceptance by the Appellant that considerations of the time taken to provide habitat compensation and enhancement are of material significance.

6.13 The nature of the application site and the proposed extraction area (as presented in Brooks Ecological, ER-5064-O8E, 30/11/22 and Drawing 232/5-3) is such that I am of the opinion that there is insufficient suitable retained habitat within the red line boundary for compensatory habitat enhancement or creation that would make a meaningful, early contribution to offsetting habitat losses. There is therefore limited opportunity for the proposed works to proceed whilst giving proper consideration to requirements of the Mitigation Hierarchy or the Biodiversity Gain Hierarchy to

consider compensation or offsetting when adverse impacts cannot be avoided or appropriately mitigated, as is required by the BNG process.

6.14 The loss of the high value priority habitats as well as the locally relevant medium distinctiveness acid grassland habitats for this length of time constitutes a long-term loss of habitat which is unacceptable under Policy EN9 of the Core Strategy. It fails to meet the requirements of Policy EN2 as measures to compensate any potentially harmful effects is inadequate due to the timeframes required. The consideration of the time take from habitat loss to habitat restoration is an essential consideration for the LPA when complying with its Biodiversity Duty, set out in the NERC Act 2006. This is sustained in the approach to Biodiversity Net Gain which penalises late commencement of habitat improvement works and incentivises early commencement and includes a mechanism whereby short-term losses can be considered as retained as detailed above.

6.15 The Appellant's Statement of Case states that:

> *"The site's working scheme retains and protects the areas of highest biodiversity value and reinstates others at the earliest opportunity."*

6.16 As described in the Biodiversity Net Gain Assessment report (Brooks Ecological, ER-5064-O8E, 30/11/22)[9] and the associated Biodiversity Metric 3.1 for Year 5, the site supports some 1.3674ha of upland heathland. This habitat, which may have existed prior to the original quarry operations, has colonised previously worked areas and matured over the years since operations at the site ceased. As described in the Preliminary Ecological Appraisal Report (Brooks, 2021)[10] the heathland habitats on site are defined in the Biodiversity Net Gain process as being of High Distinctiveness. It is my position that the upland heath identified on the site is the most valuable habitat present on the site. Other habitats recorded on the site being: bracken, upland acid grassland and gorse scrub, none of which are considered High distinctiveness in the Biodiversity Net Gain approach and none of which are listed as HPI in Section

[9] Biodiversity Net Gain Assessment (Ref: ER-5064OBE), Brooks Ecological, 30/11/2022
[10] Preliminary Ecological Appraisal Report (Ref: ER-5064-01), Brooks Ecological 06/04/2021

41 of the NERC Act, 2006. According to the information provided in the appellants Biodiversity Net Gain Assessment report (Brooks Ecological, ER-5064-O8E, 30/11/22) and the associated metric calculators, only 8% of this Priority Habitat will be retained, with the other 82% removed during the lifetime of the quarry operations.

6.17 Therefore, I consider the statement included in the Appellant's statement of case to be incorrect.

6.18 In light of the above it is my position that refusal of the application is in accordance with the Council's Biodiversity Duty as amended in the NERC Act, 2006 by the Environment Act 2021 and the requirements of the NPPF Paragraph 186 (a). The proposals fail to meet the requirements of Policy EN2 due to the delays to realising appropriate biodiversity enhancements based on the requirements of the Biodiversity Net Gain process. The development fails to meet the requirements of Core Strategy Policy EN9 to avoid a "*long-term net loss of biodiversity"*.

Badgers

6.19 Badger Sett 4 is located within 30m of the haul road and the office/ facilities/ turning/ loading and maintenance area as well as the staff parking area. A sett in this area would be subject to long-term disturbance from vehicle movements including quarry traffic, human activity and the construction of these elements of the quarry. It may be possible to adequately mitigate for short-term disturbance effects caused by this kind of activity with the 30m buffer and secure a derogation license from Natural England for disturbance only. However, the long-term nature of the quarry and specifically these elements, including creation and operation of vehicular working areas, means it was not made clear at application how disturbance over this length of time could be mitigated suitably to avoid abandonment. No proposals for replacement setts have been made and the extent of badger activity in the retained gorse scrub limits the opportunities for sett creation anywhere on the site. We are therefore unable to assess the extent of the impacts to badgers and if a licence could be obtained and the proposals therefore comply with the Badgers Act 1992.

6.20 In our response of 25th April 2022 to the 2022 application (22/01170/MAF) the Biodiversity Team stated that:

> *"Although the proposal for the reopening of the quarry would retain those habitats where badger setts are confirmed, it would not be possible to maintain the 30m buffer between an active sett and construction and plant movements. Therefore, protection of the active badger sett from disturbance cannot be achieved. In addition, the 30m stand-off covers regular construction activity.*
>
> *Closure of a sett would require additional detailed survey information and a suitable mitigation plan (including locations for artificial sett creation) in order to satisfy the requirements of a Natural England Licence.*
>
> *There is currently insufficient information about badger activity and about options for mitigation or compensation to allow a full assessment of potential impacts on badger. Therefore, the application does not meet the requirements of the NPPF or Bradford Core Strategy Policy EN2*"

6.21 Despite the above comment on the earlier application, the 2023 application did not include options for mitigation or compensation. Specifically, we would need to know the details of the proposed mitigation under a licence to disturb the retained sett 4 and/ or details of a suitable location for the creation of a compensation sett should the proposed mitigation of disturbance be judged inadequate.

7.0 Conclusion and Summary

7.1 The above Proof of Evidence shows that timely habitat creation and enhancement is a material consideration when determining if a proposal will meet its requirements to provide ecological enhancement. This is driven by the Biodiversity Net Gain process and Core Strategy Policy EN2 but also sustained by Core Strategy Policy EN9. It is my judgement that the compensation proposed for habitat losses, given the extended timeframes, is not appropriate, in light on the legal goals contained in the Environment Act, 2021 and therefore the application is not compliant with Core

Strategy Policy EN2 and that considering the amendments to the Natural Environment Rural Communities Act, 2006 in relation to the Biodiversity Duty, the Council is correct to refuse the application. It illustrates how extant and emerging policy and legislation is key to the government's plans to stop and reverse biodiversity loss by 2030.

7.2 This evidence also shows that the Council was correct in its judgement that the proposals did not comply with the above policy and legislative components. It illustrates how compliance with the Biodiversity Duty and the requirements of the NPPF mean that the Council is justified to request a Biodiversity Net Gain assessment and adhere to the principles of the process, including the timely provision of ecological enhancements.

7.3 The above evidence also shows that the options available to the Appellant for the achievement of the required Biodiversity Net Gain, particularly the option to offset impacts through early habitat creation an approach approved by other MPAs, but that the Appellant did not explore these options following the withdrawal of 22/01170/MAF.

7.4 The above evidence shows that the proposals do not comply with Policy EN2 of the Core Strategy on the basis that the Biodiversity Net Gain process, used to evidence the enhancements required by the policy, is driven by temporal considerations of habitat restoration, creation and enhancement in order to address the biodiversity crisis and facilitate the achievement of legally binding government goals to halt biodiversity loss.

7.5 As shown in the evidence of Robet Masheder of West Yorkshire Ecology, the site has strategic importance due to its inclusion in the habitat network. This increases the significance of the habitat losses (through implementation of multipliers for strategic significance within the Biodiversity Metric 3.1 used in the assessment of these proposals) which result in a long-term net loss of habitat, in contravention of Core Strategy Policy EN9.

7.6 The above evidence also shows that the most valuable habitat found on the site is Habitat of Principal Importance, upland heathland and that the majority of this habitat will be lost as a result of the proposed operations and will not be restored until the 2050s with the full maturation of the habitat and realisation of the overall biodiversity gains not realised until the 2060s.

7.7 This proof of evidence shows that there was inadequate information provided to the MPA in relation to badgers for the application to be determined despite describing of the required level of detail in response to the earlier application.

Appendix 1 - WML-CL35 CLASS LICENCE Badgers: interference with badger setts and exclusion of badgers from their setts and closure/destruction of setts

CLASS LICENCE

Badgers: interference with badger setts and exclusion of badgers from their setts and closure/destruction of setts

NATURAL ENGLAND

OVERVIEW

This licence permits persons registered under this licence to interfere with badger (*Meles meles*) setts, including: monitoring of sett use by badgers, the exclusion of badgers from their setts and destruction of setts for the purposes of development (as defined in section 55(1) of the Town and Country Planning Act 1990) and preventing serious damage. It also permits the disturbance of badgers occupying a badger sett for the purpose of development. Registered Users are permitted to monitor sett use at any time of the year, but exclusion of badgers and closure of setts must only be undertaken between **1 July and 30 November (inclusive)**.

The use of this licence is subject to:

- All necessary permissions and consents being in place prior to applying to notify a site;
- Registration of the site and written confirmation from Natural England that works may proceed;
- Submission of a report of licensed activities within 14 days of completion of the licensed activities.

Registration	There are criteria and conditions to become a Registered User.
Recording & reporting	Confirmation from Natural England of individual site registration. There are data recording and reporting requirements.
Reference	WML – CL35

LICENCE TERMS and CONDITIONS

Legislation	Protection of Badgers Act 1992 (as amended) ('the 1992 Act')
Relevant section(s)	Sections 10(1)(d) and 10(2)(b)
Valid for the period	1 January 2020 to 31 December 2020 (inclusive)
Area valid in	All counties of England (landward of the mean low water mark)
Purpose(s) for which this licence is issued	• any development as defined in section 55(1) of the Town and Country Planning Act 1990 • preventing serious damage to land, crops, poultry or any other form of property
What this licence permits	Subject to all the terms and conditions of this licence and solely for the purpose(s) stated above, this licence permits Registered Users to: Interfere with badger setts (see Information and Advice note a) by means of: • Soft blocking of sett entrances • Disturbance from development • Installation of one-way badger gate(s) in sett entrances • Closure and destruction of badger setts

Who can use this licence	Only persons registered to use this licence ("**Registered Users**") and **Assistants** of Registered Users (see 'Definitions' below), except those with a recent conviction (see Information and Advice note q).
Definitions used in this licence	The "**Licensee**" is the Registered User who has successfully registered sites to Natural England and who is entitled to rely on this licence for those registered sites. A "**Registered User**" is a person who has been successfully registered with Natural England to use this licence in accordance with standards set by Natural England. An "**Assistant**" is a person assisting a Registered User. Assistants are only authorised to act under this licence whilst they are under the direct supervision of the Registered User (ie this means that the Registered User will be on site directly overseeing the work of an Assistant as they cannot undertake licensed activities alone or unsupervised). A "**badger sett**" for the purpose of this licence is defined as any structure or place which displays signs indicating current use by a badger (see Information and Advice note a and b). "**Disturbance**" for the purpose of this licence is defined as noise or activity from development that is taking place close to a badger sett that is greater than any badger occupying the sett would normally be exposed to.

LICENCE CONDITIONS

1. To use this licence you must either:
   i. be a Registered User (see Definitions)
   or
   ii. be an Assistant to the Registered User (see Definitions).

2. This licence can only be relied upon in situations where alternative measures that do not require a licence have been considered and proved to be either impractical to implement or ineffective.

3. The Licensee is required to obtain all necessary permissions and consents, including for access to the relevant land, prior to registering the site. These records must be kept for at least 24 months following completion of licensed activities.

4. This licence may only be used at a site that has been successfully registered with Natural England and where the information in the authorised site registration form remains accurate for the duration of the licensed activities.

5. Any action taken under this licence for the purpose of preventing serious damage must be limited to that necessary to resolve the problem or sufficiently reduce the scale of damage (see Information and Advice note i).

6. This licence can only be used for the purpose of development once full planning consent has been granted and conditions relating to badgers in that consent have been discharged by the local planning authority in writing, if required. Or for the purpose of development with outline planning permission once a reserved matters application has been submitted and all conditions relating to badgers in that consent have been discharged in writing by the local planning authority.

7. The Licensee is responsible for ensuring that all reasonable precautions are taken to ensure

that unnecessary suffering of the badger(s) is avoided.

8. The Registered User must send to Natural England Wildlife Licensing (badgerclnotifications@naturalengland.org.uk) a site registration form, a brief method statement and map, detailing thelocation of any action proposed under this licence at least five working days before works aredue to begin. This licence does not cover any action taken on any site not covered by acurrent site registration form, submitted to Natural England at least five working dayspreviously. See information and advice note j.

9. Works are only permitted to commence at a site following receipt of an email from Natural England confirming that the site is registered and that works can proceed as described in the site registration form and in accordance with this licence. Natural England reserves the right to request further information before a site is registered.

10. Works may only take place in agreement with the landowner, who must also have agreed to comply with the terms and conditions of this licence. Confirmation of this agreement must be declared in the site registration form. The Licensee must keep a written record of the landowner's and developer's (if applicable) agreement.

Determining use of a sett entrance by means of soft blocking

11. In order to determine the activity status of certain sett entrances, sett entrances must be lightly blocked using loose soil or untainted straw, hay, bracken or leaf litter not harmful to badgers. Monitoring must be carried out for a minimum of 21 consecutive days at intervals of no more than three days to determine whether badgers have used the sett entrances.

12. If monitoring demonstrates that badgers have not unblocked these sett entrances during the minimum 21 day period, then steps must be taken immediately to hard-block and proof these sett entrance(s) to prevent badgers from reusing them.

13. Lightly blocked sett entrances which become unblocked by badgers during the minimum 21 day period must have one-way badger gates installed, as specified by Conditions 20 - 27.

Disturbance close to an occupied sett

14. Prior to the start of operations, an area within a minimum distance of 20 metres of any known badger sett entrances that display signs indicating current use by a badger must be clearly marked using coloured tape, string, paint, or other markers. Any further setts which are discovered during the operation must be similarly marked as soon as their presence becomes known.

15. Within the marked area as above ('exclusion zone') no heavy machinery is to be used.

16. Vehicles must not drive directly over or park on top of badger sett entrances.

17. Trees/stumps/shrubs/hedges within 20 metres of the sett must not be uprooted.

18. Where works involve pile driving, rock boring, dynamic compaction or a similar activity with the potential to cause ground vibration that could disturb badgers occupying a sett or damage a sett by causing tunnel collapse, the impact on that sett must be evaluated.

19. If disturbance is reasonably expected to result in a longer term impact (eg more than four to six weeks) on the badgers occupying that sett or cause tunnel collapse, in accordance with Conditions 20 - 30, badgers must be excluded from the sett and the sett closed and proofed against re-entry by badgers before that operation begins and for its duration. Activities with the potential to cause such a level of disturbance must not be carried out between 1 December and 30 June.

Eviction and exclusion of badgers by means of one-way gates

20. The eviction and exclusion of badgers from their setts by means of one-way gates and destruction of the sett **must be carried out and completed between 1 July and 30 November (inclusive)** in any one year (see Information and Advice note j).

21. At the start of the operation, vegetation around the sett should be removed down to ground level only (and see Condition 17).

22. Un-gated entrances to tunnels which have been shown not to be occupied by badgers must be blocked and proofed against re-entry by badgers.

23. One-way badger gates, opening outwards must be securely installed in all sett entrances displaying signs of possible occupation by badgers to allow badgers to exit from but not re-enter the sett (see Information and Advice notes c and d).

24. The sett must be visited at intervals of no more than three days to inspect the gates to ensure that they open and close freely, and to check for signs of badgers having regained access to the sett (see Information and Advice note e).

25. The badger gates must remain continuously in position for a minimum period of 21 consecutive days following the last sign indicating possible access by badgers into the sett and until immediately before action is taken to close or destroy the sett.

26. Measures to exclude badgers must remain in place until immediately before sett destruction or proofing is carried out.

27. Excavation of a sett without prior exclusion (known as a 'live dig') is not permitted under this licence.

Provision of an artificial sett

28. Where the licensed action is for the purpose of development, artificial sett(s) must be provided prior to the planned closure or destruction of a main sett (see Condition 30 & Information and Advice note b).

29. Any artificial sett must be constructed in a suitable location (within the affected badger clan's territory) and be made of materials not harmful to badgers (see Information and Advice note h). Artificial setts must be sufficiently robust for long-term use by badgers, and of a size and design which reflects the importance and extent of the sett(s) to be replaced. The minimum diameter of artificial tunnels, including at sett entrances, must be 300mm; in all other aspects the guidance referred to in Information and Advice note h must be followed. Construction must be completed in advance of installing one-way gates to evict and exclude badgers from their main sett.

30. Where Condition 28 applies, action to evict and exclude badgers from their sett may only begin once there is evidence that badgers have discovered the artificial sett (see Information and Advice note h).

Recording and reporting requirements

31. The Licensee must maintain a record of all activities carried out under the authority of this licence as specified in Annex A. Records are to be kept for at least 24 months after the licence expires and are to be made available for inspection by Natural England at any reasonable time.

32. The Licensee must comply with the reporting requirements set out in Annex A. A report must be submitted within 14 days of completing the licensed activities using a single form (WML-LR-CL35) per registered site.

33. If Conditions 31 and 32 are not met then the Registered User will, by default, no longer be considered registered to act under this licence.

Licence compliance

34. The Licensee must inform Natural England of any breach of this licence as soon as practicable after it becomes known to them.

35. The Licensee and any Assistant must comply with the terms and conditions of this licence, and any information contained in the site registration form.

36. The Licensee must make a copy of the licence and site registration form and map available on each site for reference by site workers at any time and for inspection by Natural England or any Police Officer on demand.

37. The Licensee shall permit an Officer of Natural England, accompanied by such persons as he/she considers necessary for the purpose, on production of his/her identification on demand, reasonable access to monitor work being undertaken and to be present during any operations carried out under the authority of this licence for the purpose of ascertaining whether the conditions of this licence are being, or have been, complied with. All reasonable assistance must be provided to any Officer of Natural England in the discharge of their duties and to any persons accompanying him/her.

38. The Registered User must inform Natural England:
a) If they are subject to disciplinary action with their professional membership body, within one working week of being informed, setting out the circumstances. They must also inform Natural England of the outcome of the action within one working week of the conclusion of this action.

b) If they are subject to any criminal investigation by the Police or other statutory body for any wildlife-related offence(s), setting out what these are, when the outcome is likely to be known, and what the outcome is following completion of the investigation.

This will enable Natural England to assess whether their registration for use of this licence needs to be reviewed.

IMPORTANT

This licence authorises acts that would otherwise be offences under the legislation referred to above. Failure to comply with its terms and conditions:

i. may be an offence under the 1992 Act or mean that the licence cannot be relied upon and an offence could therefore be committed. The maximum penalty available for an offence under the 1992 Act is, at the time of the issue of this licence, an unlimited fine and/or a six month custodial sentence; and

ii. may result in your permission to use this licence being withdrawn. Natural England will inform any person or organisation whose permission to use this licence is withdrawn in writing. This sanction may be applied to other similar licences.

This licence permits the activities listed on the first page of this licence (under 'What this licence permits') **only**. If the activity that you wish to undertake is not covered by this licence, or if you are unable to comply with any of the terms and conditions which apply to the use of this licence, then you will need to apply to Natural England for an individual licence.

This licence is not a consent for the purposes of Part II of the Wildlife and Countryside Act 1981 (as amended) in respect to SSSIs. It is your responsibility to get consent or assent if required before this licence can be used on any SSSI.
See Advice (u - w) for further information.

Issued by and on behalf of Natural England on 1 January 2020

INFORMATION AND ADVICE specific to this licence

Badger setts

a. The 1992 Act defines a badger sett as "*any structure or place which displays signs indicating current use by a badger*". Examples of signs that may indicate 'current use' include entrances that are between 25cm & 35cm in diameter with a flattened oval appearance (like a capital 'D' on its back), entrances that are clear of debris and vegetation, entrances with smoothed sides (due to the passage of badgers), large spoil heaps (sometimes fresh) outside entrances, fresh bedding outside entrances, fresh badger footprints in spoil heaps, and well trampled runs leading to and from entrances. Further guidance (WMLG17) on interpretation of 'current use' of a badger sett is available at: https://webarchive.nationalarchives.gov.uk/20140605121602/http://www.naturalengland.org.uk/Images/WMLG17_tcm6-11815.pdf.

b. Main setts usually have a large number of entrances with large spoil heaps, and look well used. They usually have well used paths to and from the sett and between sett entrances. Although normally the breeding sett, and in continual use all year round, it is possible to find a main sett that has become disused because of excessive disturbance or for some other reason.

Evicting and excluding badgers

c. In order to prevent badgers from digging into the ground surrounding the sett, material capable of preventing access by badgers, such as heavy gauge chain-link netting, should be pegged down over the surface of the ground surrounding the gated entrances. Chain-link netting or weldmesh (if used) should be of at least 2.5mm gauge.

d. Badger activity at the one-way badger gate(s) should be monitored, for example, by placing small sticks in front of and/or behind the gate, tying a fine thread across the front of the gate, and/or smoothing the soil or sand in front of the gate in order to detect badger footprints. If sticks are used, care must be taken that they do not obstruct access to the sett or prevent operation of the gate if disturbed.

e. Checking the gates is not a licensed activity (as it is not interfering with the sett) and therefore may be undertaken by an unsupervised Assistant. However, the Registered User is responsible for ensuring that the checks are undertaken in accordance with the licence conditions and that a written monitoring schedule of badger activity at all sett entrances be maintained and made available to Natural England upon request.

f. Once badgers have been successfully evicted and excluded from a sett, and where the sett is going to be destroyed, dig back all tunnels as far as possible and backfill with materials appropriate for the particular site, eg soil/concrete/rubble. If it is not possible to destroy the sett, the entrances and as much of the associated tunnels as possible should be blocked with materials appropriate for the particular site eg soil/concrete/rubble/expanding foam.

g. After the sett has been destroyed or tunnels have been blocked, the area should be proofed against re-entry by badgers using material capable of preventing access by badgers, for example chain-link netting or similar material laid on the surface of the ground and/or as a vertical barrier (buried to a depth of at least 1.5 metres below ground) and secured to prevent further access by badgers. Chain-link netting (if used) should be of 2.5mm gauge.

Artificial setts

h. Artificial setts should be constructed within the territory of the affected badger social group (this can be determined using a bait-marking survey) and away from main roads, public rights of way or sources of danger to badgers. They should be of a size to reflect the importance and extent of the sett to be lost and provide a dry and well-ventilated (but not draughty) refuge for badgers, ideally with vegetative cover immediately around the structure. Confirmation that badgers have found an artificial sett can be achieved through monitoring signs of badger activity such as: uptake of an attractive food such as peanuts and syrup, sand traps for paw prints, hair traps around the entrance and camera traps. More detailed guidance on the construction of artificial setts is available in Scottish Natural Heritage's publication 'Guidance for the creation of artificial setts' (note the minimum tunnel diameter stipulated in Condition 22).

Serious damage

i. This licence permits action to prevent serious damage to land, crops, poultry or any other form of property. To take licensed action the damage must be, or be likely to become serious. Action under this licence is not permitted to prevent the threat of minor damage. In assessing if the damage is serious, you should consider both the likelihood and the extent of damage. The fact that damage might occur is not sufficient. If damage is not yet apparent, past experience at the site or, if appropriate, elsewhere

should demonstrate a high probability that damage will occur. A mere nuisance or normal business risk is not serious damage. Licensed action is not an alternative to good practice and management. Damage caused by badgers will be a dynamic factor and should be viewed as a part of normal business risk. The risk associated with damage by badgers will vary as both habitat and badger populations can change over time. We therefore expect adaptation to changes in risk of damage, and expect reasonable, non-lethal measures to be put into place where badger populations have increased.

Submitting a site registration form

j. Site registration forms should be submitted from 1 June and before the 31 October to ensure Natural England has sufficient time to respond to the registration request, and for the works to exclude badgers and close setts to be undertaken and completed by the 30 November. In exceptional circumstance where badgers need to be excluded after the 30 November then an individual licence must be applied for.

Registering to use this licence

k. Registration to use this licence indicates that the Registered User has demonstrated an appropriate level of competence in these activities. The licence should not be used or taken to indicate competence in any other activity that may be associated with work on badgers.

l. It is the responsibility of the Registered User to maintain their expertise at an appropriate level to act under this licence and it is also their responsibility to ensure that their Assistants have appropriate training, experience and instruction to act under this licence. Natural England may set specific criteria that Registered Users must meet to retain their "earned recognition" as a Registered User.

m. A person's registration may be revoked by Natural England; for example, if that person breaches the conditions of this licence. In these circumstances Natural England will normally give 28 days' notice of its intention to revoke a person's registration.

Compliance and Enforcement

n. Natural England checks compliance with licences and the attached conditions. Where breaches are identified, these may be subject to enforcement action.

o. Natural England will consider reporting any non-compliance, or concerns over standards, to the professional body of which the Registered User is a member.

INFORMATION AND ADVICE for all Class and General Licences

General Information

p. Ordinarily, licences will be reissued on 1 January each year (*NB: you do not need to re-register for those with registration requirements*). Please note, however, that they can be modified or revoked at any time by Natural England or the Secretary of State, but this will not be done unless there are good reasons for doing so. You are advised to check the terms and conditions of a licence prior to your first use of it each year in case of amendments.

q. No person convicted on or after 1 January 2010 of an offence under the Conservation of Habitats and Species Regulations 2017 (as amended), the Wildlife and Countryside Act 1981, the Protection of Badgers Act 1992, the Deer Act 1991, the Hunting Act 2004, the Wild Mammals (Protection) Act 1996, the Animal Welfare Act 2006 or the Protection of Animals Act 1911 (all as amended) may use this licence without the permission of Natural England unless, in respect of that offence, either:

   i. they are a rehabilitated person for the purposes of the Rehabilitation of Offenders Act 1974 and their conviction is treated as spent; or
   ii. a court has made an order discharging them absolutely.

   Any request to use the licence by a person to whom this note applies will be considered on its merits.

r. Persons acting under a licence should have regard to legislation and good practice relevant to the action(s) undertaken, including animal welfare and the Animal Welfare Act 2006 and the Wild Mammals (Protection) Act 1996.

The limits of licences

s. Licences permit action only for the purposes specified on that licence.

t. Licences do not permit actions prohibited under any other legislation, nor do they confer any right of entry upon land.

Protected sites

u. With the exception of WML-CL25 (*To permit the diversionary feeding of hen harrier (Circus cyaneus) on grouse moors in northern England*), a licence is not permission from Natural England for an activity

that could damage a Site of Special Scientific Interest (SSSI). The notification documents for each SSSI contain a list of operations that could damage its special features and for which prior permission from Natural England is required. Owners and occupiers of sites notified as SSSIs are required to give written notice to Natural England before beginning any of these operations, or allowing someone else to carry out these activities. A similar process applies for public bodies and statutory undertakers (as defined under Section 28G of the Wildlife and Countryside Act 1981 (as amended)) and this obligation applies even where the operations are carried out on land outside of the SSSI. See Gov.uk for further information.

v. In considering whether to issue consent or assent for activities on a SSSI that is a European Site, in other words a Special Protection Area (SPA) or Special Area of Conservation (SAC), Natural England will consider whether there is likely to be a significant effect on features of European importance (alone or in combination) and carry out a Habitats Regulations Assessment, as required.

w. To identify SSSIs, European Sites and the features for which they are designated, refer to www.magic.gov.uk. Consult the SSSI citation for details of 'operations likely to damage', and consider whether your activity is likely to have an impact. Advice may be sought from the local adviser for the SSSI:

Contact details for Natural England

For licensing enquiries:
Telephone 020 802 61089
Email wildlife@naturalengland.org.uk
Postal address Wildlife Licensing, Natural England, Horizon House, Deanery Road, Bristol, BS1 5AH

For other enquiries use the Enquiry Service:
Telephone 0300 060 3900
Email enquiries@naturalengland.org.uk
Web https://www.gov.uk/government/organisations/natural-england

Using and Sharing Your Information

The data controller is Natural England, Foss House, Kings Pool, 1 – 2 Peasholme Green, York YO1 7PX.

Your information will be stored and processed in accordance with the Data Protection Act 1998. This Act gives you, as an individual, the right to know what data we hold on you, how we use it, with whom we share it and to ensure that it is accurate. The information will be used by Natural England to undertake licensing functions. To do this we may have to discuss applications, licensing decisions, reports and returns with third parties.

Natural England recognises there is significant public interest in wildlife licensing and in those who benefit from receiving a wildlife licence. Therefore, we may make information publicly available (for example, survey records are normally made available via the National Biodiversity Network Gateway and to Local Record Centres). Information released may include, but is not limited to, your name or business name, application and licence details as well as reports and returns. Natural England, however, realises that some licensed activities can be sensitive and we will not release information that could harm people, species or habitats. In some cases, for example, this may mean not releasing the names and addresses of individuals or the location of the licensed activity.

Natural England or its appointed agents may use your name, address and other details to contact you in connection with occasional customer research aimed at improving the services that Natural England provides to you.

We will respect personal privacy, whilst complying with access to information requests to the extent necessary to enable Natural England to comply with its statutory obligations under the Environmental Information Regulations 2004, and the Freedom of Information Act 2000.

ANNEX A - Recording and reporting requirements

Records and Reporting

Registered Users are required to satisfy both of the reporting requirements below:

1. Submitting a licence report following completion of licensed activities

   The Registered User is required to report back to Natural England within 14 days after licensed work is complete for each registered site using report form WML-LR-CL35 to badgerclnotifications@naturalengland.org.uk.

2. Maintaining registration

   Each Registered User will be contacted by Natural England Wildlife Licensing (normally in December) and is required to (no later than 31 January) each year:

   a. Submit an annual licence return detailing each site where the licence was used (or provide a nil return via email);
   b. Whether they have changed professional body and/or the level of their membership since their last declaration (ie their initial application or last annual return to maintain registration);
   c. Whether they wish to continue to be registered.

The Registered User must maintain a record of the following information for all activities undertaken using this licence:

- For each location where the licence has been used:
  - Location (site name, county and 6-figure (minimum) Ordnance Survey grid references);
  - Date(s) of licensed activities;
  - Details of licensed works undertaken (including sett type and size, the activity undertaken).