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Natural England
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Dix's Field
Exeter EX1 1QA

BY EMAIL ONLY

[REDACTED]

Direct Dial: [REDACTED]

Email: [REDACTED]

Your Ref: [REDACTED]

Our Ref: [REDACTED]

Date: 11 October 2019

Dear Sirs

Urgent – requires immediate attention

Re: Chris Packham CBE v Secretary of State for Transport & (IP) High Speed Two (HS2) Limited

1. We write in response to your letter and enclosures of 4 October 2019. We understand that certain imminent works are still contemplated that may result in irreparable harm to ancient woodlands and disturbance to protected species. This letter, therefore, requires your immediate attention.

Letter

2. Your letter confirms that Natural England's advice to HS2 Ltd has been that during the period of the Oakervee Review selected felling by hand and blocking of roosts to prevent bats from roosting can be carried out. Natural England is, according to your letter, *"satisfied that these measures recognise the project uncertainty caused by the review and are proportionate in reducing the irreversible impacts of works while the review is underway."*
3. It is clear, therefore, that Natural England accepts that the works at Ancient Woodlands will cause irreversible impacts, notwithstanding that these impacts may have been "reduced".
4. Please provide details of Natural England's methods of assessment of what is "proportionate in reducing the irreversible impact", including but not limited to:
 - a. confirmation of what Natural England considers to be an "irreversible impact" in making this assessment;
 - b. details of the proportionality test that Natural England has applied in making this assessment;

- c. details of any assessments of proportionality carried out to date, including in respect of the measures to prevent bat roosting cited in your letter of 4 October. In responding to this urgent request, please provide the reasons for concluding that the measures are proportionate.

Further Bat Licence

5. Your letter refers to an application for a further bat licence at South Cubbington. We should be grateful if you would confirm whether that is an individual licence outside of the disclosed Class Licence WML-CL40. Please also:
 - a. confirm when Natural England expects to determine that licence application;
 - b. provide copies of:
 - i. the licence application;
 - ii. Natural England's request for further information;
 - iii. HS2 Ltd's reasoned statement; and
 - iv. the licence (if issued).

Bat Mitigation Class Licence WML-CL40

6. Natural England issued the licence WML-CL40 for the purpose of "imperative reasons of overriding public interest" or "preserving public health and public safety". In order to register a site under the licence it must be demonstrated that the "impacts arising from the works cannot be avoided".
7. Any imperative reasons of overriding public interest justifying the original grant of the licence will have been intrinsically linked to the HS2 project and the perceived public benefits associated with it. However, following the Government's decision to fully review whether and, if so, to what extent it will continue with the HS2 project, those wider benefits can (for now at least) no longer be assumed, not least because there currently exists a real possibility that HS2 will happen only in part, or in a different way, or not at all. Consequently, during this interim period – between now and any decision by the Government as to next steps on the project – there are no imperative reasons of overriding public interest that can justify the licence.
8. Furthermore, the "impacts arising from the works" would be "avoided" altogether if Natural England were to revoke the licence until the outcome of the Government's review and the Government were to decide to stop the HS2 project or to alter its scope in such a way that the licensed works were no longer necessary. In light of the real possibility that the impacts arising from the works may become wholly

unnecessary – and, therefore, avoidable – Natural England must halt the licensed works by revoking the licence until the Government’s decision on how to proceed is known.

9. Please could you urgently confirm what assessment (if any) Natural England has carried out to ensure that the impacts arising from works carried out under the licence WML-CL40 cannot be avoided? Please provide details of what consideration (if any) has been given to ensuring that the contemplated works still properly fall under the purpose for which the licence was issued: i.e. imperative reasons of overriding public interest?
10. Please urgently provide:
 - a. site registration documentation (as required by condition 9 of the Bat Mitigation Class Licence WML-CL40) submitted to Natural England within the last six weeks for South Cubbington or any other site;
 - b. site registration forms (as required by condition 11 of the Bat Mitigation Class Licence WML-CL40) submitted to Natural England within the last 12 weeks for South Cubbington or any other site; and
 - c. details of any subsequent email from Natural England permitting works to commence (as per condition 12 of the Bat Mitigation Class Licence WML-CL40) for South Cubbington or any other site.
11. In light of the change of circumstances brought about by the Oakervee Review, please confirm whether:
 - a. Natural England has requested updated bat survey records for South Cubbington or any other site;
 - b. further survey work is required before the licence can be relied upon for South Cubbington or any other site; and
 - c. Natural England has, or will, use its power to review site registrations under the licence in accordance with Annex A.

Suspension or revocation of the licence WML-CL40

12. Natural England must not grant a licence unless it is satisfied that there is no other satisfactory solution.¹ Similarly, if the basis on which the licence was granted changes significantly or falls away, it is incumbent on Natural England to reconsider the justification for the licence.

¹ Conservation of Habitats and Species Regulations 2017 reg 55(9)

13. As you are aware, Natural England, in relation to Wild Justice's General Licences challenge, said in its letter of 13 May 2019:

"When faced with the claim for judicial review, Natural England had to recognise that it had not been so satisfied before granting the general licences impugned, and that it was not then in a position to satisfy itself, that there was no satisfactory solution other than the actions with General Licences authorised in all the circumstances in which they might be used.

In that situation Natural England had no defence to the claim for judicial review and it had no legal alternative under EU and domestic law other than to revoke the General Licences: see eg C-201/02 R (Delena Wells) v Secretary of State EU:C2004:12, [2004] 1 CMLR 31, as [64]-[65]. A decision not to have revoked the General Licences in those circumstances would have been a decision effectively to permit activities thereafter that Natural England knew could not then be given a licence, flouting the requirements of the Wild Birds Directive and thwarting the prohibition on what Natural England could authorise that had been imposed by Parliament. That would not have been a proper exercise of any discretion to revoke the licences it had."

14. By analogy with the General Licences case, and on Natural England's own logic, if, in light of the current situation, the HS2-related works in question could not now be given a licence, Natural England would be under a duty to revoke the licence in question. The future of HS2 is entirely uncertain at this time: it may not proceed at all or it may proceed in a significantly different way to that envisaged at the time when Natural England granted licence the HS2 licences, including WML-CL40. The basis on which the HS2 licences were originally granted (e.g. impacts cannot be avoided; imperative reasons of overriding public interest) cannot therefore be said to hold true at this juncture. We therefore consider that Natural England is under a duty to revoke these licences.
15. Given the significant change in circumstances pending the review, our client requests that Natural England uses its power under reg. 57(4) of the Conservation of Habitats and Species Regulations 2017 to revoke licence WML-CL40, or to modify it such that it is suspended until the outcome of the review.
16. If Natural England decides not to revoke the licence, we request it to provide its reasons for this, including (i) the extent to which it considers the licence to remain justified during the interim period (whether for imperative reasons of overriding public interest or another purpose) and (ii) why it considers the impacts arising from the works cannot be avoided.

17. Given the urgency of this matter, we request a response by no later than **4pm Monday 14 October 2019**, including providing the disclosure and related information requested above.

Yours faithfully



Leigh Day

CC: **Secretary of State for Transport**

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[Redacted]

HS2 Limited

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