



Natural Resources Wales
Ty Cambria
29 Newport Road
Cardiff
CF24 0TP

24th January 2022

Re proposed forestry planting scheme at Frongoch, Carmarthenshire

Refs: 30/21-22 (EIA Screening); ATI-22499a (Request for Information)

INCC has serious concerns with the way Natural Resources Wales (“NRW”) considered the proposed forestry planting scheme at Frongoch, Carmarthenshire (the “**Project**”), including its decision dated 22 July 2021 that the Project did not require a consent under the Environmental Impact Assessment (Forestry) (England and Wales) Regulations 1999 (“**EIA Forestry Regs**”) (the “**Decision**”).

Whilst the time limit for bringing any legal challenge to the Decision has passed, we consider it prudent to raise these concerns with NRW now, particularly as NRW may be minded to take a similar approach to other projects in the future and it is likely that there will be an increase in afforestation proposals over the next decade.

We have sought legal advice on this matter and counsel has advised that there is a real risk that NRW’s Decision and its consideration of the Project was unlawful¹.

Background

The Project is for the afforestation of 73ha of farmland at Frongoch, and proposes the planting of productive conifers (Douglas fir on the lower area of the site, and Sitka spruce in the two areas extending up the hill²).

¹ Counsel instructed by Leigh Day

² See applicant’s EIA screening request at 1.2.

According to the EIA screening request, the site adjoins, and is located in the buffer for, (1) the Cwm Doethie – Mynydd Mallaen Special Area of Conservation (“SAC”) and Site of Special Scientific Interest (“SSSI”) (located on the western and eastern sides of the site) and (2) the Elenydd – Mallaen Special Protection Area (“SPA”) and Cwm Doethie – Mynydd Mallaen SSSI (located on the eastern side of the site only). However, to be clear, the footprint of the Project crosses over, and thereby includes, sizeable areas of both the SAC & SSSI (roughly 10-11ha on its western side) and the SAC, SSSI and SPA (roughly 11ha on its eastern side).

We are concerned that a number of possible environmental impacts on these protected sites were not properly considered and/or assessed by NRW. These include (but are in no way limited to):

- (i) There was insufficient consideration of impacts on the Red Kite (*Milvus milvus*), (an annex 1 species whose population is included as a qualifying feature of the SPA). The applicant’s management plan focussed on the SPA itself, but disturbance and carrion availability (recognised in the plan as factors affecting the Red Kite) can be negatively impacted by adjacent land uses (particularly as the species’ use of adjacent land is recognised in the SPA’s population size attribute for Red Kite which, in setting an acceptable lower limit, records that “[a]t least 15 pairs of kites nest regularly within the site SPA, or within 2km of the boundary”).
- (ii) The risk of seeding from the conifers was not fully considered. The application stated that “the risk of seeding from the conifers onto the SPA is minimal due to the distance” but we consider there is a real risk of Sitka self-seeding into the buffer and open habitat at the northern edge of the SPA. Furthermore, we do not consider that an intention to harvest “most” trees before they reach seeding age³ is a sufficiently robust guarantee that the open habitats will be protected. We note that Sitka can start producing cones from 15-20 years’ growth and so it is likely that some of these will cone before felling.
- (iii) The Cwm Doethie – Mynydd Mallaen SSSI’s bryophyte assemblage feature may be relevant to the area of SSSI broadleaf woodland that falls within the site boundary and livestock grazing levels will affect the condition of this feature. The EIA screening request recognises that the existing land use is “improved agricultural grassland for grazing livestock and cutting winter feed” and that grazing will be removed from the site (see e.g. at 3.1). We are concerned that the potential impacts of this on the SSSI were not properly considered.
- (iv) The open habitat at the northern edge of the SSSI (identified in Phase 1 as semi-improved acid grassland) may be vulnerable to self-seeded conifer from the Sitka spruce, which we do not consider has been properly assessed.
- (v) The ecological value of the commercial plantation has been overestimated. NRW’s opinion stated: “As the key feature of the special area of conservation in this location is the ancient woodland and the key management objective is to enhance and increase the area of native woodland that objective

³ NRW’s screening opinion stated that “The risk of seeding onto the open protected habitat and landscape is very minimal as most of the trees will be felled before reaching the age at which the major seed production is achieved.”

is achieved by the commercial plantation". While a small area of broadleaved woodland will be planted as part of the scheme, NRW's Opinion suggests that the ancient woodland forming a key feature of the SAC, will be enhanced by the commercial plantation. This is clearly not the case, ancient woodland being entirely different in species composition, structure (canopy, shrub layer, ground flora) and ecology – and thus nature conservation value – to commercial plantation. We would ask that any distinction is accurately considered and recorded in future proposals."

More generally, and as is explained further below, we have serious concerns that NRW has simply assumed, without a proper evidence base, (a) that the Project will result in an increase in the level of carbon capture and storage and/or a net reduction in greenhouse gas emissions ("GHGs"), and (b) that there will be no issues regarding acidification of affected waterbodies.

Finally, we note that the Project lies close to the core of a Red Squirrel (*Sciurus vulgaris*) populations (at Bryn Arau Duon just 2km to the north east of the site) and the valley is a major ingress route for invasive Grey Squirrels (*Sciurus carolinensis*). Increased woodland connectivity on the site will therefore increase the threat to the core Red Squirrel area by affording a safe connectivity route for Grey Squirrels. This risk does not appear to have been considered at all.

Lack of any HRA

The Decision was taken under the EIA Forestry Regs and solely related to the question posed through those Regs as to whether the Project required a consent and EIA because it was likely to have significant effects on the environment (taking into account the selection criteria in schedule 3) (regulation 6(2)). NRW reached the view that the Project did not meet this threshold and, consequently, under the EIA Forestry Regs the Project did not require NRW's consent to proceed (see regulations 3 and 4).⁴ Nothing was said in this screening opinion about whether an appropriate assessment (aka a Habitats Regulation Assessment ("HRA")) was required under the Conservation of Habitats and Species Regulations 2017 ("Habitats Regs").

On 17 November 2021, INCC wrote to NRW requesting a copy of the full HRA of the site as part of the NRW screening process. On 15 December 2021, NRW responded as follows:

An HRA was not carried out, however an Environmental Impact Assessment was undertaken, this assessment follows the criteria noted in the EIA Regs schedule 3. A HRA is not carried out at the screening opinion stage as NRW does not, at that stage, give any consent, permission, or other authorisation for the proposed works. If consent was required under the EIA Regs then the HRA would be carried out at that stage.

Subsequently, NRW confirmed that the reference to "Environmental Impact Assessment" was a reference to the EIA screening opinion only.⁵ Therefore, INCC understands that NRW did not consider

⁴ For the avoidance of doubt, INCC does not agree with the substance of that decision.

⁵ E-mail from "Access to Information Team" to Rob Parry on 23 December 2021.

if a HRA was needed for the Project because, due to its EIA screening opinion, no “consent” was required for the Project to continue.

We consider this to be a fundamentally flawed approach. The Habitats Directive (92/43/EEC) establishes a specific independent regime for the assessment of environmental impacts on European sites (as implemented by the Habitats Regs). Article 6(3) provides that:

Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site’s conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

Whilst some of article 6(3)’s wording is similar to the wording found in the EIA Directive (2011/92/EU and 2014/52/EU), in particular the phrase “likely to have [a] significant effect[s]”,⁶ the courts have clearly held that the two Directives are distinct and the phrase does not have the same meaning in each (see e.g. R (An Taisce (National Trust for Ireland)) v SSECC [2014] EWCA Civ 111 at [16]-[23]; and R (Jedwell) v Denbighshire CC et ors [2015] EWCA Civ 1232 at [61]).⁷

Moreover, the courts have emphasised that, in the context of the Habitats Directive, the phrase “likely significant effect” establishes a particularly low (“very low”⁸) threshold test, intended to achieve a very high level of protection for European sites by imposing a stringent approach to whether a HRA is required (see e.g. An Taisce at [18] referring to the leading Waddenzee CJEU judgment⁹ which held that in the context of the Habitats Directive, “likely” meant “a probability or a risk” and that “such a risk exists if it cannot be excluded on the basis of objective information that the... project will have significant effects on the site concerned” at [44]-[45]). Unlike the EIA regime (which only establishes procedural duties), the Habitats Directive imposes a substantive duty on Member States to ensure that the integrity of European sites are not adversely affected by development.¹⁰

Therefore, it cannot be assumed that a project will not need a HRA just because it does not require an EIA. Indeed the CJEU has previously ruled that domestic legislation had failed to properly transpose the Habitats Directive due to its having equated the two methods of assessment (Commission v Ireland C-418/04 [2007] ECR I-10947).

⁶ See e.g. EIA Directive, article 2(1).

⁷ See also, in the context of the different scope for the meaning of “projects” between the two directives: Friends of the Irish Environment Ltd v An Bord Pleanala (C-254/19) [2021] Env LR 16 at [29]-[30] and Coöperatie Mobilisation for the Environment and Vereniging Leefmilieu (C-293/17 and C-294/17) [2019] Env LR 27 at [65] et seq.

⁸ Attorney-General Sharpston in Sweetman v An Bord Pleanala (C-258/11) [2014] PTSR 1092 at [45]-[50], re-stating the threshold colloquially as “should we bother to check?”.

⁹ Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris Van Landbouw, Nat uurbeheer en Visserij (coöperatieve producentenorganisatie van de nederlandse kokkelvisserij UA, intervenieng) (Case C-127/02) [2005] All ER (EC) 353.

¹⁰ And unless that development falls into the exceptions set out in article 6(4).

Furthermore, the fact that the Project did not require a formal consent under the EIA Forestry Regs in no way absolves NRW from considering if a HRA was required. The Habitat Regs require a competent authority to carry out an appropriate assessment before “*deciding to undertake, or give any consent, permission or other authorisation for, a...project which (a) is likely to have significant effects on a European site... and (b) is not directly connected with or necessary to the management of that site*” but this wording must be interpreted in accordance with the simple wording of article 6(3) – “*the competent national authorities shall agree to the...project*” and in light of the Habitats Directive purpose of securing a very high level of protection for European sites (see above).

According to the CJEU, in determining whether there has been “*agreement*” to a project the Habitats Directive is not prescriptive but the definition of “*development consent*” in article 1(2)(c) of the EIA Directive is relevant to defining the term (Inter-Environnement Wallonie ASBL v Conseil des Ministres (C-411/17) [2020] Env LR 9 at [142]; Friends of the Irish Environment Ltd v An Bord Pleanala (C-254/19) [2021] Env LR 16 at [42]). Article 1(2)(c) defines the term “*development consent*” broadly as “*the decision of the competent authority or authorities which entitles the developer to proceed with the project*”. Elsewhere the court has held that the Habitats Directive applied to a decision to introduce a new class of ferry to replace existing ferries, even where no formal consent was required (R (oao Akester et anr) v DEFRA et ors [2010] EWHC 232 (Admin)).

In light of all of this, we consider that NRW’s Decision was a decision which entitled the applicant to proceed with the Project (by effectively deciding that no further consent was necessary) and thereby was an “*agreement*” within the ambit of article 6(3). Therefore, NRW needed to consider (at that stage) whether a HRA was required. Its failure to do so was arguably unlawful.

If NRW continues to assume that it does not need to consider the need for a HRA for forestry projects where there has been a negative EIA screening opinion, we consider there to be a real risk of legal challenge to future decisions.

Principles of Sustainable Management of Natural Resources

As NRW will be aware, article 4 of the Natural Resource Body for Wales (Establishment) Order 2012 (2012 Order) requires NRW to:

- (a) *pursue sustainable management of natural resources in relation to Wales; and*
- (b) *apply the principles of sustainable management of natural resources in the exercise of its functions, so far as consistent with their proper exercise.*

Section 3 of the Environment (Wales) Act 2016 (“EWA”) defines “*sustainable management of natural resources*” as meaning *inter alia* taking action that promotes (and not taking action that hinders) the

achievement of the objective to “maintain and enhance the resilience of ecosystems and the benefits they provide”.¹¹

Furthermore, section 4 of the EWA specifies that the “principles of sustainable management of natural resources” include:

- (a) *manage adaptively, by planning, monitoring, reviewing and, where appropriate, changing action;*
- (b) *consider the appropriate spatial scale for action;*
- (c) *promote and engage in collaboration and co-operation;*
- (d) *make appropriate arrangements for public participation in decision-making;*
- (e) *take account of all relevant evidence and gather evidence in respect of uncertainties;*
- (f) *take account of the benefits and intrinsic value of natural resources and ecosystems;*
- (g) *take account of the short, medium and long term consequences of actions;*
- (h) *take action to prevent significant damage to ecosystems;*
- (i) *take account of the resilience of ecosystems, in particular the following aspects-*
 - (i) *diversity between and within ecosystems;*
 - (ii) *the connections between and within ecosystems;*
 - (iii) *the scale of ecosystems;*
 - (iv) *the conditions of ecosystems (including their structure and functioning);*
 - (v) *the adaptability of ecosystems.*

In INCC’s communication on 17 November 2021, we asked for a copy of NRW’s assessment on how the forestry plantation scheme met NRW’s Sustainable Management of Natural Resources (SMNR) principles. NRW responded:

We do not carry out a specific SMNR assessment, the project is assessed against ‘the EIA Regs’ schedule 3 and the United Kingdom Forestry Standards which is the reference standard for sustainable forest management in the UK covering both woodland management and woodland creation.

We understand from this response that, in considering a development like the Project, NRW considers only the EIA Forestry Regs and the UKFS and does not also consider, and apply, the SMNR principles. If that is correct, we consider NRW to be acting unlawfully and in breach of its general purpose duties under article 4 of 2012 Order.

Article 4 is specifically drafted so that the SMNR principles can be applied in conjunction with (“so far as consistent with”) NRW’s decision-making function under the EIA Forestry Regs. This means, for example, that in considering the EIA screening request for the Project, NRW needed to “take account of all relevant evidence and gather evidence in respect of uncertainties” (section 4(e) EWA). For the reasons given above and below, we do not consider NRW has done so.

¹¹ And, in so doing, to (a) meet the needs of present generations of people without compromising the ability of future generations to meet their needs and (b) contribute to the achievement of the well-being goals in section 4 of the Well-being of Future Generations (Wales) Act 2015 (anaw 2) (see section 3(2) EWA).

INCC therefore requests (again) clarification from NRW as to if/how it considered its duties under article 4 of the 2012 Order when responding to the Project. If NRW considers that it has complied with the article 4 duties in its consideration of the Project, INCC requests clarification as to why NRW takes that view.

Section 6, Environment (Wales) Act 2016

NRW will also be aware of the biodiversity and resilience of ecosystems duty in section 6 of the EWA, which replaced and enhanced the duty in section 40 of the Natural Environment and Rural Communities Act 2006 (which had only required NRW to “*have regard*” to the purpose of conserving biodiversity). Section 6 requires NRW, as a public authority to “*seek to maintain and enhance biodiversity in the exercise of functions in relation to Wales, and in so doing promote the resilience of ecosystems, so far as consistent with the proper exercise of those functions*”. The Explanatory Notes to section 6 clarify that the duty requires public authorities to exercise their functions “*in a way that aims to improve and not reduce biodiversity and that in doing [sic] they must seek to further the resilience of ecosystems*”.

INCC has real concerns that NRW failed to comply with this duty, due to the fact that it (a) failed to consider whether any HRA was required and (b) failed to properly scrutinise the environmental effects of the Project, as described above and below.

Again, INCC requests clarification from NRW as to if/how it considered its section 6 duty when responding to the Project. If NRW considers that it has complied with the section 6 duty in its consideration of the Project, INCC requests clarification as to why NRW takes that view.

Consideration of carbon footprint

The EIA screening request included one line on carbon emission impacts, under the heading “*[t]he risk of major accidents or disasters relevant to the project concerned, including those caused by climate change...*”. It stated “[p]ositive The new woodland will increase the level of carbon capture and storage by both the trees and the soil.” NRW’s opinion does not refer to carbon impacts at all.

We note that paragraph 3 of schedule 3 of the EIA Forestry Regs requires NRW, in reaching its screening opinion, to consider the likely significant effects of the project on the environment having regard to the impact of the project on the factors specified in schedule 4, which includes expressly “*air and climate*” (schedule 4(c)). NRW also needed to consider, as part of this exercise, the characteristics of the project having particular regard to *inter alia* “*pollution and nuisances*” (paragraph 1(e) of schedule 3). Therefore, NRW should have considered the overall GHG emission effects of the Project when considering its likely environmental effects.

It is not appropriate to simply assume that afforestation projects will reduce, overall, GHGs because of the carbon capture and storage associated with planting trees. That is particularly so in the context of a project such as this which is a CONFOR-led scheme designed to secure timber supplies for Wales (with the plans indicating that timber will be harvested relatively quickly). The net GHG emissions will

depend on a complexity of factors including the precise soil type, albedo changes, age of harvesting and end-product. None of these appear to have been considered by NRW in any depth (or, indeed, at all); nor is any of this explained in NRW's Decision.

More generally, INCC is gravely concerned that by not properly scrutinising the emissions impacts of schemes like the Project, NRW is failing to consider the true impact of such schemes on achieving the UK's Net Zero target and that NRW risks acting against the Welsh Government's pledge to "[e]mbed our response to the climate and nature emergency in everything we do" (Programme for Government 6th Senedd (2021)).

INCC, therefore, requests clarification from NRW as to if/how it considered the Project's net GHG emission impacts when reaching its screening opinion.

Risks of acidification

We recognise that the site itself falls within the "Cothi- headwaters to confluence with the Twrch" catchment and that this catchment area is not acid-sensitive. However, the Cothi is acid-sensitive for most of its length below the headwaters and the Cothi drains into the Tywi river SAC.

In light of the fact that the site drains into an acid-sensitive river, NRW should have properly considered the potential acidification impacts of the Project (as a conifer plantation) and NRW's EIA screening form is too restricted in simply asking the applicant "*is the project within an acid sensitive catchment?*" in relation to "*[i]mpact on water quality*" (at 3.14). We also note NRW's 15 December response to this issue:

Acidification was considered as part of the assessment and it was concluded that because the proposed afforestation site is not within an 'at risk' or 'failing catchment area there are no concerns in relation to effects on nearby waterbodies. Our data mapping system is used to determine whether the proposal falls within the 'at risk/failing' catchment.

Again, we consider such an assessment as being far too narrow. It cannot be assumed that if a proposed afforestation site is not (itself) situated within an "at risk" or "failing" catchment area¹² that there will be no adverse acidification impacts on surrounding waterbodies.

INCC therefore seeks clarification as to whether NRW considered the potential for acidification impacts from the Project on downstream waterbodies and if not, whether NRW considers such an omission to be acceptable. More generally, INCC asks NRW to re-consider how it approaches this kind of assessment and calls on NRW to apply a more nuanced, detailed and project-specific approach.

¹² We note that NRW has not provided any specific definition as to how it defines such areas.

Conclusion

INCC reiterates its serious concerns with NRW's Decision and consideration of the Project. In the interests of openness and transparency, INCC seeks through this letter to notify NRW of these issues, including the very real risk that NRW has acted unlawfully. INCC also seeks clarification on the various matters set out above in order to fully understand NRW's approach (both in terms of its assessment of the Project's impacts and its consideration of its legal duties). From the limited information available to INCC, it considers there to be a real risk of legal challenge were NRW to respond to any future proposal in the same way it has dealt with the Project.

We look forward to receiving a response to this letter as soon as possible.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'R. Jones Parry', with a long, sweeping flourish extending to the right.

Robert Jones Parry
Chief Executive Officer
Initiative for Nature Conservation Cymru