

Bwlch Forest Track Diversion
Ecological Appraisal Report

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Client	RES Ltd
Project	Bwlch Forest Track Diversion, Ecological Appraisal Report
Version	FINAL
Project number	P23-062

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Amended following survey update	Gareth Lang	Principal Ecologist	06 April 2023

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Contents

1	Introduction.....	2
2	Methods.....	3
3	Results and Evaluation.....	4
4	Potential Impacts and Recommendations.....	7
5	References	10
6	Appendices.....	11
	Appendix 1: Figures.....	12
	Appendix 2: Photographs	13
	Appendix 3: Summaries of Relevant Policy, Legislation and Other Instruments	14

1 Introduction

Background to commission

- 1.1 RES Ltd commissioned BSG Ecology in January 2023 to undertake an ecological appraisal of land adjacent to the existing Bwlch Forest track (part of Afan Park forestry) between the A4107 and the Pen y Cymoedd Wind Farm. The track is to be subject to localised widening to permit passage of abnormal indivisible loads (AILs) during delivery of turbines to the consented Upper Ogmere Wind Farm. The impacts of localised track widening works were assessed to inform the Upper Ogmere Wind Farm planning application. The information contained within the Upper Ogmere Wind Farm Environmental Statement (ES) (2020) is referenced for context.
- 1.2 The developer does not have land rights over a section of access track passing over the Rhondda Tunnel and a short diversion to the access track is proposed to avoid that section. The proposed diversion will be approximately 200 m in length and occupy approximately 0.13 ha of a 0.82 ha application boundary ('the Site'). The Site is located at approximate Ordnance Survey Grid Reference (OSGR) SS 9080 9813 and crosses the boundary between Neath Port-talbot (NPT) and Rhondda Cynon Taff (RCT). Approximately 0.27 ha of the Site is within NPT, and 0.55 ha of the Site is within RCT. The location of the Site is presented on **Figure 1**, and the extent of the Site illustrated on **Figure 2**. Photographs are presented in **Appendix 2**.

Aims of study

- 1.3 The aim of the ecological appraisal is to identify potential ecological impacts in respect of the proposed track diversion. The report:
- Summarises desk study data (information relating to protected sites and species and to the context of the Site).
 - Describes the habitats and features present and assesses their potential to support protected species either directly or in terms of providing a corridor for dispersal.
 - Outlines legislative and / or policy protection afforded to habitats and species of importance which may be associated with the Site, and more generally with regard to biodiversity.
 - Makes a preliminary assessment of potential impacts of the scheme on biodiversity and proportionate measures to avoid, reduce or compensate for these.
 - Identifies further survey requirements.
 - Provides recommendations for biodiversity enhancement measures in line with planning policy guidance (see **Appendix 3**).

2 Methods

Desk study

- 2.1 A data request was made to the South-East Wales Biodiversity Records Centre (SEWBRc) to obtain information on statutory and non-statutory designated sites and records of protected, Priority, invasive or otherwise notable species within 2 km of the Site. Data were received on 15 February 2023.
- 2.2 The desk study also involved a review of publicly available information including the UK Government's MAGIC¹ website and Google Earth². Data from both sources was accessed in January 2023 in the preparation of this ecological report.
- 2.3 The MAGIC database was used to establish the presence of statutory designated sites of nature conservation interest in relation to the proposed development and Google Earth Pro to obtain recent and historical aerial photography of the Site and surrounding landscape, to provide ecological context for the results of the Site assessment.

Field survey

- 2.4 An initial walkover survey was completed by Trevor Fletcher (Senior Ecologist) accompanied by Gareth Lang (Principal Ecologist) on 19 January 2023. This was updated on 04 April 2023 by Trevor Fletcher following methods recommended by the Joint Nature Conservation Committee (JNCC) handbook for extended Phase 1 habitat survey (2010).
- 2.5 Plant species nomenclature follows Stace (2010).
- 2.6 The survey was 'extended' to include an assessment of the habitats on Site for their suitability to support protected species.

Limitations to methods

- 2.7 The habitat survey was completed at a suitable time of year (April) to allow sufficient key species to be identified and for the distinct habitat types on Site to be accurately classified and spatially mapped. No limitations to the survey were identified.

Personnel

- 2.8 Trevor Fletcher (ACIEEM), Senior Ecologist undertook the Extended Phase 1 Habitat Survey of the site and provided a technical review of this report. Trevor has been a Consultant Ecologist for over 5 years and has considerable experience in completing extended Phase 1 Habitat Surveys and associated reports. Trevor holds survey licenses for dormouse, great crested newt and barn owl in Wales and has carried out numerous surveys for Priority and protected species including bats, otter, great crested newt, birds, badger, water vole and reptiles.
- 2.9 Gareth Lang (ACIEEM), Principal Ecologist authored this report. Gareth is a Principal Ecologist at BSG Ecology and has 10 years of experience as an ecological consultant. Gareth holds survey licences for great crested newt, dormouse, and bats in both England and Wales, and has been the named ecologist on several dormouse and bat mitigation licences.

¹ magic.defra.gov.uk

² earth.google.com/web

3 Results and Evaluation

Designated Sites

- 3.1 The Site is not within a statutory designated site.
- 3.2 There is one statutory site of nature conservation interest within 2 km of the Site: the Mynydd Ty-isaf Site of Special Scientific Interest (SSSI) (located approximately 1.4 km east of the Site).
- 3.3 The Mynydd Ty-isaf SSSI is notified for its crags, scree slopes and ffridd habitats. The higher crags are known to provide nesting sites for a Schedule 1 raptor.
- 3.4 The section of the Site within RCT (approximately 0.55 ha) is within the Mynydd Blaenrhondda and Mynydd Ty-isaf Site of Importance for Nature Conservation (SINC), the upland plateau section of which support plantation on peatbog, with areas of relic sphagnum bog moss communities, with purple moor-grass *Molinea caerulea* and rush *Juncus* communities.
- 3.5 In addition, all watercourses within NPT that retain a generally natural form are designated as part of the Watercourses SINC. The designation is based on the Guidelines for the Selection of Wildlife Sites in Wales (Wales Biodiversity Partnership 2008). There are no watercourses within the Site; however, watercourses that are likely to meet SINC criteria are present within 250 m of it. These are part of the Afon Afan catchment.

Habitats

Dry heath / acid grassland mosaic

- 3.6 A mosaic of dry heath and acid grassland dominates the Site. Species abundance varies according to the topography which is gently undulating and slopes to the north and east. Heather *Calluna vulgaris* is abundant in the areas of drier, raised topography whereas purple moor-grass is the abundant species in lower lying, damper areas.
- 3.7 Bilberry *Vaccinium myrtillus* is occasionally found growing in association with patches of heather, becoming more abundant on the slopes of elevated topography to the east of the Site.
- 3.8 Grass species include occasionally occurring red fescue *Festuca rubra*, common bent *Agrostis capillaris* and wavy hair- grass *Deschampsia flexuosa* with rarely present mat grass *Nardus stricta*.
- 3.9 Damper areas of grassland hold abundant soft rush *Juncus effusus*. Hard rush *Juncus inflexus*, sharp-flowered rush *Juncus acutiflorus* and carnation sedge *Carex panicea* occur occasionally.
- 3.10 Bryophytes noted include the moss, common haircap *Polytrichum commune*. Lichens are represented by *Cladonia* species, occasionally noted on decaying tree stumps within the mosaic habitat.
- 3.11 Encroachment by self- seeded sitka spruce *Picea sitchensis* is evident across the Site (TN 1), with highest density of establishment occurring in the eastern parts of the Site. Immature willow species *Salix* sp. are also scattered across the habitat (with densest areas marked as scattered scrub on Figure 2), and occasional bramble *Rubus fruticosus* is evident in discrete areas.
- 3.12 Two small bog pools (each less than c. 1 m²) are present immediately north of the Site within a grassland mosaic at TN 2. The pools contain infrequent *Sphagnum palustre*.

Marshy grassland

- 3.13 Marshy grassland was present in small distinct parcels of low-lying terrain in the south of the Site, close to the existing track, and almost completely comprised purple -moor grass *Molinea caerulea*, with occasional soft rush and rarely occurring heather.
- 3.14 Willow saplings were sparsely distributed across the marshy grassland.
- 3.15 Where marshy grassland habitat lies adjacent to the existing track species including marsh thistle *Cirsium palustre* and pendulous sedge *Carex pendula* are occasionally present.

Species**Reptiles and amphibians**

- 3.16 SEWBRc provided the following records:
- Two records of adder *Vipera berus*: one involving three sightings of adder within the Pen y Cymoedd Wind Farm (approximately 1.6 km west of the Site) during 2016, and one at Blaengwynfi Football Ground (approximately 1.8 km south-west of the Site) in 2014.
 - Three records of common lizard *Zootoca vivipara*, the nearest involving four sightings during 2014, approximately 500 m north-west of the Site.
 - Three records of common frog *Rana temporaria*, the nearest involving four sightings during 2014, approximately 1.3 km north-west of the Site.
- 3.17 The dry heath, grassland and bare ground mosaic forming the Site provide suitable habitat for reptiles and amphibians.
- 3.18 There are no ponds within the Site; however, a small pond is present approximately 20 m south-west of the Site (within mature sitka plantation, TN4), and a second small pond within a quarry, approximately 20 m north of the Site. Both of these ponds were surveyed using eDNA methods on 26 June 2021 to support the Upper Ogmere Wind Farm application, and returned a negative result for the presence of great crested newt *Triturus cristatus*. However, both ponds were found to support palmate newt *Lissotriton helveticus*. Previous eDNA survey of the pond south-west of the Site undertaken in 2017, and an additional pond located approximately 1.1 km south of the Site also returned a negative result for great crested newt.

Water vole and otter

- 3.19 SEWBRc provided nine records of water vole *Arvicola amphibius* within the search area; all were recorded in 2018, between 500 m and 1 km north-west of the Site. Evidence of water vole (droppings and feeding stations) were found in an area of wet flush during survey work by BSG Ecology at the Upper Ogmere Wind Farm site in 2014 and 2016, approximately 3 km south of the Site. The track-side drains near to the Site are unlikely to support a population of water vole given that they are shallow, stone lined, and likely to be dry for most of the year. However, track-side drains approximately 250 m north of the Site are more suitable for use by water vole (they are deeper, with more vegetation cover, and adjacent to an area of peatbog). However, no evidence of presence was found in this area during survey work to inform the Upper Ogmere Wind Farm application.
- 3.20 There are no recent (within the last 10 years) records of otter *Lutra lutra* within 2 km of the Site. The narrow channels provided by nearby track-side drains are likely to limit foraging and commuting opportunities for otter.

Birds

- 3.21 A total of 17 records of birds were provided by SEWBRc. These included a record of redwing *Turdus iliacus* (a Wildlife and Countryside Act 1981 (as amended) Schedule 1 species), and five Environment (Wales) Act 2016 species of principal importance for biodiversity in Wales (Bullfinch

Pyrrhula pyrrhula, dunnoek *Prunella modularis*, song thrush *Turdus philomelos*, starling *Sturnus vulgaris*, and lesser redpoll *Carduelis cabaret*). Starling, dunnoek and lesser redpoll are also red listed birds of conservation concern in Wales.

- 3.22 The Site is not considered likely to provide nesting opportunities for any species included in the data search. However, species that may breed locally include nightjar *Caprimulgus europaeus* (in areas of heathland within Site and wider area), goshawk *Accipiter gentilis* and common crossbill *Loxia curvirostra* (in adjacent mature plantation). Goshawk and crossbill are included in Schedule 1 of the WCA and, as such, are afforded protection from disturbance at the nest. Nightjar are an Environment (Wales) Act species of principal importance for biodiversity in Wales.

Bats

- 3.23 SEWBRc did not hold any recent (within the last 10 years) records of bats within the search area. One record for each of common pipistrelle *Pipistrellus pipistrellus*, soprano pipistrelle *Pipistrellus pygmaeus*, and an unidentified bat in the genus *Myotis* were submitted in 2011 (all approximately 1.25 km east of the Site near Blaencwm).
- 3.24 The habitats within and surrounding the Site may provide a foraging resource for bats. Common and soprano pipistrelle are known to exploit plantation edge and areas of clearfell as a foraging resource (Kirkpatrick *et al.*, 2017) and may forage and commute along the existing forestry track. However, local roosting opportunities are likely to be scarce. There are no buildings present that may provide bat roost potential within 1 km of the Site, and the nearest semi-natural broadleaved woodland (which may provide more extensive bat roost opportunities) is found within the Blaencwm valley, approximately 600 m to the east. The use of the Site by foraging bats is likely to be very limited.

Notable plants

- 3.25 The SEWBRc data search returned three records of stag's horn clubmoss *Lycopodium clavatum* and one of fir clubmoss *Huperzia selago* within the search area. These records are located alongside the Bwlch Forest Track between approximately 500 m and 1 km south of the Site.
- 3.26 Survey work by BSG Ecology to inform the Upper Ogmre Wind Farm application also recorded stag's horn clubmoss between approximately 500 m and 1.5 km south of the Site.
- 3.27 Stag's horn clubmoss is an Environment (Wales) Act species of principal importance for biodiversity in Wales. It has a restricted distribution in NPT and RCT, and is associated with disturbed ground adjacent to forestry tracks.

Invasive species

- 3.28 SEWBRc provided local records of Japanese knotweed *Fallopia japonica* and rhododendron *Rhododendron ponticum*. A stand of Japanese knotweed and scattered Himalayan balsam *Impatiens glandulifera* is present alongside the Bwlch Forest track approximately 1.1 km south of the Site. These were recorded during survey work by BSG Ecology in 2020 to inform the Upper Ogmre Wind Farm application; and the Japanese knotweed noted to remain present during the walkover survey in January 2023.
- 3.29 A stand of Rhododendron *Rhododendron ponticum* is present immediately west of the Site boundary at TN 3. No evidence of other non-native invasive species was noted within or adjacent to the Site during the survey.

4 Potential Impacts and Recommendations

Designated Sites

- 4.1 No impacts on statutory sites will occur given the very limited extent of the proposed works (0.13 ha) and distance to the nearest site (Mynydd Ty-isaf SSSI; 1.5 km distant).
- 4.2 The proposed works will result in the loss of approximately 0.07 ha of dry heath and grassland habitats from within the Mynydd Blaenrhondda and Mynydd Ty-isaf SINC. This is a very small area (<0.01 %) in the context of the 1131.5 ha SINC, and its location (adjacent to an existing track within active rotation commercial plantation) is likely to reduce the value of the affected area. However, standard practice mitigation measures (set out in a Construction Environment Management Plan (CEMP)) will be employed to avoid impacts on adjacent, retained habitats (such as avoidance of insensitive vehicle movements, or storing of soil and pollutants on, or adjacent to retained habitats). Pollution control measures will also be implemented as part of the CEMP requirements to avoid the risk of impacts on hydrologically connected habitats and watercourses (including the NPT Watercourses SINC).

Habitats

- 4.3 The habitats present within the Site are typical of the wider area, and the small extent of land take required by the proposals will result in a very minor impact.
- 4.4 In the absence of the proposals, the land within the Site will become colonised by self-seeded sitka spruce or cleared and re-stocked as part of forestry operations. The CEMP will include measures to avoid impacts on retained habitats (as described above) and unsealed disturbed ground will be allowed to re-colonise naturally following construction. The small bog pools adjacent to the Site contribute towards local biodiversity. These will be marked ahead of construction and the storing of materials near these pools will be avoided such that they are retained in their current state.

Species

- 4.5 Relevant legislation protecting reptiles, amphibians, birds, water vole and bats is presented in **Appendix 3**.

Reptiles, amphibians, and ground-nesting birds

- 4.6 The habitats within the Site may support reptiles, amphibians and nesting birds. To avoid the risk of killing or injury of animals, or destruction of active nests during construction works, the footprint of the track diversion will be subject to phased vegetation clearance. Vegetation clearance should take place outside of the nesting bird season (March to August inclusive) and, ideally between October and February inclusive (to avoid the main active season for reptiles and amphibians). The vegetation will be strimmed down to a sward height of approximately 1.5 cm, and maintained as a short sward through regular cutting until commencement of construction. If vegetation management cannot commence outside of the bird nesting season, the affected area will need to be thoroughly hand searched by an ecologist prior to cutting to ensure the absence of active nests.
- 4.7 Ground works will only take place during the active season for reptiles (March to September³ inclusive) to avoid the risk of killing or injuring hibernating animals. Vegetation should be cut (as above) at least 3 days prior to ground works commencing to allow reptiles and amphibians to move away from the affected area.

³ Works may take place in October on the advice of an ecologist, and only during periods of mild weather conditions.

Schedule 1 birds

- 4.8 If works cannot take place outside of the nesting bird season (March to August inclusive), All mature conifer plantation within a perimeter of 300 m will be searched by a suitably experienced ornithologist for evidence of nesting Schedule 1 birds (such as goshawk and common crossbill). If active goshawk nests are found within the 300 m or crossbill nests within 50 m⁴, the works will be delayed until the ecologist confirms that the nests are vacant.

Water vole

- 4.9 Water vole are present in the wider area and, while water vole are unlikely to occur regularly within the Site, individuals may commute and forage along adjacent track-drains. To avoid the risk of killing or injuring any animals, a search for water vole presence by a suitably experienced ecologist will be completed prior to construction commencing. A licence may be required to exclude water vole from the work area if they are found to be using the Site for shelter.

Bats

- 4.10 There are no roosting opportunities for bats within the Site, and the surrounding conifer plantation is likely to be of low value for roosting bats. Disturbance of bat roosts is, therefore, unlikely to occur.
- 4.11 Some species of bat (including horseshoe *Rhinolophus* sp. bats, *Myotis* sp. and long-eared *Plecotus* sp. bats) are sensitive to lighting (ILP & BCT, 2018). Therefore, temporary work lighting will only be required if works are carried out during the winter period (when day-light hours are short, and bats are less active). Lighting during the main active season for bats (May to August inclusive) will be avoided.
- 4.12 If used outside of the main bat activity season, lighting will avoid light-spill onto adjacent forest edge habitats (where bats are most likely to commute and forage).
- 4.13 No permanent lighting will be installed.

Notable plants

- 4.14 No evidence of stag's horn clubmoss was recorded during the walkover survey. However, the local occurrence of this species may have been overlooked given the ground conditions during the survey. A pre-construction survey for stag's horn and fir clubmoss will be undertaken by a suitably experienced botanist. If any specimens are recorded, they will be excavated by hand and translocated to a suitable receptor area (or temporarily stored for translocation to an area of new track verge following completion of construction).

Invasive species

- 4.15 A stand of Rhododendron was present adjacent to the Site during the survey. However, other non-native invasive species have been recorded locally, and can spread rapidly. There is also a risk of causing the spread of plants if access to the Site requires passing of stands in seed.
- 4.16 The Site should be checked for non-native invasive plants ahead of construction commencing, and a programme of treatment and removal (following the advice of a specialist contractor) carried out if such plants are present. All stands of non-native invasive species along the access route to Site should also be treated or strimmed prior to construction commencing. Plants should be prevented from setting seed (or fragments transported) by regular treatment / strimming throughout the construction period.

⁴ The standoff distances given for goshawk and crossbill equal the lower range of the breeding season buffer zone suggested by Goodship & Furness (2022). These distances are considered proportionate given that the construction operation (minor groundworks and laying of approximately 200 m of track in an unforested area) will generate less noise, vibration and visual disturbance than forestry felling operations.

Enhancement

- 4.17 Section 6 of the Environment (Wales) Act 2016 places a duty on public authorities to 'seek to maintain and enhance biodiversity' so far as it is consistent with the proper exercise of those functions. In so doing, public authorities must also seek to 'promote the resilience of ecosystems'.
- 4.18 The habitat within the Site will be enhanced through the removal and control of self-seeding sitka spruce to retain an open heath and marshy grassland mosaic in the long term. The presence of willow and bramble scrub will also be managed to remove all bramble and ensure that the coverage of willow does not occupy more than 5 % of the Site area.
- 4.19 Some of the arisings from sitka removal will be used to create a reptile hibernaculum in an area of heath habitat within the northern part of the Site. The structure will follow guidance set out in Julian & Hand (2018).
- 4.20 Continued management (including scrub control) of the Site in the long term will be implemented and details confirmed within a habitat management plan.

5 References

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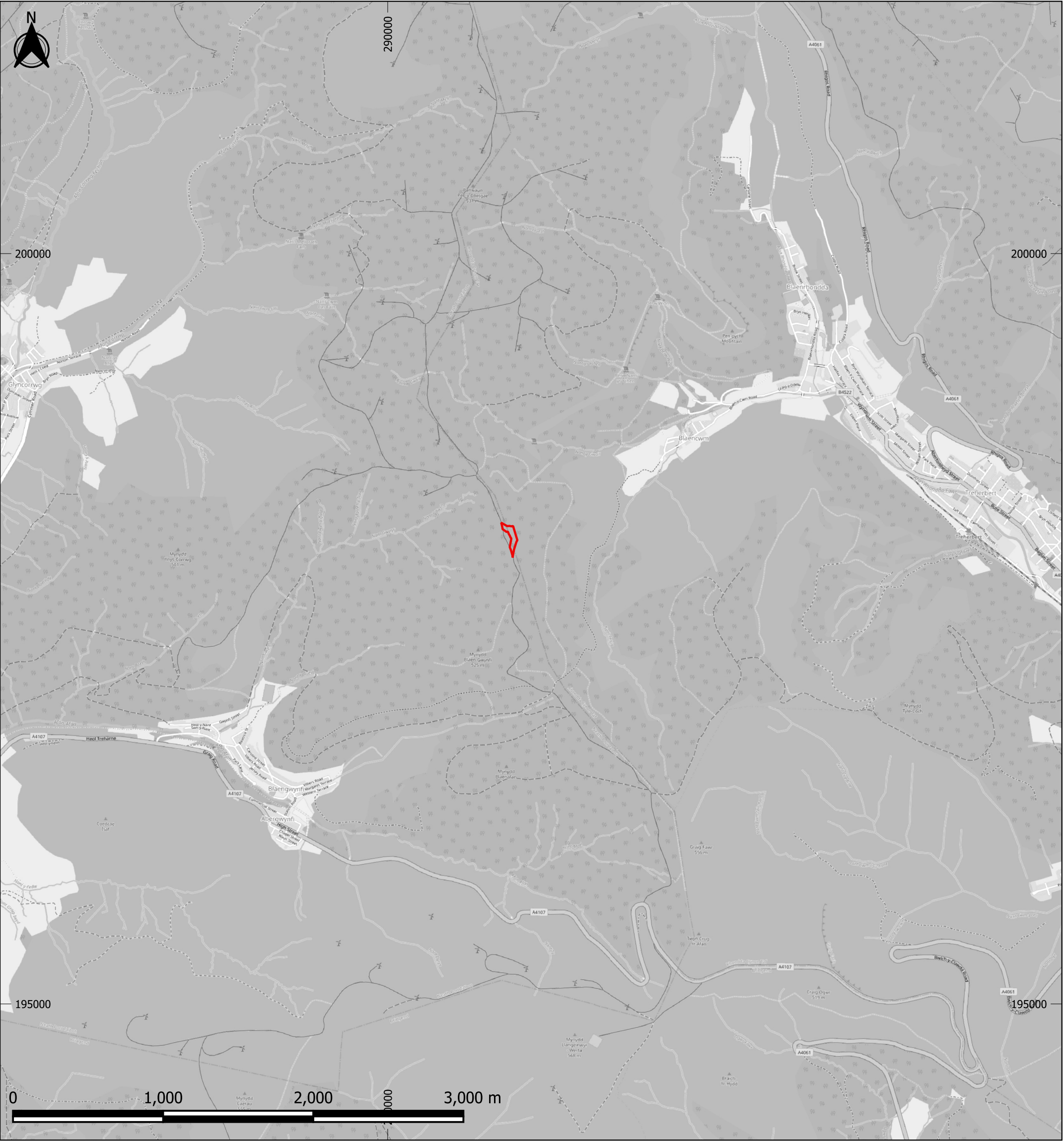
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6 Appendices

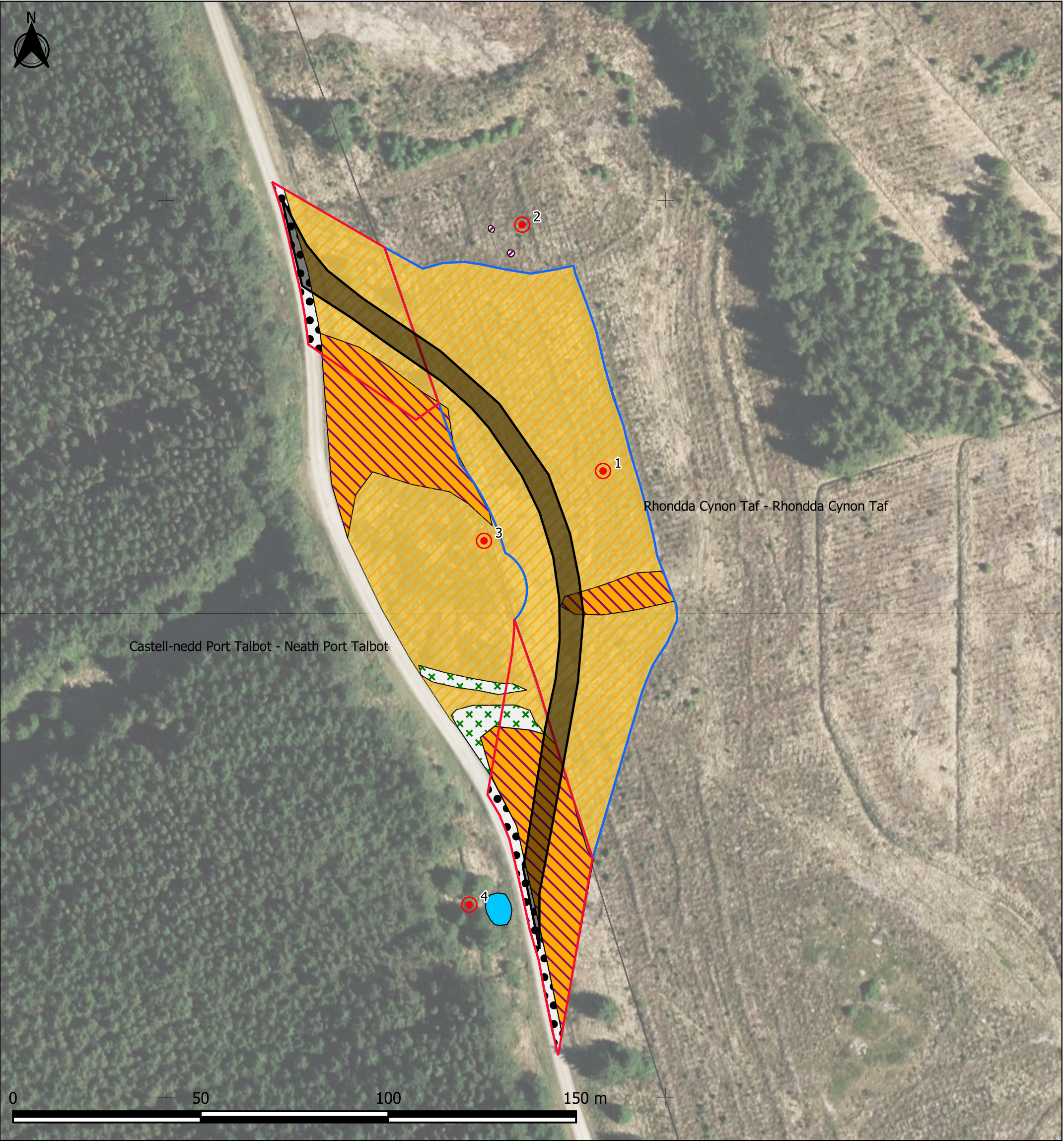
Appendix 1: Figures

(overleaf)



Legend

Site Boundary



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PROJECT TITLE
BWLCH FOREST TRACK DIVERSION

DRAWING TITLE
Figure 2: Site boundary and habitats

DATE: 06/04/2023
DRAWN: GL
CHECKED: TF
APPROVED: TF
SCALE: 1:1,000
VERSION:1.0

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Projection: OSGB 1936/British National Grid - EPSG 27700
Sources: BSG Ecology survey data

- Legend
- Site boundary
- NPT
 - RCT
 - Proposed track
 - Target note

- Habitats
- Scrub - scattered
 - Marsh/marshy grassland
 - Dry heath/acid grassland
 - Wet modified bog
 - Standing water
 - Bare ground

Appendix 2: Photographs

Photograph 1: View north-east over the Site.	Photograph 2: Self-seeding sitka spruce within the Site.
	
Photograph 3: Small bog pool north of the Site.	Photograph 4: Rhododendron plant adjacent to the Site
	

Appendix 3: Summaries of Relevant Policy, Legislation and Other Instruments

This section briefly summarises the legislation, policy and related issues that are relevant to the main text of the report. The following text does not constitute legal or planning advice.

Planning Policy Wales 11

TAN 5 Nature Conservation and Planning (Wales only)

Technical Advice Note (TAN) 5 supplements Planning Policy Wales and provides advice about how the land use planning system in Wales 'should contribute to protecting and enhancing biodiversity and geological conservation.'

The TAN provides guidance to local planning authorities on: 'the key principles of positive planning for nature conservation; nature conservation and Local Development Plans; nature conservation in development management procedures; development affecting protected internationally and nationally designated sites and habitats; and, development affecting protected and priority habitats and species.'

In section 2.4 when deciding planning applications that may affect nature conservation, 'local authorities should:

- contribute to the protection and improvement of the environment...seeking to avoid irreversible harmful effects on the natural environment;
- ensure that appropriate weight is attached to designated sites of international, national and local importance;
- protect wildlife and natural features in the wider environment, with appropriate weight attached to priority habitats and species in Biodiversity Action Plans;
- ensure that all material considerations are taken into account and decisions are informed by adequate information about the potential effects of a development on nature conservation;
- ensure that the range and population of protected species is sustained;
- adopt a stepwise approach to avoid harm to nature conservation, minimise unavoidable harm by mitigation measures, offset residual harm by compensation measures and look for new opportunities to enhance nature conservation; where there may be significant harmful effects local planning authorities will need to be satisfied that any reasonable alternative sites that would result in less or no harm have been fully considered.'

At section 3.3.2 regarding Local Development Plans policies the guidance states that a policy should be included in respect of the application of the precautionary principle.

Section 4 includes specific and detailed guidance, expanding on the principles set out in 2.4, in respect of the development control process including pre-application discussions, preparing planning applications, requests for further information and ecology in respect of Environmental Impact Assessment (EIA). The broad principles of development control requirements are set out as follows:

- 'adopting the five-point approach to decision-making – information, avoidance, mitigation, compensation and new benefits;
- ensuring that planning applications are submitted with adequate information, using early negotiation, checklists, requiring ecological surveys and appropriate consultation;
- securing necessary measures to protect, enhance, mitigate and compensate through planning conditions and obligation;
- carrying out effective planning enforcement; and

- identifying ways to build nature conservation into the design of new development.'

Environment (Wales) Act 2016

The Environment (Wales) Act 2016 passed into law in March 2016. Part 1 of the Act sets out Wales' approach to planning and managing natural resources at a national and local level with a general purpose linked to statutory 'principles of sustainable management of natural resources' defined within the Act.

Section 6 of the Act places a duty on public authorities to '*seek to maintain and enhance biodiversity*' so far as it is consistent with the proper exercise of those functions. In so doing, public authorities must also seek to '*promote the resilience of ecosystems*'. The duty replaces the Rural Communities Act 2006 in Wales, and applies to those authorities that fell within the previous duty.

Public authorities will be required to report on the actions they are taking to improve biodiversity and promote ecosystem resilience. This is expanded on in sub-section (2):

In complying with subsection (1), a public authority must take account of the resilience of ecosystems, in particular the following aspects—

- diversity between and within ecosystems;
- the connections between and within ecosystems;
- the scale of ecosystems;
- the condition of ecosystems (including their structure and functioning);
- the adaptability of ecosystems.

Section 7 concerns biodiversity lists and the duty to take steps to maintain and enhance biodiversity. It replaces the duty in section 42 of the NERC Act 2006. The Welsh Ministers will publish, review and revise lists of living organisms and types of habitat in Wales, which they consider are of key significance to sustain and improve biodiversity in relation to Wales.

The Welsh Ministers must also take all reasonable steps to maintain and enhance the living organisms and types of habitat included in any list published under this section, and encourage others to take such steps.

European protected species (Animals)

The Conservation of Habitats and Species Regulations 2017 (as amended) consolidates various amendments that have been made to the original (1994) Regulations which transposed the EC Habitats Directive on the Conservation of Natural Habitats and of Wild Fauna and Flora (Council Directive 92/43/EEC) into national law.

"European protected species" (EPS) of animal are those which are shown on Schedule 2 of the Conservation of Habitats and Species Regulations 2017 (as amended). They are subject to the provisions of Regulation 43 of those Regulations. All EPS are also protected under the Wildlife and Countryside Act 1981 (as amended). Taken together, these pieces of legislation make it an offence to:

- Intentionally or deliberately capture, injure or kill any wild animal included amongst these species
- Possess or control any live or dead specimens or any part of, or anything derived from a these species
- deliberately disturb wild animals of any such species
- deliberately take or destroy the eggs of such an animal, or
- intentionally, deliberately or recklessly damage or destroy a breeding site or resting place of such an animal, or obstruct access to such a place

For the purposes of paragraph (c), disturbance of animals includes in particular any disturbance which is likely—

- to impair their ability—
 - to survive, to breed or reproduce, or to rear or nurture their young, or

- ii. in the case of animals of a hibernating or migratory species, to hibernate or migrate; or
- b. to affect significantly the local distribution or abundance of the species to which they belong.

Although the law provides strict protection to these species, it also allows this protection to be set aside (derogated) through the issuing of licences. The licences in England are currently determined by Natural England (NE) for development works and by Natural Resources Wales in Wales. In accordance with the requirements of the Regulations (2017, as amended), a licence can only be issued where the following requirements are satisfied:

- a. The proposal is necessary 'to preserve public health or public safety or other imperative reasons of overriding public interest including those of a social or economic nature and beneficial consequences of primary importance for the environment'
- b. 'There is no satisfactory alternative'
- c. The proposals 'will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range.'

Definition of breeding sites and resting places

Guidance for all European Protected Species of animal, including bats and great crested newt, regarding the definition of breeding and of breeding and resting places is provided by The European Council (EC) which has prepared specific guidance in respect of the interpretation of various Articles of the EC Habitats Directive.⁵ Section II.3.4.b) provides definitions and examples of both breeding and resting places at paragraphs 57 and 59 respectively. This guidance states that 'The provision in Article 12(1)(d) [of the EC Habitats Directive] should therefore be understood as aiming to safeguard the ecological functionality of breeding sites and resting places.' Further the guidance states: 'It thus follows from Article 12(1)(d) that such breeding sites and resting places also need to be protected when they are not being used, but where there is a reasonably high probability that the species concerned will return to these sites and places. If for example a certain cave is used every year by a number of bats for hibernation (because the species has the habit of returning to the same winter roost every year), the functionality of this cave as a hibernating site should be protected in summer as well so that the bats can re-use it in winter. On the other hand, if a certain cave is used only occasionally for breeding or resting purposes, it is very likely that the site does not qualify as a breeding site or resting place.'

Competent authorities

Under Regulation 7 of the Conservation of Habitats and Species Regulations 2017 (as amended) a "competent authority" includes "any Minister of the Crown..., government department, statutory undertaker, public body of any description or person holding a public office."

In accordance with Regulation 9, "a competent authority must exercise their functions which are relevant to nature conservation, including marine conservation, so as to secure compliance with the requirements of the [Habitats and Birds] Directives. This means for instance that when considering development proposals a competent authority should consider whether EPS or European Protected Sites are to be affected by those works and, if so, must show that they have given consideration as to whether derogation requirements can be met."

Birds

All nesting birds are protected under Section 1 of the Wildlife and Countryside Act 1981 (as amended) which makes it an offence to intentionally kill, injure or take any wild bird or take, damage or destroy its nest whilst in use or being built, or take or destroy its eggs. In addition to this, for some rarer species (listed on Schedule 1 of the Act), it is an offence to disturb them whilst they are nest building or at or near a nest with eggs or young, or to disturb the dependent young of such a bird.

The Conservation of Habitats and Species Regulations 2017 (as amended) places duties on competent authorities (including Local Authorities and National Park Authorities) in relation to wild bird habitat. These provisions relate back to Articles 1, 2 and 3 of the EC Directive on the conservation of wild birds

⁵ Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC. (February 2007), EC.

(2009/147/EC, 'Birds Directive'⁶) (Regulation 10 (3)) requires that the objective is the 'preservation, maintenance and re-establishment of a sufficient diversity and area of habitat for wild birds in the United Kingdom, including by means of the upkeep, management and creation of such habitat, as appropriate, having regard to the requirements of Article 2 of the new Wild Birds Directive...' Regulation 10 (7) states: 'In considering which measures may be appropriate for the purpose of security or contributing to the objective in [Regulation 10 (3)] Paragraph 3, appropriate account must be taken of economic and recreational requirements'.

In relation to the duties placed on competent authorities under the 2017 Regulations, Regulation 10 (8) states: 'So far as lies within their powers, a competent authority in exercising any function [including in relation to town and country planning] in or in relation to the United Kingdom must use all reasonable endeavours to avoid any pollution or deterioration of habitats of wild birds (except habitats beyond the outer limits of the area to which the new Wild Birds Directive applies).'

Reptiles

All native reptile species receive legal protection in Great Britain under Schedule 5 of the Wildlife and Countryside Act 1981 (as amended). Viviparous lizard, slow-worm, grass snake and adder are protected against killing, injuring and unlicensed trade only. Sand lizard and smooth snake receive additional protection as "European Protected species" under the provisions of the Conservation of Habitats and Species Regulations 2017 (as amended) and are fully protected under the Wildlife and Countryside Act 1981 (as amended).

All six native species of reptile are included as 'species of principal importance' for the purpose of conserving biodiversity under Section 41 (England) of the NERC Act 2006 and Section 7 of the Environment (Wales) Act 2016.

Current Natural England Guidelines for Developers⁷ states that 'where it is predictable that reptiles are likely to be killed or injured by activities such as site clearance, this could legally constitute intentional killing or injuring.' Further the guidance states: 'Normally prohibited activities may not be illegal if 'the act was the incidental result of a lawful operation and could not reasonably have been avoided'. Natural England 'would expect reasonable avoidance to include measures such as altering development layouts to avoid key areas, as well as capture and exclusion of reptiles.'

The Natural England Guidelines for Developers state that 'planning must incorporate two aims where reptiles are present:

- To protect reptiles from any harm that might arise during development work;
- To ensure that sufficient quality, quantity and connectivity of habitat is provided to accommodate the reptile population, either on-site or at an alternative site, with no net loss of local reptile conservation status.'

Water vole

Water vole is protected under the Wildlife and Countryside Act 1981 (as amended). This makes it an offence to kill, injure or take any water vole, damage, destroy or obstruct access to any place of shelter or protection that the animals are using, or disturb voles while they are using such a place. Water vole is listed as a Species of Principal Importance under the provisions of the NERC Act 2006 in England and under the provisions of the Environment (Wales) Act 2016.

Invasive non-native species

An invasive non-native species is any non-native animal or plant that has the ability to spread causing damage to the environment.

Under the Wildlife and Countryside Act 1981 (as amended) it is an offence to release, or to allow to escape into the wild, any animal which is not ordinarily resident in and is not a regular visitor to Great Britain in a wild state or is listed under Schedule 9 of the Act.

⁶ 2009/147/EC Birds Directive (30 November 2009. European Parliament and the Council of the European Union.

⁷ English Nature, 2004. *Reptiles: guidelines for developers*. English Nature, Peterborough. <https://webarchive.nationalarchives.gov.uk/20150303064706/http://publications.naturalengland.org.uk/publication/76006>

It is an offence to plant or otherwise cause to grow in the wild invasive non-native plants listed on Schedule 9 of the Wildlife and Countryside Act 1981 (as amended).

Japanese knotweed

It is an offence to plant or cause the spread of Japanese knotweed in the wild under the Wildlife and Countryside Act 1981 (as amended). All waste containing Japanese knotweed comes under the control of Part II of the Environmental Protection Act 1990.

The Environment Agency has produced “The Knotweed Code of Practice”, which provides guidance on how to manage Japanese knotweed legally on development sites⁸. This document provides ecological information on Japanese knotweed, details of how to prevent its spread, how to manage Japanese knotweed and information on disposal. Natural Resources Wales refers to Environment Agency guidance in respect of landowners responsibilities in Wales and to the Wildlife and Countryside Act 1981 (as amended).

⁸ *Managing Japanese knotweed on development sites: the knotweed code of practice* (2006). Environment Agency. <https://www.gov.uk/government/publications/japanese-knotweed-managing-on-development-sites>. See also 2013 Code of Practice update.