LEIGH DAY

By Email Only

[redacted]

EMAIL: [redacted]
TELEPHONE: [redacted]
YOUR REF:
OUR REF: [redacted]
DATED: 1 July 2024

Pre-Action Protocol Letter – requires your urgent attention

Dear Natural England,

Re: Natural England's grant of nine new supplementary badger cull licences and its authorisation of seventeen existing supplementary badger cull licences

<u>This letter</u>

1. We write this letter on behalf of our clients in order to comply with the pre-action protocol for judicial review under the Civil Procedure Rules. If we do not receive a satisfactory response to this letter, we propose to advise our clients to make an application for judicial review without further reference to you.

2. We are aware that judicial review is a remedy of last resort and write in the hope that this matter can be resolved without recourse to legal proceedings. We therefore outline at the end of this letter the steps which we ask you to take in order to avoid recourse to the court.

The decision under challenge

3. The claimants challenge the decision of Oliver Harmar (on behalf of Natural England) on 3 May 2024 to grant nine new supplementary badger cull ("**SBC**") licences and to authorise seventeen existing SBC licences.

Party details

4. The proposed defendant is Natural England. Natural England, an executive non-departmental public body sponsored by the Secretary of State for Environment, Food and Rural Affairs ("the Secretary of State"), is the Secretary of State's adviser in relation to issues concerning the natural environment in England.

5. The proposed interested party is the Secretary of State.

6. The proposed claimants are the Badger Trust and Wild Justice. The Badger Trust is a national charity which promotes the conservation and welfare of badgers, their setts and habitat. It campaigns on a wide range of badger protection issues, including those relating to bovine tuberculosis (bTB). Please address all correspondence to the claimants' legal advisers at the address given below. Please also note that other claimants may be added in due course.

7. Wild Justice is a not-for-profit company limited by guarantee set up to advocate on behalf of wildlife to further nature conservation in the United Kingdom, to encourage public participation in nature conservation issues, and to ensure that UK laws, policies and practices protect wildlife.

The details of the claimants' legal advisers dealing with this claim

8. [redacted]

The issues

Factual background

9. Natural England is authorised, by an agreement under section 78 of the Natural Environment and Rural Communities ("**NERC**") Act 2006, to carry out various functions, which are conferred upon the Secretary of State. These include the granting and authorising of licences under section 10(2)(a) of the Protection of Badgers Act 1992 ("**the 1992 Act**") to take and kill badgers for the purpose of preventing the spread of disease. Natural England is required to determine applications for culling licenses on a case-by-case basis. It appears that Oliver Harmar has authority to make those decisions on behalf of Natural England.

10. In April 2024 Natural England obtained from its Director of Science, Dr Peter Brotherton, scientific advice to inform its decision on whether to grant nine new SBC licences and to authorise seventeen existing ones. Dr Brotherton's advice, which appears to have been shared with the Secretary of State, found "no justification for authorising further supplementary badger culls in 2024 for the purpose of preventing the spread of disease and recommend[ed] against doing so". He reached this view on the following bases:

i. Badger vaccination can provide an effective alternative to SBC and recent evidence demonstrates that vaccination can be deployed before any recovery in the badger population poses an increased risk to cattle.

ii. Alternatives to a vaccination-only approach are also available and could potentially be deployed rapidly, such as that proposed through a targeted badger control policy which was consulted upon by the Secretary of State.

iii. The steps that farmers and others have already taken, alongside continued on-farm biosecurity, management practices and other cattle measures, are likely to provide a long-lasting disease reduction benefit that will persist until other options for disease control can be implemented.

11. In a letter to Natural England, dated 1 May 2024, Sally Randall (the Director General for Food, Biosecurity and Trade at the Department for Environment, Food and Rural Affairs), acknowledged Dr Brotherton's advice but noted the farming industry's low level of confidence in badger vaccination and emphasised the importance of "maintaining industry confidence" in badger disease control particularly because the "exit strategy from culling" on which the Secretary of State was consulting "would be delivered by industry".

12. Two days later, on 3 May 2024, Natural England made its decision (in the form of a decision by Oliver Harmar) to grant nine new SBC licences and to authorise seventeen existing ones subject to completion of operational readiness assessments. That decision was communicated to Ms Randall in a letter from Mr Harmar on 10 May 2024. The decision letter asserted that "farmers' confidence may be undermined if supplementary culling is not authorised" and "accept[ed] that their engagement is going to be vital if alternative measures are going to be delivered by and in cooperation with farmers".

Grounds of Challenge

Ground 1: the decision to grant/authorise the SBC licences was made for improper purposes

13. Oliver Harmar's decision to grant nine new SBC licences and to authorise seventeen existing ones was unlawful because it was made for improper purposes which were significantly material.

14. It is well established that a public body must exercise a statutory power for the purpose for which the power was conferred by Parliament, and not for any unauthorised purpose. An unauthorised purpose may even be laudable in its own right, but still unlawful. The issue is not whether the public body has acted in the public interest, but whether it has acted in accordance with the specific purpose for which the statutory power was conferred: see, for example, *R (Core Issues Trust Ltd) v Transport for London* [2014] EWHC 2628 (Admin), §99.

15. The 1992 Act contains general prohibitions on the taking, injuring and killing, and other interference with badgers. Section 10(2)(a) of the 1992 Act permits derogation from those provisions – by the issue of licences to cull badgers – only for the specific purpose of preventing the spread of disease.

16. Notwithstanding that express statutory limitation, Natural England's decision to grant/authorise the SBC licences was taken in order to build or maintain the farming industry's confidence in the Secretary of State's badger control programme. That is evident from the following:

i. The decision was taken two days after Ms Randall's letter to Natural England in which Ms Randall highlighted the "generally low level of confidence in badger vaccination within the farming industry" and foregrounded the importance of "maintaining industry confidence" in the badger control programme in order to enable a future "farmer led approach to badger vaccination". Such an approach would, according to Ms Randall's letter, avoid the need for a government led approach which, "even … on a targeted basis would likely be prohibitively expensive, especially in a challenging fiscal context". Ms Randall also stated that any changes to the badger control programme "need to be carefully timed and communicated".

ii. Following receipt of Ms Randall's letter, Natural England in its decision expressly recognised "that farmers' confidence may be undermined if supplementary culling is not authorised" and accepted that the farming industry's "engagement is going to be vital if alternative measures are going to be delivered by and in cooperation with farmers".

17. That purpose – i.e. building/maintaining the farming industry's confidence in the badger control programme in order to secure the industry's cooperation with a future vaccination programme – falls outside the scope of section 10(2)(a) because it does not concern the prevention of the spread of disease.

18. This extraneous and impermissible purpose demonstrably exerted a substantial influence on, and was significantly material to, Natural England's decision-making in circumstances where:

i. Natural England's Director of Science, Dr Brotherton, found no scientific justification for granting/authorising the SBC licences to prevent the spread of disease and expressly recommended against doing so.

ii. Natural England's position just ten days earlier – as set out in Natural England's Chief Scientist's response to the Secretary of State's consultation on changes to badger control policy – was that vaccination and biosecurity in combination, especially following recent culling under the Badger Control Policy, may be sufficient to reduce the contribution to bTB infection made by badgers without further culling.

iii. The only other purpose relied upon by Natural England in Oliver Harmar's decision was a purported, unsubstantiated, need to minimise the temporal gap between one form of badger disease control (i.e. culling) and another (i.e. vaccination) in order to maintain the disease reduction benefits obtained from culls. Natural England was aware that Dr Brotherton's scientific advice had addressed this concern and advised against licensing further culls (on which more below).

Ground 2: failure to provide adequate and/or rational reasons and/or have a lawful evidential basis for the authorisation/grant of SBC licences

19. In addition, Natural England failed to provide adequate and/or rational reasons for Oliver Harmar's decision to grant/authorise the SBC licences.

20. SBC licences are granted under a framework of limited derogations from a general prohibition on the killing/taking of badgers. In this context if Natural England derogates from the prohibition, its derogation will be lawful only if it is properly justified by positive evidence.

21. Furthermore, Natural England's decisions – like those of any other public body – must be rational. It is well established that an unexplained evidential gap or "leap" in reasoning may amount to Wednesbury unreasonableness: *Friends of the Earth v Secretary of State for Energy Security and Net Zero* [2024] EWHC 995 (Admin), §127 citing Saini J in *R (Wells) v Parole Board* [2019] EWHC 2710 (Admin), §33.

22. Natural England has justified its decision to grant/authorise the SBC licences by reference to its identification of a purported need to "minimise" the gap between one form of badger disease control (i.e. culling) and another (i.e. vaccination). It states that this is necessary in order to "bank the maximum disease control benefits". Natural England's position is that this need is evident from:

i. Advice from the UK Chief Veterinary Officer (as relayed by Ms Randall in her representations to Natural England) that the gap should be "as narrow as possible".

ii. Ms Randall's advice that, due to personnel and funding restrictions, it is unclear when alternative measures will be operationally ready to maintain the reduced disease risk.

iii. A purported "lack of clear quantitative data" on the effectiveness of badger vaccination and a purported "lack of evidence on the comparative efficacy of vaccination against supplementary culling".

23. The evidence does not in fact support Natural England's decision.

24. First, Natural England's internal scientific advice concluded there was no scientific justification for granting/authorising the SBC licences to prevent the spread of disease. Dr Brotherton was unambiguous in his advice that the evidence shows:

i. Disease reduction benefits to cattle achieved through badger culling are sustained in the long term (likely at least 7 years post cull).

ii. Badger vaccination can be successfully deployed including in post-cull situations and there is empirical evidence that badger vaccination reduces the prevelance of *Mycobacterium bovis* (the causative agent of bTB) in badgers and can be effective in reducing disease risk to cattle.

iii. Badger vaccination can provide an effective alternative to SBC and recent evidence demonstrates that vaccination can be deployed before any recovery in the badger population poses an increased disease risk to cattle.

iv. Cattle-based measures (including enhanced testing regimes, more sensitive tests, movement controls and vaccination) may play an important part in reducing bTB incidence in cattle.

25. Secondly, as Natural England itself recognised just ten days earlier in its consultation response (authored by its Chief Scientist):

i. The basic reproduction number, R0, for bTB is "greater than 1 but not substantially so". This suggests that a combination of interventions may "drive R0 below 1. Vaccination and biosecurity in combination, especially following recent culling under the Badger Control Policy, may therefore be sufficient to reduce the contribution to TB infection made by badgers without further culling".

ii. The response also raised concerns: (i) about the potential deployment of unnecessary or ineffective measures to control bTB in badgers which did not take into account the role of other animals in spreading bTB; and (ii) that badger culling may in fact increase bTB spread to cattle "by perturbing the badger population".

26. Natural England failed to give adequate and intelligible reasons as to why it departed from this evidence (and indeed its own earlier position), and as to why it adopted its new position. As a result, Natural England's decision contains an unexplained evidential gap or leap in Natural England's reasoning, of the kind deprecated in Friends of the Earth.

27. Although the claimants of course accept that decision-makers in cases involving scientific, technical and predictive assessments should be afforded a certain margin of appreciation, they must give "sufficient explanation… of how the science relates to its decision so that the court can consider whether it embodies an abuse of discretion or an error of law": *R (Mott) v Environment Agency* [2016] 1 WLR 4338, §64. No such explanation has been advanced by Natural England. Natural

England simply asserts an unsubstantiated need to minimise the gap between badger control programmes.

The details of the action that the Defendant is expected to take

28. In light of the clear unlawfulness of the decision – based on the grounds set out above – the Defendant should consent to judgment that the decision to grant/authorise SBC licences be quashed.

ADR proposals

29. Given the nature of the issues, the Claimants do not consider that the claim is readily amenable to ADR.

The details of any information sought

30. The Claimants request that the following be provided by way of disclosure:

i. Copies of all documents or information – including correspondence, meeting notes, drafts, memorandums, advice and telephone conversation notes – which were considered by Oliver Harmar for the purpose of the decision-making when he considered whether to grant and/or authorise the SBC licences or which evidence his decision-making process.

ii. Copies of Operational Readiness Assessments and other assessments carried out in relation to the decision to grant/authorise the SBC licences.

iii. Evidence relied upon in the Operational Readiness Assessments and other assessments undertaken.

iv. The expert advice of the UK Chief Veterinary Office, as referred to in Natural England's decision letter in the form considered by Oliver Harmer for the purpose of the decisions in issue here.

The address for reply and service of court documents

31. Please use the Leigh Day address specified above.

Proposed reply date

32. We request that the Defendant reply to this letter within 14 days of receipt, i.e. by 4pm on 15 July 2024.

Aarhus Convention claim

33. This is an Aarhus Convention claim for the purposes of CPR 46.24 and 46.26. The Claimants qualify as members of the public for these purposes and the claim

concerns a challenge to an act of the Defendant on grounds that provisions of national law relating to the environment have been contravened.

Yours faithfully

Leigh Day