

Secretary of State
Department for Environment, Food and Rural Affairs
1st Floor, Seacole House
2 Marsham Street
London SW1P 4DF

By email: gltteam@defra.gov.uk

Direct Dial: [REDACTED]

Email: [REDACTED]

Your Ref:

Our Ref: [REDACTED]

Date: 3 February 2022

Pre-action Protocol letter
Requires your urgent attention

Dear Secretary of State

Re: General Licence WML-GL42: general licence to kill or take certain species of wild birds to prevent serious damage

1. We act on behalf of Wild Justice.
2. We write in accordance with the judicial review pre-action protocol in contemplation of a challenge to the legality of General Licence WML-GL42 (“GL42”) issued on 1 January 2022.

I. Proposed Claimant

3. The proposed Claimant is Wild Justice:

Wild Justice
9 Lawson Street
Raunds, Wellingborough
Northants NN9 6NG

II. Proposed Defendant

Secretary of State for Environment, Food and Rural Affairs
Department for Environment, Food and Rural Affairs 1st
Floor, Seacole House
2 Marsham Street
London SW1P 4DF

III. Interested Party

6. In the event that you consider there are interested parties, please identify them in response to this letter.

IV. Details of the Claimant's legal advisors

Tom Short and Carol Day, Solicitors
Leigh Day
Panagram
27 Goswell Road
London EC1M 7AJ

7. Please quote in any correspondence reference **TGY/TWS/00191552/23**

IV. Details of the matter being challenged

8. The decision of the Secretary of State to issue GL42 on 1 January 2022. The text of GL42 is seemingly set out at the following webpage:
<https://www.gov.uk/government/publications/wild-birds-licence-to-kill-or-take-to-prevent-serious-damage-gl42/gl42-general-licence-to-kill-or-take-certain-species-of-wild-birds-to-prevent-serious-damage>
9. We assume that the heading of that web page as “statutory guidance” is an error, and that the text it contains is GL42 itself, and not merely guidance on GL42.
10. This letter concerns the fact and manner of inclusion within GL42 of permission to kill or take Carrion Crows, Jackdaws, Magpies or Rooks by reference to a concern about their impact on Pheasants as a type of livestock.
11. We note that while being explicit in the intention to include Pheasants for that purpose within its scope, GL42 does not distinguish between different sorts of

livestock. To be clear, this letter is not concerned with other forms of livestock including piglets or lambs.

Livestock/Alternatives

12. GL42 allows for activities in relation to the permitted target species “for the purposes of preventing ‘serious damage’ [footnote 6] to ‘livestock’ [footnote 7].”

13. Looking first at the definition given by footnote 7 to the term “livestock” as used in GL42 (and therefore setting the intended scope of GL42). Footnote 7 says this:

“Livestock’ is as defined in section 27(1) of the 1981 Act). For the purpose of this licence, this expression also includes gamebirds kept in an enclosure or which are free roaming but remain significantly dependent on the provision of food, water or shelter by a keeper for their survival. This does not include supplementary feeding.” [underlining added]

14. Section 27(1) Wildlife and Countryside Act 1981 (the “1981 Act”) defines “livestock” as any animal which is kept:

“(a) for the provision of food, wool, skins or fur;

(b) for the purpose of its use in the carrying on of any agricultural activity;
or

(c) for the provision or improvement of shooting or fishing;”

15. Accordingly (as seen by the word “also”), footnote 7 seeks to apply - for the purposes of GL42 - a definition of “livestock” which is wider than that defined in section 27(1) of the 1981 Act.

16. Section 16(1)(k) of the 1981 Act empowers the making of licences for the purposes of preventing serious damage to “livestock, foodstuffs for livestock, crops, vegetables, fruit, growing timber” if it is done under and in accordance with the terms of a licence granted by the appropriate authority.

Issue 1: unlawful extended definition of ‘livestock’

17. Given that the reference to “livestock” in section 16(1)(k) of the 1981 Act is defined by reference to section 27(1) of the 1981 Act, GL42 is ultra vires and thus unlawful in its attempt to use an extended definition of “livestock” which (explicitly) goes beyond the scope of section 27(1) of the 1981 Act.

Issue 2: ‘alternative lawful methods’

18. Condition 1 of GL42 requires that:

“before using this licence, be satisfied that you, or the person authorising you to act under this licence, have made reasonable endeavours to achieve the purpose in question using alternative, lawful methods not covered by this licence.”

19. As above, the extended definition in footnote 7 embraces pheasants which are kept in an enclosure or which are free roaming but significantly dependent on the provision of shelter for their survival. Even if, contrary to what we consider further below, there were some evidence that pheasants in those situations were at any material risk from the wild bird species in question, are there any circumstances in which you consider that putting a cover or net over the enclosure or other structure providing shelter would not be an alternative method of addressing the problem? To put the point the other way round: do you envisage any situation in which it would be lawful to rely on GL42 to kill the wild birds in question by reference to an enclosure or other shelter which was not roofed over? If so, please explain the basis for that. Please also explain why, in order to reduce the risk of an inappropriate reliance on GL42 it does not make clear that such nets/covers will always be an alternative method which must be tried first.

Issue 3: ‘significantly dependent on the provision of food’

20. As above, GL42 seeks to cover *“gamebirds kept in an enclosure or which are free roaming but remain significantly dependent on the provision of food... for*

their survival". But that "does not include supplementary feeding." That makes no sense. If the supplementary feeding of one or more pheasants is excluded, in what possible sense could a pheasant then be "significantly dependent on the provision of food"? In particular, once a pheasant is no longer wholly dependent on food which has been provided to them by a keeper (i.e. they are in part at least finding other food sources) then any food still being provided to them by the keeper is necessarily "supplementary feeding" by that keeper. Please explain exactly what you have in mind in contemplating pheasants which are significantly dependent for food and yet that food is not by way of supplementary feeding? The risk that what appears to be a meaningless and nonsense 'definition' may lead to the additional killing of wild birds renders that definition unlawful.

Issue 4: ascertaining significant food dependence

21. Even if, contrary to the above, it were somehow possible to envisage some theoretical situation in which a pheasant remained significantly dependent for food and yet the food in question was not 'supplementary feeding' then how do you envisage that a gamekeeper, member of the public, or an official investigating possible wildlife crime, would establish that the pheasant was indeed in that situation? What, in practice, would be the ascertainable characteristics of that situation? The risk that what appears to be an unworkable 'definition' may lead to the additional killing of wild birds renders that definition unlawful.

Issue 5: dependent for shelter

22. In referring to dependence "for shelter" what forms of shelter do you have in mind (as provided by keepers) as being relevant for the purposes of footnote 7?

Serious Damage

23. We then note the footnote 6 definition of "serious damage":

“Serious damage’ means damage to livestock, foodstuffs for livestock, crops, vegetables, fruit, growing timber, fisheries or inland waters that exceeds mere nuisance, minor damage or normal business risk.”

24. We note in that regard that, when – for example – assessing an application for a specific licence to kill Buzzards by reference to serious damage to Pheasants at the [REDACTED], Natural England explained that “typical” gamebird losses from Buzzards are 1%-2% such that a loss of 5% was required to justify the granting of a specific licence. There is no basis to adopt a different approach to serious damage here (as indeed reinforced by footnote 6 referring to ‘minor damage or normal business risk’).

Issue 6: no evidence of a causal risk that might justify a lawful general licence

25. That all matters because Wild Justice is not aware of any evidence at all that the species mentioned above would ever cause damage at the 5% level (or even, for that matter, at 1%-2% level) to Pheasants when falling within the definition of livestock within section 27(1) of the 1981 Act, or even within the extended explanation set out in footnote 7 of GL42.
26. Given that the inclusion (within the terms of GL42) of any particular combination of wild bird and type of livestock can plainly only be lawful if there is evidence that the particular wild bird in practice causes the particular damage in question, it follows that there is no lawful basis to authorise within a general licence killing of those species by reference to Pheasants in those situations.
27. Accordingly, GL42 is unlawful by virtue of the inclusion within its scope of permission to kill or take Carrion Crows, Jackdaws, Magpies or Rooks by reference to a postulated impact on Pheasants as defined in section 27(1) of the 1981 Act let alone within the claimed extended definition (which, as above, is unlawful regardless of any issue of evidence).

Issue 7: General licence rather than specific licence

28. We envisage that you may (in responding to Issue 6 above) rely on anecdotal accounts and/or even may possible fears about risk (or similar) rather than any recognised or verifiable evidence of any relevant interaction between the wild bird species and pheasants in the situations contemplated by footnote 7. Please explain the basis on which it was decided to address those matters by virtue of this general licence (rather than simply leaving open the possibility of applications for specific licences which of course always exists). Inclusion within the general licence means that any such feared situation would not be subject to the evaluation and scrutiny which (quite properly) comes through the specific licence process. We consider that the increased risk that brings of entirely unjustifiable killing of wild birds renders it unlawful to have proceeded by way of general licence rather than specific licence in relation to those matters.

VII. Details of what action the Defendant is expected to take

44. The Defendant is asked, within 14 days of this letter, to respond to the matters raised above including addressing the illegalities we identify and to confirm in the light of them that GL42 will be amended to rectify the illegalities set out above, failing which we are advised to commence judicial review proceedings without delay.

VIII. Details of information and documents sought

45. Please provide a response to both the points of unlawfulness raised above, and the particular questions we have raised, which for ease of reference we summarise as follows:

- i. Issue 2: ‘alternative lawful methods’: Please explain whether there are any circumstances in which it would be lawful to rely on GL42 to kill the wild birds in question by reference to an enclosure or other shelter which was not roofed over. If so, please explain the basis for that. Please also explain why, in order to reduce the risk of an inappropriate

reliance on GL42 it does not make clear that such nets/covers will always be an alternative method which must be tried first.

- ii. Issue 3: ‘significantly dependent on the provision of food’: Please explain exactly what you have in mind in contemplating pheasants which are significantly dependent for food and yet that food is not by way of supplementary feeding.
- iii. Issue 4: ascertaining significant food dependence: Please explain DEFRA supposes a relevant person (such as a licence user or wildlife crime investigating officer) would establish that a pheasant remains significantly dependent for food but yet that food is not ‘supplementary feeding’ (assuming that to be theoretically possible which we do not accept). What, in practice, would be the ascertainable characteristics of that situation?
- iv. Issue 5: dependent for shelter: In referring to dependence “for shelter” what forms of shelter do you have in mind (as provided by keepers) as being relevant for the purposes of footnote 7?
- v. Issue 7: General licence rather than specific licence: Please explain the basis on which it was decided to address the interactions between the wild bird species and pheasants in the situations contemplated by footnote 7 by way of this general licence (rather than simply leaving open the possibility of applications for specific licences which of course always exists).

46. Please also provide with your response to this letter copies of:

- i. Any all and all documents or other matters taken into account for the purposes of deciding to include within GL42 permission to kill or take Carrion Crows, Jackdaws, Magpies or Rooks by reference to a postulated impact on Pheasants.

- ii. Any and all documents relating to any dialogue with external stakeholders which was relevant to or informed the approach to be taken to the formulation of footnote 7.

IX. Aarhus costs

45. If a claim is pursued it will plainly be an Aarhus claim to which the cost protection of CPR 45.43 will apply. If you disagree, please fully explain why.

X. ADR proposals

48. We do not currently consider that these issues are suitable for alternative dispute resolution but would be pleased to consider any proposals you have for this.

XI. Address for reply and service of court documents

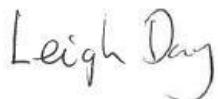
49. See above for the address of the Claimant's legal advisers. Service of documents by email is accepted.

XII. Proposed reply date

50. We seek a response within the standard Pre-action Protocol time limit of 14 days, that is by 4pm on 17 February 2022, failing which we reserve the right to issue judicial review proceedings without further reference to you.

We look forward to your timely response.

Yours faithfully



Leigh Day