

## Environment and Sustainability Committee

### E&S(4)-28-12 paper 2



## Evidence from the RSPB to the Environment & Sustainability Committee

### Inquiry into the Draft Natural Resources Wales (Functions) Order

8<sup>th</sup> November 2012

The RSPB is Europe's largest wildlife charity, with more than one million members, over 51,000 of them living in Wales. The Society manages one of the largest conservation estates in the UK, covering more than 140,000 hectares; over 16,000 of these in Wales. Across the UK the RSPB's reserves are home to 80% of our rarest or most threatened bird species. The RSPB also works beyond our reserves, including in Futurescapes areas, with a range of organisations, businesses and landowners to bring about habitat improvements for species of conservation concern. We work to protect and enhance habitats such as upland and lowland farmland, heather moorland, coastal heath, wet grassland, estuaries and reedbeds, and our reserves help to protect rare and threatened wildlife.

RSPB Cymru welcomes the opportunity to respond to the Committee's scrutiny of the Second Order and the invitation to give oral evidence to the Committee. RSPB Cymru has serious concerns about many of the main aspects proposed for inclusion in the draft second Order for the Natural Resources Wales (NRW). We have provided an overview of these concerns under headlines below. Our views are based on the proposals within the draft second Order and the recent NRW consultation which closed 5<sup>th</sup> October 2012. The latter according to the explanatory note accompanying the draft second Order, provides further detail and is aligned with the draft second Order.

*The new body has a huge role in tackling the challenges ahead. The natural environment of Wales is degraded and under an increasing burden from human and climactic pressures. Wales, alongside other nations globally, failed to meet the 2010 international target to halt the loss of biodiversity. And without a body to proactively manage, protect and restore the natural environment, Wales will continue to lose its wildlife and fail to meet the 2020 international biodiversity target to halt and reverse biodiversity loss.*

### **Providing Leadership in Addressing Wildlife Declines**

To deliver sustainable development (SD), the objectives of all three pillars of SD – social,

economic and environmental – must be achieved. Consequently, without a public body that specifically leads on environmental enhancement and sustainability, the Welsh Government will not achieve SD. Moreover, without environmental sustainability, Welsh society and the Welsh economy will no longer be able to derive the ecosystem service benefits which we value. We would also add that nature should be protected and conserved for its own sake (i.e. its intrinsic value). The RSPB and many of our supporters would agree that we have a moral responsibility for the stewardship of nature, as well as managing it for the utilitarian services humans receive from it.

NRW is not and should not be a sustainable development body – a separate SD Body is being proposed by the Welsh Government under the SD Bill. The aim of NRW must be to protect biodiversity (i.e. the building blocks of ecosystems) as well as ecosystems themselves. A healthy natural environment where biodiversity loss has been halted and reversed would be a key test to achieving SD in Wales.

### **Statutory Purpose**

The recently published ‘Summary of Responses to the Sustaining a Living Wales consultation’<sup>1</sup> provides the Welsh Government with the mandate for creating a body that provides leadership on nature conservation. However, this is not reflected strongly enough in the statutory purpose for the body.

Within the first Order the terms “*sustainably maintained*” and “*sustainably enhanced*” are ambiguous. Furthermore, the definition of “*sustainably*” itself is also ambiguous, but appears to imply that NRW must show benefits for people and the economy as well as the environmental benefits when carrying out conservation and biodiversity enhancement actions.

Whilst NRW must proactively contribute to delivering SD, it cannot be responsible for delivering SD alone – this is the responsibility of the Welsh Government as a whole. Given that our environment has suffered degradation and still faces significant pressures, it is essential that NRW is able to take actions and give advice based on what the Welsh environment needs.

We believe that many, if not most, of the actions to improve the environmental management by NRW will also provide economic and social gains and make a clear contribution to sustainable development. However, NRW must also be free to take actions and give advice for the good of the Welsh environment even when the economic and social benefits are not immediately obvious. Restoring our environment requires direct investment even when the wider benefits are not apparent or quantifiable but will be essential in order to move towards living within our environmental limits – a key tenet of sustainable development.

NRW must provide robust and proactive leadership for the natural environment and wildlife of Wales and improve on the work delivered by CCW, EAW and FCW up until now.

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<sup>1</sup> Welsh Government (Sept 2012) *Consultation Report – Executive Summary. Sustaining a Living Wales Green Paper*. <http://wales.gov.uk/docs/desh/consultation/120920nefexecutivesummaryen.pdf>

The statutory purpose of NRW must be that of providing ‘environmental leadership’.

**We would urge the Welsh Government to use the second Order to amend the first to make this clear in the statutory purpose.**

RSPB Cymru proposes the following statutory purpose as we believe it better meets our, and Welsh Government’s aspirations for the new body:

*“To maintain, protect and proactively improve Wales’ natural environment, for the benefit of the environment, people and economy of Wales now and in the future.”*

### **Nature Conservation & Natural Beauty Duty**

RSPB Cymru’s most significant concern is that the proposed Nature Conservation & Natural Beauty duty is weaker than the existing nature conservation duty for CCW, and consequently is legally not permissible under the restrictions of the Public Bodies Act <sup>2</sup> as it weakens the “*necessary protection*” for the wildlife and natural environment of Wales.

Although the Second Order make some improvements on the proposals in the Welsh Government’s consultation document, the wording is still weaker than the current CCW conservation duty, plus there are still outstanding weaknesses.

The main issue is that the proposed duty is limited to applying “... *so far as is consistent with*” four subclauses. These subclauses create caveats that result in a proposed conservation duty (and the Public Access & Recreation Duty which is drafted in a similar fashion) that can only be exercised if the impacts on people and the economy are also acceptable. We believe that this drafting limits any conservation of the natural environment to actions that can be shown to have benefits for people and the economy. Often this is not possible, as the benefits are either indirect, such as pollination or maintaining healthy soils, or will not be realised in the short-term, such as water purification or the storage of Carbon in peatlands.

In addition, the wording of the duty appears to imply that it applies only when the body is formulating “*proposals*”, rather than covering the body when exercising any of its functions or carrying out any actions. While this wording comes from the existing duty on the Environment Agency, compared with the existing CCW duty, this is narrower wording and consequently risks non-compliance with the Public Bodies Act by removing “*necessary protection*”.

Should the word “*proposals*” be removed from the text, we would welcome the duty “... *to further the conservation and enhancement of natural beauty and the conservation of flora, fauna, geological or physiological features*” as specified in the consultation document. However, a

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<sup>2</sup> The Public Bodies Act 2011 allows Welsh Ministers to transfer existing functions to the new body with some modifications, but does not enable them to make widespread legislative changes. Furthermore, Welsh Ministers are not allowed to remove “*any necessary protection*”.

positive proposal in the consultation document to amend this duty to exclude the phrase “*of special interest*” at the end and so align it with the current CCW duty has not been included in the draft second Order. We urge the government to ensure the tightening up of the wording around the duty in the publication of the second Order to ensure compliance with the Public Bodies Act.

Overall, the outcome is a weaker conservation duty than that currently applying to CCW, hence, under the Public Bodies Act is considered as the removal of “*necessary protection*” for the natural environment. This limitation means the Welsh Government are reducing the action that will be taken to meet the international target to halt and restore biodiversity loss also puts us at a disadvantage with respect to achieving sustainable development.

RSPB Cymru calls on the Welsh Government to amend the Nature Conservation & Natural Beauty Duty; and the Public Access & Recreation Duty to ensure they are not weaker than the current situation (CCW’s duty), and in doing so avoid non-compliance with the Public Bodies Act 2011.

### **Lack of Transparency and Accountability**

RSPB Cymru is concerned that a number of significant proposals regarding how NRW will operate are presented with inadequate levels of detail in the consultation document making it impossible to determine whether and how these proposals will deliver the requisite levels of openness, transparency and accountability. In particular, we are concerned about the following:

#### 1. Self-Permitting & Self-Assessment

### **The lack of effective internal separation and transparency specified in the legislation regarding decisions when NRW advises on and regulates its own operations – self-permitting and assessing its own projects.**

With respect to self-permitting and assessing the environmental effect of its own projects, Welsh Government are proposing providing transparency and accountability through internal separation of decision-making within NRW, i.e. the part of NRW proposing the project will be operationally separate from that part which will be assessing the implications of the project (under a number of EU Directives) and awarding the permit. However, the proposals lack any detail about how this separation is to be carried out in practice and how NRW intends to achieve genuine transparency and accountability.

The consultation document states that the proposals are compliant with a piece of case law on this issue (the *Seaport Investments* judgment). However, this case law states that the operational separation must ensure real autonomy within the organisation, including at an administrative level to ensure that an “*objective opinion*” can be given on a project. Legal advice received by RSPB Cymru finds that this means that the separation must be permanent rather than temporary and supported by separate administration, including human resources, finance, etc. Without further detail, it is unclear whether the proposals will be adequate to ensure openness and accountability and whether they are compliant with the current case law.

A further concern is that even operational separation within NRW would not be adequate to allow prosecutions in relation to European Protected Species (EPS) licenses or SSSI protected site issues (for which CCW currently has responsibility) to be brought, where NRW is carrying out projects which might be in breach of these offences. The Welsh Government need to provide more detail on this issue.

## 2. Statutory Consultee Role

**We believe it necessary to set out in the legislation the detail of how NRW should conduct itself when it is consulting with itself in order to be appropriately transparent.**

The consultation document proposes that the requirement to consult with itself be removed from NRW, except where such requirements stem from EU legislation. It is only sensible that if there are going to be circumstances where NRW is no longer obliged to consult with itself that there should be greater transparency and accountability of decision-making. Information which previously would have been publicly available in responses to consultations from each of the existing bodies for example, will no longer be available if there is no consultation process between organisations. However, Welsh Government have not provided information within the consultation document about how this will be achieved in practice in the future. This information may be contained within the 'scheme' (see point 3 below) which is due to be developed by NRW but again, the consultation document does not provide enough information to be satisfied that this is what will happen or whether it will be adequate.

## 3. Publication of 'Schemes' & Public Registers

**There are issues regarding the timing or order of actions, in particular the timing of the publication in 'schemes' and public registers of decisions that have already been made by NRW.**

Welsh Government are proposing that NRW publishes a 'scheme' identifying conditions where formal publication of decision documents will be required, irrespective of whether or not publication is required by other legislation, as well as the publication of public registers. The scheme should cover decisions made where NRW no longer has to consult with itself (see point 2 above) and list permits including those where it has assessed its own projects (see point 1 above).

However, the current proposals relate to decisions that have already been taken and permits that have already been granted. This means that interested parties would not be able to make representations prior to or during the decision-making process, unless they were a consultee. It would also prejudice civil society's ability to bring legal actions, for example, judicial review of decisions because the first the public would learn of it would be after the decision was taken or the permit granted. The issue here is the timing and order of the various aspects of the process which remove, rather than deliver, openness and transparency.

We ask the Welsh Government to provide assurances and further detail on how in practice these processes will be truly open, transparent and accountable to the Senedd and the wider public.

