



**Evidence from RSPB Cymru to the
Constitutional and Legislative Affairs Committee
on the Draft Natural Resources Wales (Functions) Order**
7th January 2013

On the 15th November 2012, the Welsh Government published the New Draft Second Order to create the new 'single body', Natural Resources Wales (NRW). RSPB Cymru has already provided the Environment and Sustainability Committee with written evidence on the previous version of the Draft Second Order and, as part of the Wales Environment Link (WEL) coalition, has provided oral evidence to the Committee (14th November), again on the previous draft. We have also considered the oral evidence from the Minister for Environment & Sustainable Development, John Griffiths AM on 28th November to the Environment and Sustainability Committee. While we welcome the Minister's assurances that he will listen to views and makes changes where appropriate, we still have serious concerns and have sought legal advice on the latest draft Order. This contribution provides our views on the new version which we will refer to as the "New Draft Second Order", and is based on that legal advice.

Nature Conservation: Removal of "necessary protection", and the weakening of existing duties and purposes

The New Draft Second Order creates a new Nature Conservation Duty on the face of the First (Establishment) Order¹. However, despite some amendments to the previous version, we are seriously concerned that the outcome is the same as before – the proposals for NRW's Nature Conservation Duty are weaker than those currently applying to CCW, and hence are not compliant with Section 16(2)(a) of the Public Bodies Act 2011.

The main areas of weakness relate to the caveats on the Nature Conservation Duty that in combination with the outstanding weaknesses of the statutory purpose (in the First Order) will limit its scope and so weaken it. There are also new drafting issues that further weaken the duty. We set out these issues in more detail in the bullets below.

1. Caveats on the new Nature Conservation Duty – the New Draft Second Order has been amended to remove the caveats that were of concern in the previous version. However, they have been replaced by a new, more general caveat – i.e. the new Article 5A(1) duty (see Schedule 1) "*applies to any other function only to the extent it is consistent with the provisions of any enactment relating to the function*" (see new Schedule 1, new Article 5A(2)(b)). This caveat limits the application of the nature conservation duty with respect to other legislation, to only applying where it is consistent with functions exercised under other legislation, i.e. making the nature conservation duty subservient to that other legislation. This caveat does not currently apply to CCW in the exercise of its Nature Conservation Duty. Therefore, the new drafting still results in a weaker duty than currently exists, and consequently to be compliant with the Public Bodies Act 2011 and ensure that there is no removal of "necessary protection" from the natural environment of Wales, the caveat (new Article 5A(2)(b)) should be removed from the new Nature Conservation Duty.

¹ See New Draft Second Order, Schedule 1 – the creation of new Article 5A

To be compliant with the Public Bodies Act 2011 and avoid weakening the current CCW duty, the caveat (new Article 5A(2)(b)) must be removed from the new Nature Conservation Duty (Schedule 1, new Article 5A(1))

2. Statutory Purpose – the New Draft Second Order does not amend the statutory purpose set out in the First Order². Therefore, our concerns regarding the previous Draft Second Order remain. 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. This ambiguity, particularly when taken in combination with the caveat (see above) and other weakened language (see below) further weaken the Nature Conservation Duty and constitute a removal of “*necessary protection*” for the natural environment.

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, i.e. across all Government Departments. Given that our natural environment is already degraded and still faces significant ongoing and future pressures, it is essential that NRW is able to take actions and give advice based on what the Welsh environment needs. 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 indirect or not immediately obvious.

The statutory purpose of NRW must be that of providing ‘environmental leadership’. We would make the following proposal for the statutory purpose which we believe meets the 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.”

We urge the Welsh Government to use the Second Order to amend the First Order to make it clear in the statutory purpose that the body must provide environmental leadership and ensure that the statutory purpose does not “*remove any necessary protection*”.

3. Retaining stronger wording – we strongly believe that the wording of new Article 5A (see Schedule 1), is weak, because the new body “*must exercise its functions so as to promote nature conservation and the conservation and enhancement of natural beauty and amenity*”, whereas the existing version which applies to EAW, is “*to further*”. It is our legal view that “*to promote*” requires an act whereas “*to further*” requires an outcome – the latter being stronger. Language is important, particularly in legislation, and in this case, to be compliant with the Public Bodies Act, the stronger language needs to be retained.

² First Order: **Article 4.**—(1) The purpose of the Body is to ensure that the environment and natural resources of Wales are—

- (a) sustainably maintained;
- (b) sustainably enhanced; and
- (c) sustainably used.

(2) In this article—

- (a) —sustainably|| (—*yn gynaliadwy*||) means—

- (i) with a view to benefitting, and

- (ii) in a manner designed to benefit, the people, environment and economy of Wales in the present and in the future;

- (b) —environment|| (—*amgylchedd*||) includes, without limitation, living organisms and ecosystems.

To ensure no removal of “*necessary protection*” and full compliance with the Public Bodies Act 2011, Welsh Government must retain the current stronger wording – “*to further nature conservation ...*”

4. Removing conflicts – a new addition to the Nature Conservation Duty is “*amenity*” which is included as one of the factors NRW is “*to promote*”. We are worried that as drafted there is the potential for conflicts between amenity and nature conservation interests. Currently the EAW have to take amenity “*into account*” rather than having a duty “*to promote*” (or “*to further*”) it, thus ensuring that nature conservation retains its primacy in EAW decision-making. While promoting amenity is an aim we should support, we believe it should be a secondary benefit of achieving our environmental objectives rather than equal to it (so as not to risk destroying the nature that people are seeking to enjoy).

To address this potential conflict, either the amenity element should be removed from the main Nature Conservation Duty and be taken “*into account*” instead, or alternatively, the amenity element should be subject to a caveat similar to that applying to historic sites (see Schedule 1, new Article 5D(b)) which limits public access to historic buildings under specific circumstances relating to the main Nature Conservation Duty, i.e. through the use of the phrase, “*so far as consistent with ... article 5A*”. In this case the amenity element should be separate from the main Nature Conservation Duty and say “*so far as consistent with ... article 5A(1)*”.

We urge the Welsh Government to address this potential conflict by either removing the amenity element from the main Nature Conservation Duty and to take it “*into account*” instead, or alternatively, the amenity element should be separate from the main Nature Conservation Duty and subject to the caveat “*so far as consistent with ... article 5A(1)*”.

Consulting, Regulating and Permitting its own Operations – Openness, Transparency and Accountability

We remain concerned that no further detailed information has been provided regarding openness, transparency or accountability. For example, there is no detail on how operational/functional separation will be achieved within the new body when issuing nature conservation advice on permits for its own activities or when consulting itself, e.g. on statutory environmental assessments.

Furthermore, despite some amendments regarding the publication of applications and decisions and notifying Welsh Ministers (see Schedule 1, Articles 17 & 18), we do not believe that the Welsh Government have resolved the issue of operational separation within NRW. For example, how will the body enforce against itself should it be in breach of its own permit or if its actions damage a protected site where NRW is also the enforcement authority. In normal circumstances, the part of NRW that will deal with the enforcement functions may seek to take action (involving criminal sanctions) under the Wildlife & Countryside Act 1981 for example, against the person(s) that committed the offence, but should an offence result from NRW carrying out its own functions, a conflict of interest arises. In essence, there is no mechanism for NRW to hold itself to account in such circumstances and even if there were, there is a risk of a conflict of interest arising. Even if there were no conflict of interest, an external bystander may perceive there to be a conflict of interest.

While self-permitting and self-regulation may not be new or novel, the concern is with the merger of the three existing bodies, the number of situations where self-permitting occurs will increase. We cannot expect an external body to arbitrate on each occasion. Therefore, we believe that there should be a legislative requirement to achieve operational separation through permanent separate directorates within NRW to ensure it is compliant with the *Seaports Investments*

judgement. We would also expect NRW to make public internal disagreements, along with a rationale for the final decision taken in such cases.

The Welsh Government must provide further clarity as to how it plans to resolve these serious conflict of interest issues, as well as the lack of openness, transparency and accountability, perceived or otherwise. To that end, there should be a requirement within the New Draft Second Order to create permanent separate directorates within NRW and for internal disagreements to be published

An effective stakeholder engagement process should also enable NRW to deliver its requirements of openness and transparency. One way this could be achieved would be through creating a Stakeholder Advisory Committee that would support NRW in achieving openness, transparency and accountability, in addition to advising the CEO, Chair and Board. Examples of actions for the Stakeholder Advisory Committee include reviewing all applications and decisions that involve NRW as both the applicant and the regulator; the Committee would regularly review the effectiveness of the operational separation within the body; the Committee would be made aware of any internal disagreement regarding advice from one part of the body to another and if necessary act as a mediator or an arbitrator.

New Well-being Duty

A new Well-being Duty (Schedule 1, new Article 5E)³ has been added. It is an expanded version of an existing EAW duty which required the EAW “*to have regard to economic and social well being of local communities in rural areas*”. However, in expanding this duty, to cover health, social and economic wellbeing of individuals, businesses and communities, we believe it has greater potential to conflict with the Nature Conservation Duty. This issue is similar to that with respect to the statutory purpose. NRW cannot achieve Sustainable Development through its functions alone, rather it contributes to it by delivering a healthy natural environment which underpins the well-being of people and the economy. However, as drafted there is a risk that the duty could be interpreted to mean conservation and management activities should be restricted to those that deliver “*economic well-being of ... businesses*”. Whilst in many cases nature conservation supports economy & well-being, NRW must be free to undertake nature conservation activities where these wider benefits are not immediately apparent. NRW must have a clear primary remit to protect, restore and enhance the natural environment.

To address this potential conflict, the new Well-being Duty should be subject to a caveat similar to that applying to historic sites (see Schedule 1, new Article 5D(b)) which limits public access to historic buildings under specific circumstances relating to the main Nature Conservation Duty, i.e. through the use of the phrase, “*so far as consistent with ... article 5A*”. In this case the Well-being Duty should be amended to say “*so far as consistent with ... article 5A(1)*”.

To ensure it does not come into conflict with the main Nature Conservation Duty, the Well-being Duty should be subject to a caveat similar to that applied to historic buildings (see Schedule 1, new Article 5D(b)), by adding “so far as consistent with ... article 5A(1)”

New Forestry Duty

The wording of the proposal in new Article 5A(4) (see Schedule 1), to apply the existing Forestry Duty is overly complex and poorly drafted such that it achieves the unintended outcome that NRW must endeavour to achieve what it is endeavouring to achieve. This duty should be amended in the New Draft Second Order so that NRW is simply made subject to the existing duty under Section 1(3A) of the Forestry Act 1967, by removing the phrase “*endeavour to*”.

³ New **Article 5E**. In exercising its functions, the Body must have regard to—
(a) the health and social well-being of individuals and communities;
(b) the economic well-being of individuals, businesses and communities.

The Forestry Duty in the New Draft Second order should be amended to simply apply the existing duty under the Forestry Act 1967, by removing the phrase “endeavour to”.

Creating NRW’s Stakeholder Engagement Policy

We are concerned that there is still very little information as to how the new body will interact and engage with stakeholders. This is particularly concerning as a number of existing statutory stakeholder engagement bodies, i.e. the Environment Protection Advisory Committee and the Regional and Local Fisheries Advisory Committee, are being abolished (see Article 9).

The current lack of an engagement strategy results in an information vacuum and a high level of stakeholder uncertainty, which is undesirable. We believe that interim stakeholder engagement arrangements need to be put in place to ensure a smooth transition to the new body’s instatement.

Once NRW is established, we would expect to see a number of methods and forums for stakeholder engagement for various issues and geographical scales. In particular, we would expect a top-level Stakeholder Advisory Committee to be set up to advise the CEO and the Board, and a Scientific Advisory Committee to provide expert advice it on scientific and technical matters relating to natural resource management and nature conservation. In addition, we would like further detail on how NRW will engage with environmental NGOs as stakeholders but also as delivery bodies for practical conservation activities.

We would like to see a clear commitment to at least minimum standards of stakeholder engagement enshrined in the New Draft Second Order, and a requirement for NRW to create a Stakeholder Advisory Committee