Infrastructure 27, RSPB Cymru

Senedd Cymru | Welsh Parliament

Pwyllgor Newid Hinsawdd, yr Amgylchedd a Seilwaith | **Climate Change, Environment, and Infrastructure Committee**

Bil Seilwaith (Cymru) | Infrastructure (Wales) Bill

Ymateb gan RSPB Cymru | Evidence from RSPB Cymru

General principles

What are your views on the general principles of the Bill, and is there a need for legislation to deliver the stated policy intention?

A robust planning system underpinned by strong legislative and policy requirements is essential to protect and restore priority habitats and species, improve the resilience of ecosystems and enable our biodiversity to thrive. We welcome the Bill's partial creation of a unified consenting regime, but there are many other planning requirements that are not included. Ultimately, key tests of success are whether it will front-load the application process so that key environmental issues are dealt with as early as possible, avoiding debate and delay later in the process, and securing the role of Natural Resources Wales (NRW) and its ability to act as an independent advisor and regulator. We have significant experience of planning systems including the operation of the regime for Nationally Significant Infrastructure Projects (NSIPs) under the Planning Act 2008 and have specific concerns in the following areas:

- Opportunities for public consultation and engagement (see 2iii and 2iv)
- Accountability of decision-makers (see 2v)
- The decision-making framework, especially the role of infrastructure policy statements, the development plan and the lack of effective marine spatial planning (see 2v)
- A missed opportunity for net biodiversity benefit from Significant Infrastructure Projects (see below)

NET BIODIVERSITY BENEFIT
Planning Policy Wales currently requires development to provide a net benefit for biodiversity in fulfilment of the biodiversity and resilience of ecosystems duty under Section 6 of the Environment (Wales) Act 2016. A similar policy requirement

for biodiversity gain exists in England under the National Planning Policy Framework and the policies of many local plans, but is difficult to implement consistently for all types of development. However, the Environment Act 2021 has introduced a statutory requirement for biodiversity gain which applies to most types of development in England, under both the Town and Country Planning Act 1991 and the Planning Act 2008. When fully introduced, this will apply a requirement for biodiversity gain of at least 10% to Nationally Significant Infrastructure Projects (NSIPs). The RSPB considers that, given the scale and duration of NSIPs this should be at least 20%. The Welsh Government should take a similarly ambitious approach to biodiversity benefit for Significant Infrastructure Projects. The Infrastructure (Wales) Bill provides an ideal opportunity to legislate for this.

What are your views on the Bill's provisions (set out according to parts below), in particular are they workable and will they deliver the stated policy intention?

Part 1 - Significant infrastructure projects

We have no objection to the definition of Significant Infrastructure Projects (SIPs) in Part 1 and the relevant fields (energy, flood prevention etc) in clause 17. However, Welsh ministers have powers under Part 2 (clauses 22 and 23) to direct that development may be treated as a SIP or an application treated as needing infrastructure consent. It is not clear if this is restricted to development falling within the fields listed in clause 17. Controversy has ensued in England where housing, commercial or leisure uses have been proposed as NSIPs, rather than being dealt with by local planning authorities under the Town and Country Planning regime. In the case of the London Resort at Swanscombe, an application for leisure and commercial use was accepted as an NSIP, sidelining the relevant local plan. Use of the SIP process should be restricted to genuine infrastructure within the fields listed in clause 17, and other types of development should be dealt with under the Town and Country Planning regime.

Part 2 - Requirement for infrastructure consent

All necessary consents, permissions and licences should be considered at the same time as the main application for infrastructure consent. The current disjointed approach can cause challenges and issues for all parties involved including long delays to obtain all the necessary consents. The information required for the decision-maker for all such consents should also be subject to pre-application consideration and consultation to ensure that the general public

and stakeholders are provided with all necessary information and details from the outset.

Part 3 - Applying for infrastructure consent

Pre-application consultation (clause 30) is an essential means of engaging with the general public and expert stakeholders. We note that details are to be subject to regulations; the requirement should be obligatory rather than permissive ("may", not "must" in clause 30 (2)) and the regulations must themselves be subject to public consultation. Natural Resources Wales (NRW) should be identified as a statutory consultee on all Significant Infrastructure Projects, together with the relevant local planning authority and other bodies already identified in planning legislation. If approached positively rather than as a developer PR exercise, pre-application consultation can not only elicit views about the project but can provide useful information which is not in the public domain and help to shape the form of development or matters such as the scope and methodology of an Environmental Impact Assessment or Habitats Regulations Assessment and discuss any mitigation measures that may arise. Our experience with the NSIP regime highlights the importance of establishing common and disputed ground on matters raised in pre-application discussions prior to submission.

However, in some cases the quality of information provided by the developer can be poor or insufficient time given for response. The regulations and accompanying guidance should set the bar high for the standard of pre-application consultation and assessment so that all parties can be confident that a good job has been carried out when an application is submitted for examination. Applications should not be validated where the information provided is demonstrably inadequate to inform assessment.

Specifically on environmental assessments including Habitats Regulation Assessments, which must be carried out during the pre-application stage, it is also important to ensure that rigour is applied to cumulative and in-combination assessments, especially where prior strategic assessments have been carried out poorly. This is important to understand the additive and synergistic environmental effects of the SIP proposal in conjunction with other existing and planned developments. Such matters may not have been adequately assessed or understood at the strategic level.

A national register of all SIPs should be maintained on the Welsh Government website (as is the case for Developments of National Significance), with links to

the applicant's website. This will help all parties to engage with a proposal from the earliest opportunity.

Part 4 - Examining applications

Similarly, the general public and expert stakeholders must be given suitable opportunities to engage during the examination process. We welcome that it is open to the examining authority to choose the route of an inquiry, hearing or written procedure, but the method of examination needs to be proportionate and appropriate to the issues under discussion. Inquiries offering the opportunity for cross-examination can sometimes be the best way to examine evidence robustly, especially where parties disagree. However, an 'open-floor' discussion is often better for the community although unlikely to provide a fair opportunity for the main parties to contribute in full. Examinations under the Planning Act 2008 are a good model to consider since they are largely undertaken via a written procedure but with the ability to have hearings, and open floor discussions for the community.

Ideally, all necessary information to determine an application, including environmental information, should be provided when an application is submitted. However, in the event that this is not the case, it is important to ensure that any additional technical information provided by the developer after the start of the examination process results in proceedings being paused to enable full consultation and avoid bad decision-making. Where necessary it should be subject to relevant Environment Impact Assessment consultation requirements to enable members of the public who have not made representations, based on the original information, to do so.

It is also crucial to enable opportunities within the examination process to discuss and test extremely technical evidence so that significant issues are resolved by the time a decision is made. This did not happen in the case of the Swansea Bay Tidal Lagoon, where the Secretary of State granted a Development Consent Order before matters regarding the potential impacts on fish were dealt with. This required the provision of additional evidence by the applicant and detailed consideration by NRW before a marine licence could be issued. In the event, the issue was never resolved.

Part 5 - Deciding applications for infrastructure consent

Clause 52 makes provision for Welsh ministers to delegate a decision to the 'examining authority'. It is not clear, because this is to be specified in regulations, what kind of development this would apply to, although the 2018 consultation

paper suggests that this would apply “where applications are considered to be uncontroversial and do not give rise to objections” (para 5.10). Some responses to the 2018 consultation paper recognised that there is an issue of democratic deficit if decisions are taken by inspectors or other officials rather than elected ministers. It is important that Welsh Ministers do not restrict their role to policy-making, but retain the final say on Significant Infrastructure Projects, as they carry the political accountability for the consent.

On a related point, clause 57 (5) appears to suggest that where the 'examining authority' is the decision-maker, Ministers must make an infrastructure consent order; i.e. they cannot come to a different view and refuse consent. As stated above, we consider that Ministers should retain the final say. We seek clarity that it will still be the case that ministers are the ultimate decision-makers, particularly where there are issues of significant controversy or environmental impact.

The decision-making framework set out in clauses 53-55 is a crucial element of the bill. We object to the nature of the infrastructure policy statement (IPS) and its primacy over the National Development Framework and the Welsh National Marine Plan (clause 53 (2)). Although superficially similar to National Policy Statements designated under the Planning Act 2008, it does not appear that IPS will be subject to any kind of public consultation, sustainability appraisal or scrutiny by the Senedd (as national policy statements are in the UK Parliament) but simply designated by ministers.

According to the 2018 consultation paper, both the National Development Framework (currently Future Wales: the national plan 2040) and the Welsh National Marine Plan (WNMP) (which had not then been adopted) were intended to set out where development in Wales and its waters will occur and to provide specific policies guiding development (para 5.16). However, the WNMP is not a suitable or adequate framework for decision-making in the marine environment because, unlike Future Wales, it does not contain a spatial strategy to determine where development is most sustainably located or indeed the level of development that can be sustained. The RSPB and Marine Conservation Society have called for a marine development plan to overcome these deficiencies. Although the Welsh Government has been developing sectoral locational guidance for some sectors to complement the WNMP, this is planning guidance rather than statutory policy and does not look at cross-sector spatial planning nor assess cumulative impacts. Although not ideal (because it is not cross-sectoral) any IPS (for example, for offshore wind) could be made a spatial policy document, providing a marine equivalent to the spatial elements of Future Wales, provided it

is subject to proper consultation, appraisal and scrutiny.

The National Development Framework for Wales is part of the statutory development plan and we support its inclusion as a primary consideration in decision-making. However, this should be extended to the development plan as a whole, thus including the relevant Strategic and Local Development Plan. Strategic Development Plans in particular could play an important role in identifying the need for and appropriate location of new strategic infrastructure, such as by identifying areas of strategic opportunity or constraint.

We note that Welsh Ministers will need to take into account policy contained in the UK Energy National Policy Statements due to the mix of reserved and devolved powers in this area.

Part 6 - Infrastructure consent orders

No response.

Part 7 - Enforcement

The Bill requires Natural Resources Wales (NRW) to submit a marine impact report for applications in the Welsh marine area and contains provision to grant deemed consent under a marine licence. However, it is silent on whether NRW is responsible for overseeing discharge of the licence. The 2018 consultation document said: "Responsibility for discharge of conditions will largely remain with the relevant enforcing authority, which is the LPA onshore and the Welsh Ministers offshore, though functions may be delegated other bodies as specified in the consent." (para 5.54). NRW has the expertise to fulfil this role and the Welsh Government should provide clarity on its intentions.

Part 8 - Supplementary functions

No response.

Part 9 - General provisions

No response.

What are the potential barriers to the implementation of the Bill's provisions and how does the Bill take account of them?

No response.

How appropriate are the powers in the Bill for Welsh Ministers to make subordinate legislation (as set out in Chapter 5 of Part 1 of the Explanatory Memorandum)?

No response.

Are any unintended consequences likely to arise from the Bill?

No response.

What are your views on the Welsh Government's assessment of the financial implications of the Bill as set out in Part 2 of the Explanatory Memorandum?

No response.

Are there any other issues that you would like to raise about the Bill and the accompanying Explanatory Memorandum or any related matters?

No response.