



## The Proposed Environmental Protection and Waste Management LCO

### Submission to National Assembly for Wales Scrutiny Committee from RSPB Cymru

#### Background

The RSPB is Europe's largest wildlife charity with over one million members, with over 40,000 of them living in Wales. The Society manages one of the largest conservation estates in the UK, covering more than 100,000 hectares, of which 19,000 are in Wales.

The RSPB's vision is of a world where biodiversity loss has halted and in which human actions ensure the sustainable management of the planet's natural resources. Such a world would provide future generations with clean air and water, a stable climate, abundant and diverse wildlife populations and a robust, diversified sustainable economy.

We are grateful for the opportunity to submit a response on the LCO to the Committee and we hope that our comments will assist the scrutiny of an important new phase of devolution in Wales.

#### Summary

RSPB Cymru welcomes the proposed Environmental Protection and Waste Management Legislative Competence Order but:

- Asks for further clarification over the scope of the powers being devolved to Wales under the term 'Environmental Protection.' RSPB Cymru feels strongly that clarification must be sought on the definitions in order to facilitate public understanding and engagement with devolution. It is vital that civil society is able to navigate and comprehend our devolution settlement and be able easily to access information as to whether the Assembly or Westminster is the competent authority on an issue.
- Recommends that an additional matter of "Biodiversity" is added to the scope of the LCO in order to allow the National Assembly for Wales to pass Measures to 'further biodiversity', to help address continuing declines in wildlife in Wales.

#### Question 1

**Would the terms of the proposed Order allow for the implementation of the policy agenda on waste management and environmental protection by means of Measures? If not, how would the proposed Order need to be re-drafted and why?**

- 1.1 RSPB Cymru urges the National Assembly for Wales to seek further legal opinion on the definition of 'environmental protection' in the context of Matter 6.2.

- 1.2 The scope of the term 'environmental protection' is very unclear. As far as we can ascertain there is no legal definition of the term, however, its everyday usage and its use in previous legislation (e.g. the Environmental Protection Act 1990) suggest that the scope is considerably broader than the examples given at points 12 and 13 of the Ministers Memorandum.
- 1.3 The drafting of the proposed LCO appears to be an extract from Section 6, Schedule 7 of the Government of Wales Act 2006. We are unclear as to why this should be given that Schedule 7 relates to Acts of the Assembly (following a referendum on devolution). Given that the whole of Section 6 is not included in this LCO, it maybe reasonable to assume that the other matters in section 6 are not included in the scope of this LCO. However, the term 'environmental protection' could be argued to include many of the matters listed in section 6, (e.g. Genetically Modified Crops, Nature Conservation and sites of special scientific interest etc) and, indeed, these are covered under the Environmental Protection Act 1990.
- 1.4 As drafted in the LCO, "Environmental protection, *including* pollution, nuisances and hazardous substances" (my emphasis) only serves to illustrate that this is not a limiting definition – but it is unclear what else is included.
- 1.5 The consultation question asks us to consider how the LCO implements the policy agenda on 'environmental protection'. We do not feel that the Explanatory Memorandum adequately sets out what this policy agenda is – indeed there appear to be conflicting messages as to whether the interpretation of 'environmental protection' is wide or restricted to a narrow agenda of 'environmental nuisances' (e.g. waste, pollution, cigarette butts and fly tipping). Para 7 of the Memorandum refers to the Environmental Protection Act 1990 and other Acts, and para 15 sets out that the principal purpose of the LCO is to enable "a package of measures to improve the environment of Wales" – the scope of which could be very wide. No attempt is made to define 'local environmental quality', but clearly all environments are local to someone and, therefore, this could cover any aspect of environmental management, and indeed all the matters specified in Section 6, Schedule 7 of GoWA 2006. The Welsh Assembly Government's Environment Strategy 2006 refers to 'our local environment', and includes in this a wide range of issues from the built environment, landscape and historic character, green space, support for biodiversity, flood risk management, environmental nuisances, access issues and areas for recreation.
- 1.6 RSPB Cymru feels strongly that clarity must be sought on the definitions in order to facilitate public understanding and engagement with devolution. It is vital that civil society is able to navigate and comprehend our devolution settlement and be able to easily access information as to whether the Assembly or Westminster is the competent authority on a matter. If the only way to understand the powers of the Assembly is to commission expensive legal opinion, or take test cases to the courts, then this disenfranchises the voluntary sector and the wider public from the governance of Wales. This seems to work against a principal aim of devolution, ie to bring government decision making closer to the people affected by those decisions.

## **Recommendation**

RSPB Cymru urges the National Assembly to seek legal counsel on the scope of the term 'environmental protection', so that a common understanding is available to all the people of Wales.

## **Question 2**

**The proposed Order includes a Table setting out certain exceptions from the scope of Matters 6.1 and 6.2 – see the entries at numbers 1, 2, 12, 13, 14, 15, 16 and 18. Are these exceptions appropriate? If not, how should they be re-drafted and why?**

- 2.1 It is not clear to us why the exceptions are taken from Schedule 7 (related to Acts of the Assembly following a future referendum on further devolution). There is no obvious correlation between this schedule and Schedule 5 which relates to Measures and contains no exceptions or details on the Fields devolved.
- 2.2 RSPB Cymru finds the phraseology of exception 18 very difficult to follow. We understand that the exception refers specifically to energy conservation *per se*, other than through the encouragement of energy efficiency, but without regulatory action. We are unclear why the Welsh Assembly Government would seek to exclude this area, as we felt that this could restrict its powers with regard to action on climate-change-causing emissions, which could be included in the definition of pollution. Such actions could help the Assembly to make progress towards addressing the causes of climate change and unsustainable development.
- 2.3 It is unclear why exceptions to Matter 5.10 are also to be found in this Table. We suggest that these exceptions from a different issue are dealt with in a separate clause of the LCO and in their own table.

## **Question 3**

**Are the terms of the proposed Order drafted appropriately, too narrowly or too broadly. If necessary how should the proposed Order be re-drafted and why?**

- 3.1 RSPB Cymru asks the Committee to consider extending the scope of the LCO to specifically include Biodiversity. We believe that this could best be done by the addition of a new Matter 6.3 'Biodiversity' at Clause 2 No (3) of the Order.
- 3.2 We ask for this additional power at this time, because we feel that it would be a relatively straightforward addition to the LCO, which already covers environmental issues. Our primary reason for requesting this is that devolution of primary powers over Biodiversity would allow the Assembly to bring forward Measures, such as a duty on public bodies to further biodiversity in Wales<sup>1</sup> (as is currently the case in Scotland<sup>2</sup>). This would facilitate greater proactive engagement across the public sector in tackling biodiversity declines.
- 3.3 In 2001, at the Gothenburg summit, EU Heads of State and Governments set out an agreement to "halt the decline of biodiversity by 2010." Both the UK and Welsh Assembly

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<sup>1</sup> Wales Environment Link Policy Priorities for the National Assembly for Wales 2007, WEL

<sup>2</sup> Nature Conservation (Scotland) Act 2004

Governments have committed to delivering on this target and the Assembly has also made a specific commitment in its Environment Strategy, 2006. For example, it states that the loss of biodiversity puts many key ecosystem services at risk, and specifically stresses the need for clarity on roles: “Outcome 4: The roles and responsibilities of organisations are understood, leading to better integration for the delivery of environmental protection *and enhancement*” (my emphasis).

- 3.4 The Assembly has a duty to promote sustainable development, and the health of our biodiversity is a key test of whether we are developing sustainably.
- 3.5 Detailed population recovery targets are set for a wide range of species and habitats in the Welsh Biodiversity Action Plans<sup>3</sup>. However, there is little coordinated action to implement these plans across the public, private and voluntary sectors and funding is in short supply.
- 3.6 Despite these commitments and ‘action plans’, there is no evidence that we have stemmed the tide of biodiversity loss in Wales. Habitat loss and fragmentation in the face of intensified land-use (both agricultural and development) are identified as the primary causes of these declines. Most existing wildlife legislation focuses on providing some level of legal protection to important habitats and species. However, there is very little legislation that requires positive action from public authorities to manage proactively for the priority wildlife under their control, or to secure compensatory actions where important sites are being lost.
- 3.7 The current duty to further the conservation of priority species and habitats in the Natural Environment & Rural Communities Act 2006 applies only to the Welsh Assembly Government itself – all other public bodies (Local Authorities, Assembly Sponsored Public Bodies, water companies etc) are required only to “have regard to biodiversity,” which does not have the same focus *on action* for delivery.
- 3.8 A new duty ‘to further biodiversity’ should not mean additional burdens and expensive new programmes, but rather a clear signal that biodiversity needs to be integrated into all areas of policy and practice. It will ensure that existing responsibilities are carried out in ways that support existing biodiversity and enhance its management e.g. sensitive management of the land holdings of public bodies. Local Planning Authorities can encourage positive planning for biodiversity – e.g. the inclusion of planning conditions (s106) and planning gain measures to ensure that biodiversity is properly taken into account in development proposals or that compensation is provided: the ‘win-win-win’ that is often quoted with regard to sustainable development.
- 3.9 It may be that a Measure such as to further biodiversity could be included under this LCO as currently drafted – within the meaning of 6.2 “environmental protection.” However, the word ‘protection’ might limit the interpretation of 6.2 from enabling a Measure that would include enhancement or furthering. For this reason, and for greater clarity in the devolution

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<sup>3</sup> Welsh Biodiversity Action Plans exist for all the avian taxa on the list set out in “Going Wild in Wales” Welsh Assembly Government 2003, in accordance with Section 74 of the Countryside and Rights of Way Act 2000.

settlement, we suggest that an additional Matter (6.3) is added to the LCO at Clause 2, No (3).

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