

**NATURAL ENVIRONMENT FRAMEWORK
A LIVING WALES
REGULATORY AND MANAGEMENT
APPROACHES WORKSTREAM**

**A REPORT ON AN ANALYSIS OF THE
EFFECTIVENESS OF CURRENT
REGULATORY AND MANAGEMENT
APPROACHES AND RECOMMENDATIONS
INCLUDING FURTHER WORK**

Lynda M Warren, Aberystwyth University

September 2011

SUMMARY

CONTENTS

Summary	2
1. Introduction	3
2. Evidence	8
3. Questionnaire	11
4. Consultation Responses	33
5. Input from Individuals	47
6. Committee Reports	59
7. CCW Legislation Critiques	65
8. Literature Review	85
9. 1:1 Interviews	88
10. Management Approaches Workshop	97
11. Additional Sources of Information	99
12. Conclusions	110
13. Using the Evidence to Support NEF	127
14. Recommendations and Deliverables	137
 Annex 1 Project Proposal	 146
Annex 2 Workstream Report to NEF Programme Board	150
Annex 3 Comments Log	153
Annex 4 Recommendations collated by section number	187

CHAPTER 1. INTRODUCTION

THE REGULATORY AND MANAGEMENT APPROACHES WORKSTREAM

1.1. As stated in the Welsh Government's consultation document *A Living Wales – a new framework for our environment, our countryside and our seas*¹, the NEF process “seeks to address multiple objectives at the same time and set priorities locally within a sustainability framework”. A public consultation was launched and a number of workstreams set up to progress the concept with the desired outcome of “a clear set of national priorities, backed up by institutional and regulatory changes and integrated local delivery mechanisms”. The consultation document goes on to state the principle of the new framework, which is:

- to secure sustainable and integrated management of land and water by making the long-term health of ecosystems and the services they provide central to decision making; and, by doing this
- to make optimum use of our finite land and water resources and ensure Wales' natural and cultural capital assets are maintained and enhanced.

1.2. The purpose of the NEF has further been defined as being:

- to ensure that Wales has increasingly resilient and diverse ecosystems that deliver economic, environmental and social benefits.

1.3. Updating regulatory and management approaches to deliver the new approach is identified in the consultation document as one of the key next steps. The Regulatory and Management Approaches Workstream was therefore set up in order to: analyse the effectiveness of the regulatory and management approaches currently available to deliver the NEF outcomes and, where appropriate, to identify gaps in legislative provision and areas where management of financial instruments may be more appropriate than legislation and to make recommendations for changes to current regulation or approach or new legislation. In summary, the purposes are to:

- analyse the effectiveness of the current regime;
- identify gaps in policy, management and legislation;
- identify areas where financial instruments may be more appropriate than legislation;
- make recommendations for legislative change; and
- make recommendations for changes in approach to regulation and management.

1.4. Eight individual projects provided the evidence base for this workstream. These sources of information are shown in table 1.1.

¹ Welsh Assembly Government Consultation Document *A Living Wales – a new framework for our environment, our countryside and our seas*; issued 15 September 2010 and available at <http://wales.gov.uk/consultations/environmentandcountryside/eshlivingwalescons/?lang=en>

PURPOSE OF THIS REPORT

1.5. The purpose of this report is to draw together the output from the eight projects. This report will then be used to inform the final workstream report scheduled for December 2011. The project proposal (see Annex 1) identifies the following products for the reporting work:

- clear individual output for the projects requiring primary analysis;
- main report identifying key messages and recommendations at the strategic, legislation and tactical level;
- specific and cited stakeholder engagement to clarify and discuss points raised/suggested by individual named contacts;
- presentation of key messages and findings to the regulatory and management approaches workstream.

Table 1.1. Sources of Information for the Regulatory and Management Approaches Workstream

Project Title	Project Description	Further Information
1. Questionnaire	Electronic survey of views on effectiveness of current legislation and its implementation	E-mailed to >200 people; responses covering 30 pieces of legislation received
2. Consultation Responses	Responses to <i>A Living Wales</i> consultation	180+ responses of which ~60% made specific reference to this workstream
3. Input from individuals	Information provided by LBAP representatives specifically for this workstream	Other individual responses have been grouped under this heading as well
4. Committee Reports	Recommendations from Sustainability Committee Inquiries into Planning and Biodiversity	Evidence presented to the Committee was also considered
5. CCW Legislation Critiques	Assessment of 7 pieces of legislation	Covers principles for good regulation
6. Literature Review and Policy Map	Existing literature reviews and research condensed, streamlined and analysed with recommendations for reform	Output: report, mindmap and bibliography; no further analysis required
7. 1:1 Interviews	Small set of targeted interviews with business, regulators and individuals to provide case studies of existing regulatory systems leading to proposals for major regulatory innovation, including any ideas which could be trialled during 2011	Output: report with recommendations
8. Management Approaches Workshop	Workshop to identify solutions in relation to: • shared outcomes and integration in the context of sustainable development across all Government sectors; • existing policy and management frameworks with respect to improvement in process, tools and gaps	Output: short report of Workshop held 5 April 2011

1.6. The eight projects are very different in nature and have been subjected to different degrees of analysis. Some primary analysis was required for four of the projects (questionnaire, consultation responses, input from individuals and workstream approaches workshop). In other cases, the evidence was presented to me in a more or less completed package. The report attempts to synthesise any conclusions from the projects requiring primary analysis with those already drawn from the other projects. It identifies key messages from across the eight projects and makes some proposals for taking this workstream forward at strategic, legislation and tactical levels.

APPROACH TO THIS REPORT

1.7. I read all the evidence presented (including, where possible, evidence submitted to those projects where primary analysis had already been undertaken) and extracted information relevant to this workstream. Common messages were grouped and the conclusions presented under different themes to make it easier to consider possible ways forward.

1.8. This report is on the outcome of the eight projects and is not a ninth project! However, a report just synthesising the outputs of eight projects would amount to little more than a summary. As part of the process of analysis, therefore, I have reflected on the full spread of evidence and on the conclusions of the individual projects and drawn my own broad conclusions. I have kept my own views separate from those contained within the evidence and must emphasise that these are just personal suggestions for future actions, albeit informed by a wealth of information. It is this wealth of information in the evidence that it is the most important part of this exercise, however, and readers are encouraged to go behind the summaries presented in this report to obtain further details. Data from each of the projects are contained in, or directly referenced in, Appendices to this report, which are available from the Project Team.

1.9. The wording of this report has been informed by discussions within the workstream and, in particular with the Project Team members. I am grateful to Chris Mills, Jennifer Dack and Kathryn Monkton of Environment Agency Wales and to Clive Thomas of the Forestry Commission Wales for the time they have spent with me discussing the finer points of the evidence and my conclusions and for some stimulating debates on possible recommendations for future work. I am also grateful to the many people who have commented on previous drafts of the report. I have attempted to take account of all their comments (which are collated in Annex 3) and I apologise if I have misinterpreted them in any way.

1.10. As noted above, the projects approach the regulatory and management framework from different starting points and from different viewpoints. Some are clearly strategic in their approach; the Policy Map and the Committee Reports fit in this category. Others, including CCW's legislation critiques and the 1:1 interviews, focus on specific pieces of legislation. Tactical approaches to reform were apparent in most, if not all of the evidence streams although they were usually not identified as such. It has been suggested to me that this report should be organised to demonstrate the hierarchy between strategic, legislation and tactical levels by presenting the evidence and analysis under these headings. I have tried to approach the conclusions to this report with the three

levels in mind. It will be for the NEF programme itself, however, to decide how to take these levels forward into the next stage. It was not possible in the time available to produce a logical map of where, when and what action was needed. In any case, this might have proved too simplistic. Legislation often – usually even – outlives strategy so the hierarchy can be far more complex than is at first apparent.

1.11. The structure of the report is based around the individual projects. These are presented in the order in which they are described in the Project Proposal and are treated individually. Comments on the first draft of this report are collated in Annex 3 which also notes any action taken in response. Where additional comments have been added to the text of the main report I have indicated that these are comments made in response to the previous draft and did not form part of the original evidence.

BROAD OVERVIEW OF REPORT

1.12. The main desired outcome from this workstream is described in *A Living Wales* as

Fresh approaches to the design of regulatory and management regimes that deal with the health of the relevant ecosystem as a whole, reflecting risk, costs and benefits, opportunity and resilience.

1.13. This report is the mere tip of an iceberg of information. It is not possible to state how many people actually contributed evidence to this workstream or even to put a number on the organisations that participated. There can be no doubt, however, that the body of evidence supplied amounts to a wealth of detailed knowledge and opinion across a wide range of topics of relevance to the management of the natural environment of Wales. It should provide an important source of information for the further development of NEF and, indeed, for other projects that might be embarked upon in the future.

1.14. The Report from the Regulatory and Management Approaches Workstream to the Programme Board Meeting on 1 August 2011 (shown in full in Annex 2) notes that one of the broad conclusions from the evidence presented in this report is that even those who are engaged with the *Living Wales* development seemed to find it difficult to address the wider picture and consider improvements to the current legislative framework ‘to deliver an ecosystems approach’. There was plenty of evidence on and suggestions for improving the current legislative framework, mainly in relation to biodiversity, but these are unlikely in isolation to reduce environmental risks, safeguard ecosystems or provide much help in delivering increasingly resilient and diverse ecosystems. When combined with the continued lack of real engagement with ‘Living Wales’ principles by many beyond the biodiversity sector, this suggests that there is some way to go in the development of strategic thinking and engagement on its implications.

1.15. This general conclusion should not be surprising and is borne out by the policy analysis in the report which reflects findings from other analyses such as that carried out by RELU, for example. It may be that, if the exercise was launched today, rather than a year ago, there would have been

greater appreciation of the need for fundamental changes in approach because the NEF principles have been echoed in several other strategic developments and publications most of which were not available when evidence was being put together or even when this report was being drafted. Taken together these recent developments demonstrate a growing awareness of the need for an ecosystems approach to management and regulation following the broad principles behind NEF. In putting together this report I have attempted, with the help and guidance of the Project Team, to put the evidence in the context of this need.

CHAPTER 2. THE EVIDENCE

2.1. The eight projects comprising the evidence base were designed to address the scope of the workstream from different perspectives. Evidence, in this context, includes factual statements about particular pieces of law or regulatory processes, opinions about what is good and what is bad about existing frameworks and suggestions for change. Opinions range from expert and academic opinions through opinions from practitioners, to comments from the interested lay person. It will be apparent from reading the various chapters that much of the information provided is about perceptions. It is important to appreciate that this does not make the evidence less valid. Law and regulatory management practices are designed to influence and control human activities and it is the social construct that people put on these various measures that largely dictates the way they are implemented. So, even if perceptions are found to be misinformed, the fact that they exist needs to be taken into account if regulatory approaches are to be improved. For this reason I have included specific examples of law and practices that are perceived to be unsatisfactory so that further work can explore the reasons for this dissatisfaction.

2.2. The evidence is not comprehensive in its coverage nor does it provide an even representation of views but this does not diminish its importance. In fact, the absence of information from and about some sectors is, in itself, an important strand of evidence pointing as it does to a lack of engagement.

2.3. *A Living Wales* identifies four underlying reasons for refreshing the approach to regulation through NEF:

- the need to build sustainable use of Welsh lands and seas into the direction of all policies, plans and programmes;
- to reflect the challenge posed by climate change;
- to address the failure to deliver biodiversity goals;
- to look at the appropriateness of interventions, reflecting on where the greatest risks and opportunities lie, and managing for long-term outcomes rather than narrow impacts.

2.4. For many contributors of evidence, however, the focus of the exercise was on the third reason, addressing the failure to deliver biodiversity goals. The launch of the consultation document at the Wales Biodiversity Partnership Conference can only have added to this view of the consultation. My conclusion from reading the evidence and the analyses of it, was that there was no clearly agreed understanding of the purpose of NEF in general and, in particular, this workstream. For some, the workstream provided the opportunity to address anomalies in the current legislative framework and management regime for the protection of wildlife; for others it went much wider and provided the opportunity to address the full suite of environmental regulatory frameworks and management regimes with a particular purpose of delivering ecosystem services. The two interpretations are not mutually exclusive but they have affected the scope of the evidence presented. The range of environmental legal instruments covered is by no means comprehensive; there are few references

to pollution control measures in comparison to the references to nature conservation law, for example. The issues addressed in relation to regulation are also limited. Again the focus is on the impact of biodiversity measures, even when there issues are about better regulation that might equally apply to pollution control in general.

2.5. There is, of course, a separate well established programme UK government programme based on the recommendations of the Hampton Review which focuses on better regulation. Evidence was invited by the workstream on the extent to which better regulation could be applied more widely beyond pollution control regulation to wider environmental management issues including biodiversity management. Although there is some projects specifically addressed this point – notably the Questionnaires, the 1:1 Interviews and the CCW Legislation Critiques – the detailed responses do not present a clear picture. However, there were many comments across the projects pointing to the need for improved relations with regulators which do point to a perceived need for better regulation.

2.6. It will be for the NEF programme to take action to ensure that the purpose of NEF is properly understood and its processes properly integrated in to management approaches. The scope of the evidence to this workstream has been discussed by the Project Team and has been taken into account in drawing conclusions and making recommendations for further work.

2.7. Tables 2.1 and 2.2 provide a rough breakdown of the interests behind the various evidence streams contributing to the projects. It provides no more than an indication of the responses and should not be taken as definitive; my purpose is just to illustrate that some sectors are apparently under-represented. It is not clear precisely why this should be but the underlying reason is surely that the sector does not (or did not) consider NEF to be of sufficient relevance to be worth engaging with. Any decisions on future actions arising from this workstream will need to take this into account and engagement plans should be developed accordingly.

Table 2.1. Breakdown of Evidence Available to Regulatory and Management Approaches Workstream by Sector

Project	Qnnaire	Cons Doc	Individs	Cttee Rpts	CCW critiques	1:1 interview	Work-shop
Nature conservation	•	•	•	•	•	•	•
Farming		•					
Fisheries	•	•					
Forestry	•	•					•
Water	•	•			•	•	
Planning	•	•		•			•
Economics							
Pollution	•	•				•	•
Marine	•						

2.8. Much of the evidence provided is given from personal experience. There are only a few specific examples of good and bad practice but many general comments. Similarly there are only a few specific suggestions for regulatory change but several consistent general suggestions.

Table 2.2. Breakdown of Evidence Available to Regulatory and Management Approaches Work by Provider

Project	Qnnaire	Cons Doc	Individs	Cttee Rpts	CCW critiques	1:1 interview	Work-shop
Regulators	•	•				•	•
Nature conservation body		•		•	•		•
Environmental NGO		•		•			•
Business	•	•				•	
Public Utility		•				•	
Local Planning Authority		•		•			
Local Authority		•					
Local Authority biodiversity		•	•				
Consultant	•	•					
Consultee	•	•					
Individual		•	•				

CHAPTER 3. PROJECT 1 QUESTIONNAIRE

INTRODUCTION

3.1. The questionnaire was sent electronically to over 200 people. There were 18 questions covering the context of a piece of legislation, its implementation and wider considerations. Respondents were free to comment on any pieces of legislation. The responses were collated according to legislative instrument. Eighty two responses were received of which 64 were from regulators, four from the regulated, 11 from consultees and three from consultants or advisors. Over thirty legislative items were addressed covering pollution control, conservation, forestry, planning and EIA, and general environment. Table 3.1 itemises the responses and provides a summary of the key points raised.

3.2. The questionnaire is detailed and well structured. If there had been more responses and the answers had been collated against question number it might have been possible to carry out some semi-quantitative analysis but this has not been possible with the available material. Instead, I have tried to identify any trends and draw out broad conclusions. I have also recorded any specific critiques and suggestions for change.

3.3. I have attempted to identify any broad differences in view between different types of respondent where there is sufficient information to make a meaningful distinction between categories. In the case of multiple responses to a single piece of legislation, it is often the case that different respondents have addressed different aspects of the legislation. Similarly comments from the regulator and the regulated on a piece of legislation do not necessarily address the same part of that legislation.

3.4. The questionnaire was broken down into three sections each of which is considered in turn here.

SECTION 1 CONTEXT

3.5. In this section respondents were invited to identify the legislation they were commenting on, specifying any particular parts of that legislation where appropriate, and to state the role in which they were responding. Two key questions asked how effective the legislation was and whether it achieved what it was designed to achieve. The results are collated in table 3.2 in order to provide a one page overview of the respondents' views on effectiveness. It is difficult to draw any general conclusions from these responses. Where respondents are of more than one type there is sometimes broad agreement but this does not always occur and in some cases different respondents with the same role disagree. The table does, however, give a clear indication of where respondents feel the legislation is ineffective. Given that respondents were invited to make submissions on legislation of their choosing, however, it is not surprising that points of dissatisfaction have been

raised – there are likely to be many parts of the same or other legal instruments that are regarded as satisfactory but which have not attracted comment.

Table 3.1. Output from Project 1: Questionnaire**Accent Legislation Comments**

Legislation	No of Respondents	Responses – Key Points Raised
Bathing Water Regulations 2008 • Regn 14 short term pollution	1 regulated	Regulations rightly enable more information to be given to beach users about potential water quality deterioration but the way they are likely to be implemented by Environment Agency will have unintended consequences for sewerage undertakers and penalise water companies.
Carbon Reduction Commitment Energy Efficiency Scheme Order 2010	1 regulator	Scheme is very complex and difficult for both regulator and regulated (DECC are simplifying it) but rate of compliance is high
Climate Change Act 2008 • Carbon budgets in UK • UK Climate Change Risk Assessment • Adaptation Reporting Power	3; all as regulators and consultants/advisors	Provisions re carbon budgets and reporting described as effective and properly implemented. Risk assessment ineffective. Concerns are more about lack of awareness than legislation itself which is described as having correct and necessary powers. Reference to clear targets / reporting duties being good.
Conservation of Habitats & Species Regulations 2010 • Pt 6 Assessment of Plans & Projects • Regn 65 Co-ordination between competent authorities (CAs) • Regn 41(2) Disturbance	5; 2 consultees, 1 regulator, 1 regulated, 1 regulator & consultee	Pt 6 is described as effective by both regulator and consultees. Regn 41(2) described as ineffective by regulated (woodland sector). Recommendation for risk based enforcement of duties. Regn 65 described as ineffective by regulator. Recommendation of appointment of lead CA for complex schemes.
Controlled Waste (Registration of Carriers and Seizure of Vehicles) Regulations 1991	1; regulator	Legislation is effective and partly achieves what it was designed to achieve but does not distinguish between hazardous and non-hazardous waste and there need to be more grounds for refusing an application (e.g. lack of competence).
Control of Major Accident Hazards Regulations (COMAH)	2; regulators	Link with Environmental Protection Regns noted. Need to involve HSE and this legislation as part of effort to achieve healthy ecosystems.

1999		
Control of Pollution (Amendment) Act 1989 • s 7(3)(a) 'without reasonable cause' • s 1 carrying waste for business or profit • s 1(1)	3; 2 regulators; 1 regulated	All conclude that legislation does not have correct and necessary powers. Regulators had concerns over the inadequacy of measures to prevent and deal with fly tipping. The regulated person was concerned at failure to cover 'gifted waste' differently and felt this led to more fly-tipping.
End of Life Vehicles Regulations 2003 • Schedule 5	2; regulators	Disagreed on most things! One thought legislation effective but could be improved by extending controls to other vehicle types. The other felt legislation and implementation ineffective and needed further clarification.
Environment Act 1995 • s 108 enforcement powers • Pt III National Parks 62(2) duties	2; 1 consultee; 1 regulator	Both sections considered to be ineffective. Enforcement powers lack appropriate powers of seizure. The duty to consider impact on National Parks is not enforced because of lack of resources by NPAs and out of date WAG guidance. Recommended that the 'have regard to' duty would be stronger if worded as 'must have regard to' rather than 'shall have regard to'. <i>A comment on this evidence made by the Campaign for National Parks in response to the first draft of this report argues that the ineffectiveness is due to a failure of WG and CCW to take responsibility for publicising, monitoring and enforcing the duty. It goes on to say that changing the wording would not make any practical difference unless accompanied by the necessary resources, political commitment and systems.</i>
EIA Regulations for Forestry ²	1; regulator	Heading states that the legislation covered is the Clean Air Act but this is presumably an error. Legislation and its implementation considered to be effective but some improvement possibly required to reporting and consistency.
Environmental Permitting Regulations 2010: • Pt 2 Environmental Permits • Pt 4 Enforcement • Regn 12(1) • Schedule 1, Pt 2	8; all regulators; commenting on different aspects	Taken as a whole EPR were not regarded as effective (4 felt the Regulation they were commenting on was effective; 4 felt it was not). 50:50 split on whether effective and achieved aims. Concerns mainly relate to scaling back of regulatory powers notably power to suspend permits where there are breaches of conditions. Other measures proposed included simplifying language and encouraging public engagement. It was suggested that implementation would be improved if regulatory role was not split between authorities

²Presumably the Environmental Impact Assessment (Forestry) (England and Wales) Regulations 1999

• Regn 37 • Definition of 'emission'		
Environmental Protection Act 1990 • Pt II, s 34, duty of care re waste • Pt II, s 59, power to require removal of waste • s 33(1)(b) waste prohibitions • s 59ZA, powers for removal of waste on landowner • s 33; illegal deposit of waste • Environmental Permitting (England and Wales) Regulations 2010 as amended • s 33(1)(c) waste prohibitions	7; regulators	Environmental Permitting Regns described as very effective and achieving what they were designed to achieve; s 33(1)(b) and (c) described as ineffective and not achieving what they were designed to achieve; s 33, however, described as effective and partially achieving its aims; rewording of s 33(1)(b) replaced "treat, keep or dispose" with "submit to a listed operation" which was more difficult to understand; fines for illegal deposit of waste are too low; s 34 described as effective and achieving what it was designed to achieve; s 59 described as ineffective and only partially achieving its aims and s 59ZA described as ineffective and not achieving what it was designed to achieve; it is only possible to serve notice on occupier or owner of land not person depositing the waste and landowner can appeal making it more difficult to get waste removed. Correct and necessary powers were said to be present for s 33 but not for the other sections considered.
Environmental Protection (Duty of Care) Regulations 1991	1; regulator	Legislation for transfer of waste is seen as ineffective and only partly achieves what it was designed to achieve because it is essentially self-regulating and little incentive for producer of waste to ensure its proper handling.
Flood and Water Management Act 2010	1 regulator	Gives clear responsibilities to Environment Agency and local authorities for management of flooding; no gaps are now left.
Forestry Act 1967	3; 1 regulator; 1 consultee; 1 regulator & consultee	Legislation described as effective but did not achieve all it was designed to. Regulator commented that Act was linked to maintenance of a strategic resource but the UK Forestry Standard has changed role of woodlands to maintenance as a habitat and provider of ecosystem services. Changes are needed; particularly in relation to felling. Message appears to be one of complexity and lack of joined up management with nature conservation; no requirement to replace woodland lost for development.

Greenhouse Gas Emissions Trading Scheme Regulations 2005	1 regulator	Concluded that legislation is effective but only partly achieves what it was designed to achieve because of issues with the security of the ETS scheme and the inability to address hoarding of disused emission allowance during a recession. Accordingly it did not have the correct and necessary powers
Hazardous Waste Act 2005	2 regulators	Legislation stated to be effective; disagreement between regulators as to whether implementation process was clear, streamlined and cost effective.
Land Drainage Act 1991 • Ordinary watercourses • IDBs' duties • ss 23-25	3; regulators	Legislation for ordinary watercourses was said not to be effective and only to partly achieve what it was designed to achieve because, e.g. not enough protection for ecological interests. This respondent identified a loophole in the form of permitted rights which allowed damaging activities in order to maintain land drainage. The other two respondents said legislation was effective, achieved its aims and had correct and necessary powers.
Marine and Coastal Access Act 2009 • regulations for inshore fisheries	1; regulator	<i>[Note: heading says Management of Inshore Fisheries and refers to Marine and Coastal Access Act, Salmon and Freshwater Fisheries Act and Sea Fisheries Shellfish Act but comments are on secondary legislation under the Marine and Coastal Access Act]</i> Legislation said to be ineffective and failing to achieve what it was designed to achieve because it results in different organisations being responsible for different parts of the ecosystem which sometimes conflict; lacks correct and necessary powers.
Marine Strategy Regulations 2010	1 consultee	Designed to implement and ecosystem based approach recognising ecosystem services. Correct and necessary powers included.
<i>National Environment Framework: A Living Wales</i>	2; consultee; consultee, consultant/advisor and regulated	<i>Not considered further here because commenting on NEF; comments covered in section 3 'Input from Individuals'</i>
Nitrate Pollution Prevention (Wales) Regulations 2008	1 regulator	Considered ineffective because of failure to discuss implementation measures with EA, CCW and farming industry; but this failure has been recognised and is being addressed. Good point about over-emphasis on impact on water.
Persistent Organic Pollutants Regulations 2007	1 regulator	Legislation is judged to be effective, to achieve what it was designed for and has correct and necessary powers

Plant Health Act 1967 Whole Act with respect to forestry	1 regulator	Legislation is effective and achieves objectives in that it provides measures for control of tree pathogens and the removal of infected and susceptible material, e.g. destruction of larch infected by <i>Phytophthora ramorum</i> but it does not have the correct and necessary powers because it does not consider the impact on woodland.
Radioactive Substances Act 1993 - Whole Act - Schedule 23	2 regulators	Both thought legislation was effective and achieved what it was designed to achieve.
Reservoirs Act 1975 S 10(6) measures in the interest of safety	1 regulated	Measure is effective and achieves its aims but does not have the correct and necessary powers; it needs to be clear that the Act has overriding powers.
Salmon and Freshwater Fisheries Act 1975 - Disturbance of spawning fish - s 27 - s 2(4) (2 respondents) - tagging provisions	5 regulators	All thought their parts of the Act were ineffective; one of the respondents addressing s 2(4) and the respondent addressing tagging thought the legislation had partially achieved what it was designed to achieve; the other three concluded that it had not achieved what it was designed to achieve with respect to the parts they were considering. Only two of the respondents thought that the correct and necessary powers were in place.
Sludge (Use in Agriculture) Regulations 1989	1; regulator	Legislation is effective, achieves what it is designed to achieve and has the correct and necessary powers
Town & Country Planning Act - Act as a whole - TAN 15	2; 1 consultee; 1 consultant/consultee	3 key TCPA issues raised: lack of enforcement of planning conditions; registration of incomplete applications with no flood consequence assessment; no joined up assessment of water needs through a water cycle study and similarly with flooding. TAN 15 good but weakened by later WAG guidance. 3 suggestions made: legislation requiring parallel tracking of planning and permitting; SUDs etc; Wales Spatial Plan supported by National Infrastructure Plan deliverable locally. Suggestion of a natural capital tool to enable LPAs to understand value of e.g. greenfield site
Wales Waste Measures 2010 AND Recycling, Preparation for Reuse and Composting Targets (Monitoring and Penalties) (Wales) Regulations 2011	1; regulator	Legislation is effective and partly achieves what it was designed to achieve. Likely to work where all parties in recycling chain cooperate with the monitoring authority; difficult to get information from outside Wales where recycle is sent from Wales. Powers to provide information are unenforceable.

Waste Electrical and Electronic Equipment Regulations 2006	1; regulator	Legislation regarded as ineffective and failing to achieve aims because the Regulations only apply to WEEE that is separately collected. There is no ban on landfilling or requirement that all WEEE must be treated in accordance with the legislation.
Water Framework Directive regulations • WFD Regulations • Regulations 3 and 17	2; 1 regulator; 1 regulator & consultee	Regulator thought 'this part of the legislation' (part unspecified) was effective and achieved its objectives; regulator/consultee thought it was ineffective and did not achieve what it was designed to achieve. Similarly, the first respondent thought the correct and necessary powers were in place but the other one disagreed and pointed to need for duty on other public bodies to comply with WFD.
Water Resources Act 1991 • Abstraction licensing • Pt IV Flood Defence • s 158 works agreements • s 109 consenting	4 regulators	Abstraction licensing and s 109 described as effective; Pt IV and s 158 as ineffective. Abstraction licensing thought to achieve what it was designed to achieve; otherwise comments were of partial achievement (yet regulator commenting on abstraction licensing also said that first come first serve system no longer met needs of water efficiency). All felt that legislation did not have correct and necessary powers.
Water Resources (Control of Pollution) (Silage, Slurry and Agricultural Fuel Oil) (Wales) Regulations 2010	2 regulators	Both thought regulations were effective, achieved what they were designed for, and had correct and necessary powers.
Wildlife and Countryside Act 1981 • ss 1-27 Species Protection • s 28 SSSIs	3; 1 regulator; 1 consultee; 1 regulated	The regulator and consultee thought that ss 1-27 and s 28 were generally effective but the regulated disagreed; however, all three thought the Act achieved what it was designed to achieve. For s 28, however, lack of resources for monitoring, etc. means damage continues after notification. The legislation needs consolidating for Wales and is over-bureaucratic in places.

Table 3.2. Project 1: Questionnaire Questions 5 & 6

Legislation	Legal Framework	Regulator	Regulated	Consultee/Consultant	Regulator / Consultant / Consultee
Bathing Water Regulations	Effective				
	Achieves				
Climate Change Act	Effective				
	Achieves				
Conservation of Habitats & Species Regulations	Effective				
	Achieves				
COMAH	Effective				
	Achieves				
Controlled Waste (Registration of Carriers and Seizure of Vehicles) Regulations 1991	Effective				
	Achieves				
Control of Pollution (Amendment) Act	Effective				
	Achieves				
End of Life Vehicles Regulations	Effective				
	Achieves				
EIA (Forestry) (England and Wales) Regulations	Effective				
	Achieves				
Environment Act	Effective				
	Achieves				
Environmental Permitting Regulations	Effective				
	Achieves				
Flood and Water Management Act	Effective				
	Achieves				
Forestry Act	Effective				
	Achieves				
Greenhouse Gas Emissions Trading Scheme Regulations	Effective				
	Achieves				
Hazardous Waste Act	Effective				
	Achieves				
Land Drainage Act	Effective				
	Achieves				
Marine Strategy Regulations	Effective				
	Achieves				
Nitrate Pollution Prevention (Wales) Regns	Effective				
	Achieves				
Persistent Organic Pollutants Regulations	Effective				
	Achieves				
Plant Health Act	Effective				

	Achieves				
Radioactive Substance Act	Effective				
	Achieves				
Reservoirs Act	Effective				
	Achieves				
Salmon and Freshwater Fisheries Act	Effective				
	Achieves				
Sludge (Use in Agriculture) Regulations	Effective				
	Achieves				
T&CP Act & SSAFO Regulations	Effective				
	Achieves				
Wales Waste Measures 2010 AND Recycling, Preparation for Reuse and Composting Targets (Monitoring and Penalties) (Wales) Regulations 2011	Effective				
	Achieves				
Water Framework Directive regulations	Effective				
	Achieves				
Water Resources Act	Effective				
	Achieves				
Wildlife & Countryside Act	Effective				
	Achieves				
WEEE Regulations	Effective				
	Achieves				
Carbon Reduction Commitment etc. Order	Effective				
	Achieves				

	No	Yes	Yes, 2+ responses	Yes and No	No comment	Don't know
--	----	-----	-------------------	------------	------------	------------

SECTION 2 IMPLEMENTATION

3.6. This section sought views on how effective the implementation was. It also asked whether the implementation process was clear, streamlined and cost-effective and whether it complied with Hampton principles. Table 3.3 gives a broad indication of the responses by sector. It should be noted that there is a degree of subjectivity in this analysis as it attempts to cover 3 questions and 11 sub-questions and is based on summary response forms and not the raw data.

3.7. Hampton Principles

Respondents to the Questionnaire were asked to indicate how strongly they agreed or disagreed with the following statements relating to the Hampton Principles:

Statement 1	Regulatory systems adopt a risk based approach
Statement 2	Regulations are easily understood, easily implemented and easily enforced
Statement 3	Sanctions successfully change the behaviour of the offender and deter future non-compliance
Statement 4	Sanctions eliminate any financial gain or benefit from non-compliance
Statement 5	Sanctions consider what is appropriate for the particular offender and regulatory issue
Statement 6	Sanctions restore the harm caused by regulatory non-compliance
Statement 7	Inspections do not take place without a reason
Statement 8	Regulators recognise that a key element of their activity is to allow, or even encourage progress and only intervene where there is a clear case for protection.

3.8. Of the responses available, 35, covering 15 legal instruments, are in summary form only and cannot be analysed further. For the remaining responses, covering 19 legal instruments, the distribution of responses to the question is shown in Figure 3.1. It is clear from the histograms that there was a considerable spread of responses to each statement making it difficult to draw any firm conclusions as to opinions on Hampton compliance. There were insufficient data to justify any attempt to distinguish between responses by role of respondent or by legal instrument or topic. At best, it is possible to make the following observations.

3.9. The most positive responses were to statements 7 and 8 signifying broad agreement with the suggestion that inspections do not take place without a reason and interventions are only made where there is a clear case for prosecution. With the exception of statement 1, that regulatory systems adopt a risk based approach, the distributions of all the other responses are skewed towards disagreeing with the statement. There was a lot of disagreement with the statements on sanctions. The highest level of disagreement was in response to statement 6, that sanctions restore harm caused by non-compliance which is perhaps not surprising given that in many cases the sanction may be limited to a financial penalty. The lack of support for statement 5, that sanctions consider particular circumstances, also suggests that sanctions are not being, and possibly cannot be, used flexibly.

Table 3.3. Project 1: Questionnaire Questions 10, 12 and 13

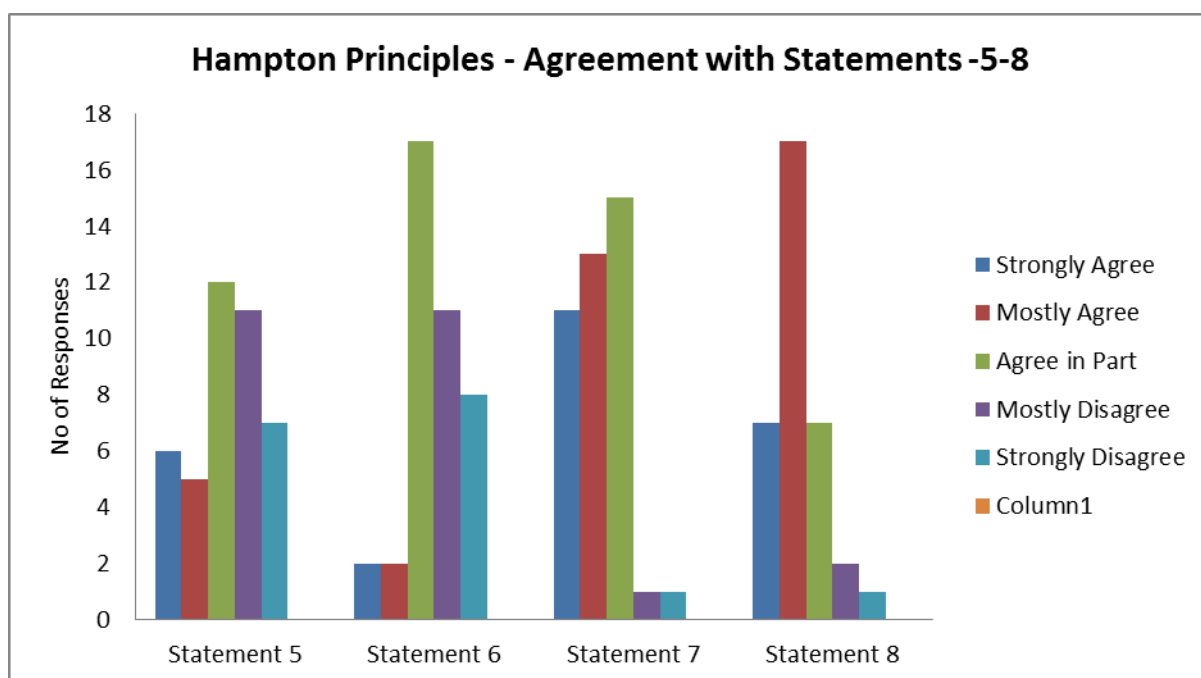
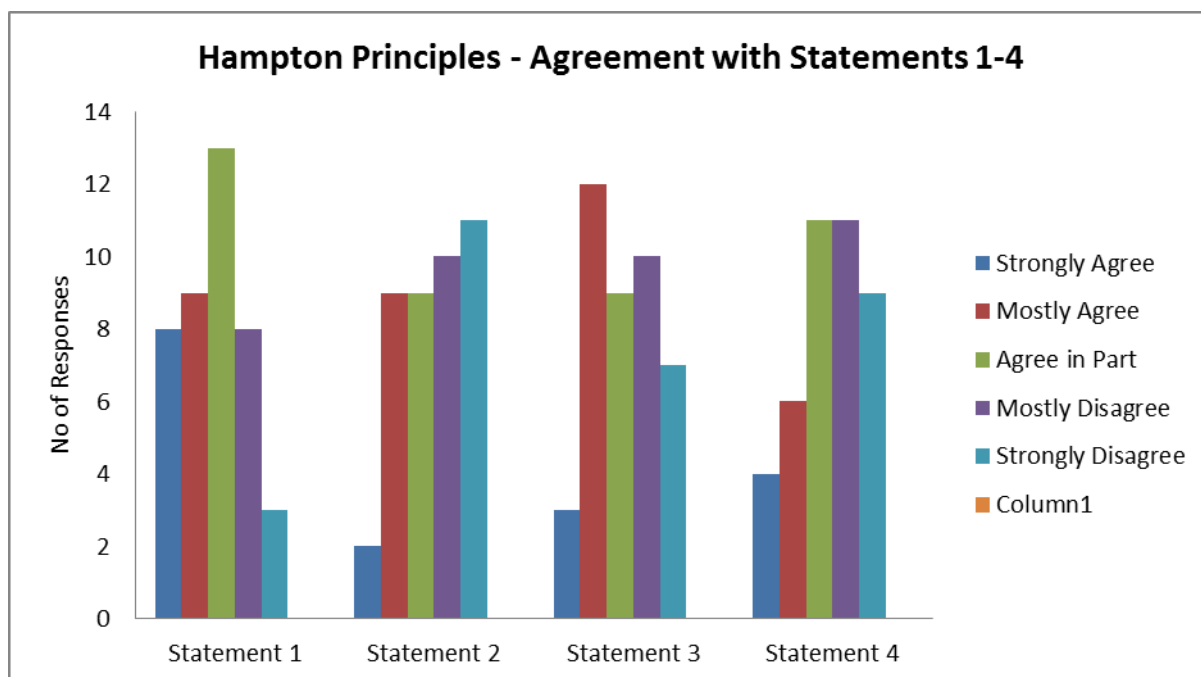
Legislation	Implementation	Response	Comments
Bathing Water Regulations	Effective		Often not possible to determine source of contamination but water company will get the blame because of way reported
	Hampton compliant		Mostly or strongly disagree
EIA (Forestry) (England and Wales) Regulations	Effective		Single respondent
	Hampton compliant		
Climate Change Act	Effective		3 regulators from same agency; 2 felt effective and 1 felt ineffective
	Hampton compliant		Agreement in part
Conservation of Habitats & Species Regulations	Effective		Most respondents found implementation to be ineffective
	Hampton compliant		Respondents found legislation to be partly compliant but no indication of which parts
COMAH	Effective		Both respondents felt compliant in part
	Hampton compliant		
Controlled Waste (Registration of Carriers and Seizure of Vehicles) Regulations 1991	Effective		Many waste carriers are not registered because of lack of awareness
	Hampton compliant		Mostly disagreed
Control of Pollution (Amendment) Act	Effective		2 of 3 respondents said ineffective; 1 said effective
	Hampton compliant		2 of 3 respondents felt not compliant; 1 felt compliant in part
End of Life Vehicles Regulations	Effective		1 regulator says effective and other says ineffective
	Hampton compliant		Mixed response
Environment Act	Effective		Regulator says effective; consultee says ineffective
	Hampton compliant		Consultee thinks definitely not compliant; regulator thinks partly compliant
Environmental Permitting Regulations	Effective		4 of 8 thought effective and 4 of 8 thought ineffective (all regulators)
	Hampton compliant		7 of 8 thought broadly compliant
Flood and Water Management Act	Effective		Too soon to tell
	Hampton compliant		Very mixed response; strongly agrees that risk-based but mostly disagrees

			with other statements.
Forestry Act	Effective		Regulator thought ineffective; regulated and regulator/consultee thought effective
	Hampton compliant		Mixed views
Greenhouse Gas Emissions Trading Scheme Regulations	Effective		Registry is well maintained in UK and compliance rates are very high
	Hampton compliant		Mostly agreed with statements
Hazardous Waste Act	Effective		
	Hampton compliant		Disagreed over compliance
Land Drainage Act	Effective		IDB's conservation clearly set out but salmonid spawning streams had been dredged to remove gravel
	Hampton compliant		Two regulators strongly disagreed with the statement; the third mostly agreed
Marine Strategy Regulations	Effective		Too soon to say
	Hampton compliant		Agrees in part with all statements offered
Nitrate Pollution Prevention (Wales) Regulations	Effective		Not streamlined; not cost-effective
	Hampton compliant		Single regulator respondent who felt compliant in some respects and non-compliant in others
Persistent Organic Pollutants Regulations	Effective		E.g. of companies importing fireworks containing hexachlorobenzene
	Hampton compliant		Strongly or mostly agree to most statements
Plant Health Act	Effective		Plant health notices and penalties are easy to undertake
	Hampton compliant		Broadly agree that compliant, sometimes strongly agree.
Radioactive Substances Act	Effective		Legislation very specific and centrally delivered
	Hampton compliant		Not complete agreement but generally positive re Hampton principles
Reservoirs Act	Effective		Can conflict with other Acts, e.g. CROW Act re designated areas
	Hampton compliant		Spread from strongly agree to strongly disagree
Salmon and Freshwater Fisheries Act	Effective		Evidential requirements too difficult to apply effectively
	Hampton compliant		Most respondents disagreed with 6 out of 8 statements but agreed, sometimes strongly, that inspection only took place with a reason and that intervention was only where there was a clear case for

			prosecution. The respondent addressing tagging agreed in part with all the statements.
Sludge (Use in Agriculture) Regulations	Effective		Requires little resource – 1 audit per annum for each water company
	Hampton compliant		Mixes response; strongly agrees only with statement that inspections do not take place without a reason
T&CP Act & SSAFO Regulations	Effective		Regulator and consultee thought effective; advisor/consultee thought ineffective
	Hampton compliant		Broad agreement that compliant
Wildlife & Countryside Act	Effective		Regulator and consultee felt effective in part; regulated said ineffective
	Hampton compliant		Broadly compliant
WEEE Regulations	Effective		Single regulator respondent thought ineffective on basis of amount of WEEE not entering regulatory chain
	Hampton compliant		
Wales Waste Measures 2010 AND Recycling, Preparation for Reuse and Composting Targets (Monitoring and Penalties) (Wales) Regulations 2011	Effective		
	Hampton compliant		Mostly agreed or agreed in part with 7 out of 8 statements; the one disagreed with being that sanctions restore harm caused by regulatory non-compliance
Water Framework Directive regulations	Effective		Regulator thought effective; regulator / consultee thought ineffective
	Hampton compliant		Regulator thought there was a degree of Hampton compliance; other respondent largely disagreed
Water Resources Act	Effective		Two regulators thought it was effective; two thought it was not
	Hampton compliant		Mixed responses; no strong agreement that compliant
Carbon Reduction Commitment etc. Order	Effective		Single regulator respondent thought it was very effective
	Hampton compliant		Broadly compliant

	No	Yes	In part	Don't know
--	----	-----	---------	------------

Figure 3.1. Distribution of Responses to Questions on Hampton Principles



SECTION 3 WIDER CONSIDERATIONS

3.10. This section sought views on whether the legislation created any unintended consequences or additional benefits or disadvantages to ecosystems or species. The main points raised are shown in Table 3.4.

Table 3.4. Project 1: Questionnaire Questions 15 - 17

Legislation	Ecosystem Impacts
Bathing Water Regulations	Current system discourages water company from working constructively with other parties
EIA Regs for Forestry	Improved reporting and consistency required to deliver healthy and resilient ecosystems
Climate Change Act	Reducing carbon emission is high priority but must not compromise other ecosystem services
Conservation of Habitats & Species Regulations	Unintended consequences: • designation seen as block to development and therefore opposition and this detracts from broader ecosystem services that could be provided by site (regulator) • woodland management and conservation treated in law as mutually exclusive (regulated)
COMAH	Legislation completely in line with ecosystem protection
Controlled Waste (Registration of Carriers and Seizure of Vehicles) Regulations 1991	No comment recorded
Control of Pollution (Amendment) Act	The longer that 'gifted waste' is not dealt with the greater the risk to ecosystem and species.
End of Life Vehicles Regulations	Unintended consequence: requirement to de-pollute vehicles as first stage of dismantling process means that inadvertent pollution during subsequent storage and treatment is avoided
Environment Act	Unintended consequence: some landscape improvements, e.g. from undergrounding of overhead cables, but patchy implementation
Environmental Permitting Regulations	Unintended consequences: • benefits/disadvantages of discharges to water, e.g. warm discharges enhance breeding of some species but impact negatively on fish • some installations leave areas around sites for wildlife to self-populate
Flood and Water Management Act	Flood risk management could take precedence over ecosystem management. Legislation does not provide framework for short term gains vs long terms problems to be assessed. National flood and coastal risk strategies will be critical. Flood risk alone by not prevent development but integration with biodiversity etc. could provide more comprehensive set of values to assess against socio-economic ones.

Forestry Act	Unintended consequences: woodland lost to development is an ecosystem modified
Greenhouse Gas Emissions Trading Scheme Regulations	Broad ecosystem benefits from reduced energy demand. Possible disadvantage is outsourcing of manufacturing to non-UK countries with poorer environmental regulation
Hazardous Waste Act	No comments recorded
Land Drainage Act	One respondent thought the right to maintain drainage was taken too far and used as an excuse to damage habitats and another thought there was little scope for wider environmental enhancement but the third respondent felt there was scope for interpreting the legislation in a conservation context.
Marine Strategy Regulations	Key to success will be effectiveness of measures to achieve good environmental status.
Nitrate Pollution Prevention (Wales) Regulations	Unintended consequences: higher degree of protection and improvement should be given to specific eutrophic waters NVZ areas but this could encourage export of high nitrogen manures outside these areas thereby adding to biosecurity threats
Persistent Organic Pollutants Regulations	Legislation implements international pollution conventions but also provides mechanisms for achieving some of the requirements of the Water Framework Directive
Plant Health Act	Unintended consequence because no provision to replace woodland destroyed under the Act resulting in deforestation. Suggests amendment to redress this and raises possibility of compensation for owners comparable to that under animal health measures.
Radioactive Substances Act	Legislation is in line with ecosystem protection and aims to protect the environment through implementation of best available techniques. Noted that working with key stakeholders can be effective in converging actual and perceived risks.
Reservoirs Act	May be necessary to remove an ecosystem and mitigate; reducing risk of reservoir failure aids flood protection. Act needs to be clearer as to which takes precedence – public safety or ecosystem protection.
Salmon and Freshwater Fisheries Act	Possible conflicts between fisheries' interests and recreational river users. One comment to the effect that the 'legislation inadvertently [had] a damaging effect on salmon populations and [undermined] other conservation work being carried out'. Suggestion of need for access agreements between different river users to resolve conflicts
Sludge (Use in Agriculture) Regulations	Legislation encourages sludge to be used on land, maintaining and improving soils and reducing waste to landfill. Compliance is part of cross compliance so there is a financial incentive for farmers to comply.
T&CP Act & SSAFO Regulations	Unintended consequences: • loss of flood plain storage structures in rivers may result in obstruction of fish, potential pollution and disposal of domestic foul effluent • inappropriate development in flood plains has potential for coastal erosion • legislation emphasises need for slurry to be spread only on suitable land and not on water-logged land which is likely to be more important for habitats.

Wales Waste Measures 2010 AND Recycling, Preparation for Reuse and Composting Targets (Monitoring and Penalties) (Wales) Regulations 2011	Legislation is designed to improve the standards of materials composted and anaerobically digested so that they are no longer regarded as waste. Compliance with quality standards will ensure material is suitable for incorporation into land, improving soil fertility and water retention.
Water Framework Directive regulations	The regulator noted that the regulations were cross-cutting and required good ecological status which is a holistic approach. Added that freshwater improvements should also benefit terrestrial and marine ecosystems. By contrast, the other respondent felt there were few benefits to ecosystems or that these were unclear.
Wildlife & Countryside Act	Unintended consequences: • concerns over decline in otters have encouraged protection of water quality • protection of water voles has safeguarded riverine habitats from insensitive development • protection of natterjack toads has enabled conservation of sand dunes • protection of dormice helps ensure woodland conservation • protection of lichens can be mechanism for ensuring clean air • protection of bogs provides natural carbon sinks
WEEE Regulations	No comments recorded
Carbon Reduction Commitment etc. Order	Reduction in energy demand can lead to ecosystem benefits e.g. through improved air quality
Water Resources Act	Legislation could be used for ecosystem benefits but not as currently worded and/or implemented. • Abstraction licences can 'lock up' water that is not being used. • Part IV should provide for ecological integrity • Legislation for works agreements makes delivery of Habitats Directive requirements difficult • Links between flood defence consenting and biodiversity need to be clarified and overriding principles better understood.

SPECIFIC EXAMPLES

Bathing Water Regulations

3.11. The way that Regulation 14 is likely to be implemented by the Environment Agency will have unintended consequences for sewerage undertakers. The Regulations enable more information to be provided to beach users to inform them of potential water quality deterioration and public health issues, which clearly the right thing to do, but current policy on pollution incidents will potentially penalise water companies and they are disincentivised from providing information on asset performance. The response explained that the water company will have to provide real time information on spills from overflows on adjacent public sewers at designated bathing waters and

that, because of the possible loss of amenity, the Environment Agency intends to categorise these spills as pollution incidents even if they are within the terms of consents or permissions issued by the Agency. It is claimed in the response that even such a 'compliant spill' event will affect the way in which the water company's performance is measured by other regulators and have a negative impact on the company's reputation with customers. The Environment Agency has agreed that, during wet spells when overflows on public spills operate, bacterial contamination may well be coming from local diffuse sources and not the overflow, i.e. it is often not possible to determine the source of contamination leading to a loss of amenity. Nevertheless, the water company's assets will carry the blame. There is a need, therefore, to address the anomaly of permitted discharges being classified as pollution incidents.

Carbon Reduction Commitment Energy Efficiency Scheme Order

3.12. This is a new scheme, in operation for less than a year at the time of completing the questionnaire so the respondent (regulator) could not determine its effectiveness. However, it was noted that the scheme is very complex and difficult for both the regulator and the participants to understand and is currently being simplified by DECC. One further relevant comment was that the Chancellor of the Exchequer removed the revenue recycling element of the scheme without prior consultation thereby generating the impression that the scheme was a 'stealth tax'. In consequence much of the goodwill and enthusiasm generated by the Environment Agency has been lost.

Climate Change Act

3.13. *"Controversies over Severn Tidal Power (at the large scale) and high-head hydropower (at the small scale) illustrate well how a (literally) overriding target can be used to promote schemes that may be intrinsically unsuitable as currently configured."* Respondent is regulator and consultee/advisor commenting on measures to reduce carbon emissions

Conservation of Habitats and Species Regulations

3.14. Suggestions for improvement:

- appoint a lead Competent Authority (CA) for complex schemes to ensure that all elements of the scheme have been assessed before licences/permits are granted (concern is that not all CAs are aware of their responsibilities or resources to carry them out so legislation is not always fully implemented (respondent is a regulator). A second respondent, a consultee, said that coordination between CAs is required.
- Produce simple guidance and/or a checklist for CAs to make it more likely that they will implement the legislation (respondent is the same regulator in first bullet point). The same consultee also commented on the need for specific guidance for CAs backed by training.
- Statutory conservation agency should be included from the start of the decision making process rather than as a consultee (respondent is the same regulator).
- A third respondent, responding as a regulator and a consultee, thought that a more comprehensive definition of the term "plan or project" was needed to reduce uncertainty around the HRA process and also advocated fostering a culture of early consultation, i.e. pre-application.

3.15. There was also a comment from a further respondent, this time someone who is regulated, to the effect that the stringent requirements re species protection are *"overwhelmingly onerous for*

certain land management types especially woodland for otter, great crested newt, bats and particularly, the hazel dormouse". Unfortunately no details are provided.

COMAH Regulations

3.16. The respondents describe this legislation as being in accordance with ecosystem protection because it aims to protect the environment, and not just people, from the impact of major accidents. One of the respondents, a regulator, emphasised the importance of a joined up approach with HSE to make this legislation effective at delivering healthy and resilient ecosystems. This exists already but must be maintained.

Control of Pollution (Amendment) Act

3.17. One of the respondents, a regulated party, comments that there should be a simplified process for 'gifted waste' whereby registered carriers can take responsibility so that the waste can be moved quickly. At the moment there is unreasonable onus on landowners who are ill equipped to assess the risk.

End of Life Vehicles Regulations

3.18. One respondent, a regulator, suggests that implementation could be improved by extending controls to types of vehicle that are outside current controls but does not provide details. The other respondent, also a regulator, suggests improvements could be made by providing clarity on how long an end of life vehicle can be kept before de-pollution and on appropriate storage for vehicles not fully de-polluted.

Environment Act

3.19. Section 62(2) amends the National Parks Etc. Act by adding a new s 11A which imposes a duty on public bodies to have regard to the purposes for which National Parks are designated thereby integrating some aspects of environmental policy-making into their planning processes but the duty is allegedly poorly regulated because the National Park Authorities are not resourced to police it and existing WAG guidance is out of date and rarely promoted.

Environmental Permitting Regulations

3.20. The eight respondents (all regulators) made a number of suggestions for improvements to the Regulations including the removal of the requirement for there to be a "risk of serious pollution" with regard to suspending permits or, at the very least, clear guidance as to what represents "serious pollution".

Environmental Protection Act

3.21. A number of concerns over Part 2 of the Act, on waste management, were expressed some of which related to changes arising from amendments presumably designed to improve the legislation:

- It is only possible to serve notice on the occupier of the land not the person who actually deposited the waste
- S 59ZA was introduced to allow notices to remove waste to be served on landowners in the absence of the occupier but the provisions could lead to a landowner appealing if they did

not knowingly cause or permit the waste to be deposited making for further complications rather than greater simplicity.

- Fines are often too low and it is difficult and time-consuming to bring cases to court
- The repeal of the words “treat, keep or dispose” and their replacement with “submit to a listed operation” did not make for improved understanding because the new wording is difficult to understand whereas the original wording is more readily understood by those who are regulated, the general public and the judiciary.

Town & Country Planning Act

3.22. A consultant and consultee responding to the TCPA gave examples of inadequacies in the effectiveness of the legislation and suggested a number of additional powers:

- The legislation for enforcement of planning conditions is adequate but LPAs are not resourced to undertake the enforcement role effectively.
- Consideration should be given to legislating to require parallel tracking of planning and permits for certain development types.
- Developers should be required to front load planning applications, i.e. to submit all necessary information with the application, and LPAs should not register incomplete applications.
- The need to plan for water is contained in WAG policy but it is not joined up through a water cycle study.
- Similarly, for flood risk, although flooding has to be taken into account there is no requirement for this to be done in a strategic manner.

COMMENTS

3.23. This project is one of the few in this workstream to provide information on legislation that is not directly related to nature conservation or the rural environment. Nearly half of the pieces of legislation were concerned with pollution prevention and control, two related to planning, one was on forestry, one was on fisheries and only two were concerned primarily with nature conservation. Unfortunately there is no clear message coming across from the responses to the pollution legislation although it is significant that respondents chose to make comments on them. From Table 3.2 it can be seen that there 23/30 pieces of legislation were judged to be effective and achieving their purpose by at least one of the respondents.

3.24. The questions on the wider context were not answered by all respondents but it is clear that most of them did give some thought to these questions especially the one on unintended consequences. Most of the responses suggested possible situations where ecosystems might benefit or be disadvantaged by legislation not designed for the purpose of ecosystem protection and these provide good examples of the sorts of wider consequences that need to be considered further. Unfortunately these suggestions are not fleshed out with examples but the responses to these questions from respondents to the wildlife legislation provide interesting suggestions on wider ecosystem benefits that might accrue from wildlife protection.

OVERALL CONCLUSIONS – WHAT DOES THIS TELL US AND HOW DOES IT HELP

3.25. Although the responses to the questionnaires are inevitably subjective both in choice of subject and comments, there are some general themes that seem to come up across the range of legislation covered. Complexity is the most common of these and refers to complex, difficult to understand legal wording and to complex arrangements for implementation. Some of these complexities arise because of the way the legislation assigns responsibilities or because more than one piece of legislation is involved in regulating a particular activity. In other cases the complexity arises from the administrative arrangements put in place to implement the legislation. The message that comes across is that there is a need for a stronger focus on the desired outcome and a more integrated approach between public bodies charged with ensuring the outcome is delivered.

3.26. The questionnaire asked specifically about unintended consequences and a number were identified, not all of them negative in effect. There several references to pollution control legislation leading to enhanced ecosystems, for example. While it will be important to address the negative unintended consequences in due course, the lessons to be learned from the positive ones are likely to be more useful in shaping regulatory approaches to deliver NEF. Ideally, legislation should be drafted and policy developed in such a way as to encompass previously unintended consequences.

3.27. It is very easy for those working day-to-day on particular types of regulation to forget that most people will not share their familiarity with the regulatory framework. Several responses referred to the need to raise awareness. This need does not just apply to those who are being regulated or are likely to be affected by a regulation. It is just as relevant for regulators and other public bodies who need to be aware of how their particular bit of the regulatory framework fits into the larger whole. Greater coordination and integration between public bodies has been called for in several of the workstream projects including this one.

3.28. Areas for possible further consideration include:

- Consideration of wording of powers and duties (have regard to etc.)
- Legal mechanisms to tie procedures together (e.g. planning and permitting)
- Making enforcement a duty so that resources follow
- Looking at potential models – e.g. the HSE regulations which tend to be risk-based
- Great recognition of the limits of hard scientific evidence and the inevitability of scientific uncertainty and finding a way to deal with this that does not just involve invoking the precautionary principle or adopting a risk based approach.

CHAPTER 4. CONSULTATION RESPONSES

INTRODUCTION

4.1. The Welsh Government's Consultation Document *A Living Wales – a new framework for our environment, our countryside and our seas* was issued on 15 September 2010 and the consultation closed on 31 December 2010. The responses were posted on the NEF website and were downloaded for this report. I read every submission and tried to pick out any general comments of relevance to this workstream but concentrated in particular on responses to the questions on “refreshing regulatory and management approaches”. Adam Cole-King, CCW, undertook a qualitative analysis of comments made under this heading which provided a useful starting point for a fuller analysis. In this chapter, I pay particular attention to any specific examples provided as evidence. General points of more strategic interest are discussed in chapter 12.

4.2. The consultation attracted nearly 200 responses of which about 60% commented on the “refreshing regulatory and management approaches” theme. As Adam Cole-King notes, there are two potential sources of bias in our separate analyses – our subjectivity in reading and extracting information from the responses and the sheer volume of responses (there are over 1000 pages of written responses). It is also important to understand the range of views that are captured in these responses and not to assume that they represent a cross section of societal interests. Table 4.1 gives a rough indication of the types of organisations making responses and the sectors they were interested in.

4.3. Of the other sectoral interests, forestry and woodland management attracted the largest number of responses, three times as many as were submitted by farming interests. There were very few responses from the viewpoint of the wider environment. A few respondents had interests in water quality and/or freshwater systems including fisheries and there were three responses from the energy sector. Only one response came from an organisation with a particular focus on the marine environment, reflecting a general lack of coverage of marine issues in all of the projects.

4.4. Non governmental organisations comprised the largest category of respondents. The term “NGO” is used in its widest sense, however, and includes charities, learned societies, campaigning bodies, partnerships etc. The only private groupings not included under this heading are businesses and trade associations. The latter were well represented and covered the full spread of sectors of interest shown in the table. Most of the individual responses did not address the regulatory and management approaches theme.

4.5. The table shows that a large majority of responses came from individuals or organisations with an interest in the natural world whether from a scientific, conservation, or business perspective. Biodiversity was the main sector of interest for respondents but this category represents a broad spectrum of interest ranging from conservation bodies such as the RSPB and the Wildlife Trusts, to specialist species groups such as the Lichen Society and the British Trust for Ornithology. There were

several responses from individual members of local biodiversity groups as well as responses from the LBAP groups and these contributed to the large number recorded. There is an element of double counting as well because, with one or two exceptions, the 15 responses with a science background are also included under the biodiversity heading as they were nearly all from organisations with a primary interest in the biological sciences.

Table 4.1. Responses to Consultation Document

Sector	Number of Responses	Additional Information
Academic	6	Universities, research bodies, museums
Biodiversity	45	Focus of organisation - includes management
Business	15	Forestry and timber industries predominant
Civic Society	3	Community councils and voluntary bodies
Energy	3	
Farming	6	
Fisheries	1	
Forestry and Woodlands	18	
Geology	7	
Individuals	38	
Land Management	9	
Law	1	
Local Authorities	11	Not all restricted to ecology officer
Marine	3	
National Parks and AONBs	6	
NGOs	50	Includes conservation charities, learned societies, species groups
Planning and EIA	3	
Public Bodies	5	
Recreation and Rural Affairs	15	
Science	15	
Sustainable Development	1	
Trade Associations	19	
Water	7	

4.6. As noted earlier in this report, it is not surprising that the bulk of the interest in NEF came from the natural environment sectors so the lack of responses from industry could be expected. It does limit the usefulness of the consultation exercise, however, in that it does not allow the reader to obtain a balanced view of how issues are perceived. On the positive side, the wealth of information submitted does allow a good understanding of the key issues concerning those working in, or otherwise interested in, the natural environment.

4.7. Adam Cole-King summarised the results of his analysis under 16 themes. Table 4.2 shows the most commonly made responses revealed by his analysis.

Table 4.2 A *Living Wales* Consultation: Summary of Analysis made by CCW

Comment	%
Better implementation & enforcement of existing legislation - lack of resources and political will.	33
Mainstream ecosystem/biodiversity into all government policy and strategy at all levels (EU, UK, WG, local); the environment should not be a 'sector'.	29
Ecosystem approach is not an alternative to conservation of sites and species. Cannot just focus on ecosystems and ecosystem services; need to conserve an ecosystem's components including all its less immediately obvious ones (e.g. geodiversity, lower plants, invertebrates).	26
Protected site network is essential and should be strengthened in terms of coverage and connectivity/wider environment.	26
Lots of technical/detailed amendments to close loopholes and remove anomalies in existing legislation.	18
Make more use of positive incentives, such as market-based approaches and tax incentives, rather than rely just on regulation and voluntary cooperation.	15
Site/species protection focuses on addressing impacts at local level (e.g. the immediate footprint) rather than wider ecosystem 'bigger' picture. Legislation protecting localised interests trumps consideration of wider ecosystem issues in decision making.	13
Significant improvements needed for Glastir if it is going to deliver a great deal (e.g. funding levels, targeting, design of prescriptions).	13

4.8. I have built on this approach and grouped the responses under five types of action suggested for refreshing regulatory and management approaches as shown in Table 4.3.

Table 4.3. A Living Wales Consultation: Suggestions for refreshing regulatory and management approaches

Approach	Commentary	Contributing Themes from Consultation Responses
Legislative Changes	Need for minor amendments for the most part but with some suggestions for strengthening	• Strengthen protected area network • Emphasis on local protection at expense of bigger picture needs to be addressed • Strengthening NERC Act: biodiversity duty • Lots of technical/detailed amendments to remove anomalies
Changes to Implementation	Better implementation; delivery and enforcement	• Better implementation and enforcement of existing legislation • Need to mainstream ecosystem/biodiversity considerations • Clear WG guidance to LAs on delivery of biodiversity functions • Training to planning officers
Scale of Delivery	Various comments all relating to the context in which legislation is used and the need for it to be applied at the appropriate scale to delivery ecosystem benefits	• Emphasis on local protection at expense of bigger picture needs to be addressed • Need environmental/ecological boundaries not administrative ones • UK perspective on EU legislation, not Welsh one • Environmental planning etc. on catchment basis
Mechanisms for Delivery	This includes development of policy for implementing law as well as actual implementation in practice	• Need to mainstream ecosystem/biodiversity considerations • Positive incentives • Need environmental/ecological boundaries not administrative ones • Ecosystem approach is not alternative to biodiversity conservation • Emphasis on local protection at expense of bigger picture needs to be addressed • Precautionary principle should continue to underpin NEF • Risk based approaches need careful thought • Significant improvements to Glastir needed • Strengthen protected area network
Principles	Principles defining the purpose of legislation and how it should be used	• Precautionary principle should continue to underpin NEF • Risk based approaches need careful thought

SPECIFIC EXAMPLES

4.9. Table 4.4 summaries examples and potential case studies highlighted by respondents to the consultation. Further details of these responses are given below.

Table 4.4. A Living Wales Consultation: Examples and Case Studies for refreshing regulatory and management approaches

Response	From
Problem with sites too small to support viable population of butterflies	Butterfly Conservation Wales
Requirement for biodiversity proofing of all ERDF projects in Scotland but meaningless because no agreed definition of reduction in biodiversity so cannot evaluate	Environment Systems Ltd
Doubt that planning permission for development & new woodland takes proper account of all environmental and economic issues. Concern that 'go through motions of EIA' as deterrent; not clear that ES is used.	Institute of Chartered Foresters
Bat survey revealed presence of bats; owners keen to enhance features in their planned extension; LA required more surveys because initial one not done under their guidance and money spent on this could not be spent on enhancements	MG (individual consultant)
LA required surveys for 2 BAP species for a very minor development even though habitat was completely unsuitable because database showed presence within 1 km square	MG (individual consultant)

Butterfly Conservation Wales

4.10. Butterfly Conservation Wales is part of the UK charity Butterfly Conservation. It is the lead partner in Wales for most species of butterflies and moths identified as priority species on the NERC Act s 42 list. It considers that the drastic decline in Lepidoptera species "is largely because of factors on land outside of the designated land network. Butterflies have continued to be lost from both SSSIs and nature reserves because they are too small in themselves to support viable colonies".

Environment Systems Ltd

4.11. Environment Systems Ltd is a Welsh based consultancy providing information and analysis of environmental and geographic information which specialises in the development and delivery of base-lining, mapping and monitoring in the environment, agriculture, land and property sectors.

4.12. The response recommends that minimum standards of biodiversity management should be applied to any developments funded by public money or requiring planning approval. It notes that there is a requirement for biodiversity-proofing of all ERDF³ funded projects in Scotland but considers this to be “largely meaningless” because there is no agreed definition of what constitutes a reduction in biodiversity which means that the requirement cannot be evaluated. It makes the further observation that few standards of environmental management are currently applied, citing BREEAM building standards⁴ as one example.

Institute of Chartered Foresters

4.13. The Institute of Chartered Foresters is a membership body for forestry and arboricultural professionals in the UK. Amongst other things, it regulates the standards of entry into the profession and provides opportunities to obtain professional qualifications by examination. Its members are involved in land management, and particularly woodland management at a practical, policy and academic level across Wales in both the private and State sectors. The response questions whether there has, in fact, been a failure of the traditional approach to nature conservation and believes that “the mere fact that the 2010 biodiversity targets have not been met is not in itself evidence” of such a failure. The response refers to “a sense of ‘moral panic’ apparent from the consultation document” and criticises it for the “lack of concrete evidence”. The Institute feels “that the reasons for failure to achieve the 2010 targets should be more fully examined so that conclusions can be drawn about the effectiveness of existing environmental protection mechanisms”.

4.14. Against this background comment, the response goes on to provide an example of an existing mechanism which it believes is ineffective: “One example of existing mechanisms that our members have some experience of is the decision making process surrounding planning permissions for development, and for new woodland establishment. We are doubtful that this process takes proper account of all the environmental and economic issues or that it informs the decision making process. Very often our members have the impression of being asked to go through the motions of an EIA as a deterrent to development rather than a rational evidence gathering process. It is by no means clear that the Environmental Statement is actually used to inform the decision that it is eventually taken.” It also refers to the use of ecosystem services balance sheets which would present an analysis of changes to ecosystem services as a result of a development proposal and says that such balance sheets are being used in support of urban tree planting proposals in the USA. It is sceptical of their value here, however, and comments “[w]e are doubtful that an ecosystem services balance sheet calculation would fare any better since the decision is not being taken on the basis of the

³ European Regional Development Fund

⁴ BREEAM stands for the Building Research Establishment’s Environmental Assessment Method. According to BRE, BREEAM sets the standard for best practice in sustainable building design, construction and operation. Assessments are carried out by licensed organisations and, if successful, lead to recognition of the standard achieved in the form of certification.

evidence available". I have not been able to find any further information on ecosystem services balance sheets but a Google search of "ecosystems services balance sheet urban tree planting United States" revealed several sites on assessments of urban trees which might be worthwhile following up.

Ecology Matters - Mick Green (Consultant)

4.15. Mick Green is an environmental consultant. He provides a number of examples, under the heading "refreshing regulatory and management approaches", based on his work experience:

A recent review of legislation relating to the protection of cetaceans undertaken for [the Whale and Dolphin Conservation Society] (Green, in prep) concluded that there is sufficient legislation in place to protect whales and dolphins, it is just not applied correctly." He believes that current environmental legislation is fairly comprehensive despite being developed in a piecemeal fashion and thinks the problem lies in the piecemeal way in which it is applied.

... there is too much 'tick box' application of legislation leading to excess costs and resentment from the public, especially for small scale projects. Examples of this are a bat survey that revealed the presence of bats, the house owners were very keen on having bats and agreed to build in a lot of mitigation and enhancement features into their proposed extension. The results would have been a great benefit to bats. However, the local authority required further bat surveys because the initial survey was not undertaken to their guidance, causing unnecessary costs to the owner – money that could have been spent on more bat friendly features. The experience of the surveyor and the end outcome should have been sufficient to allow permission to be granted.

4.16. He offers a further example this time on BAP species. "... the local authority required surveys for two BAP species for a very minor development, even though the habitat was completely unsuitable. A database had revealed their presence within 1 km square and so triggered the request for the survey. A much more common sense approach based on expert knowledge should be applied."

COMMENTS

4.17. Although there are some common themes coming out of the wealth of information supplied in response to this consultation, there are few examples of practice – good or bad. There is a tendency to generalise, possible to avoid disclosing details of projects that could be identified with individuals or particular sites, and this makes it difficult to explore the issues further in this report.

4.18. One particular concern that was raised on many occasions by respondents, especially individuals and SMEs, was over the way the consultation was presented. Several respondents

referred to the opaque language and the failure to pose questions that might prompt a response. Even professional bodies commented on the tone of the consultation document and its lack of precision. One consequence is that, while this was a public consultation, it did not attract much public comment. The vast majority of responses came from parties with a vested interest in the natural environment and the way activities are regulated in respect of it. Conservation and scientific bodies had greater awareness of the consultation than other groups such as industry and SMEs.

4.19. Despite these shortcomings, the consultation responses did contain a wealth of information about the process of regulation and management and some of the comments triggered ideas for further consideration. The discussion focuses on biodiversity aspects and does not attempt to explore the results in the context of NEF as a tool for multiple services. Given that most of the comments discussed appear to have been based on an original understanding of NEF as a biodiversity conservation tool, this seems to be the most appropriate approach for this chapter. Discussion of how the present legislative base for biodiversity is, or could be made to, address ecosystem services on a more integrated and systematic basis is deferred to Chapter 13.

4.20. Issues have been grouped according to the level at which they will need to be addressed – strategic, legislative or tactical. This is a somewhat artificial arrangement as some issues cover more than one level and because the comments were not normally made with these distinctions in mind. The purpose is to make it easier to identify issues that may require further attention at the different levels as NEF and, in particular, this workstream, are taken forward.

Need for strategic action

Changing perspective on protected areas

4.21. One suggestion was that protected areas should be renamed “sustainable resource areas” with “inalienable resources”. The reason for this suggestion was to change our perspective of protected areas being little islands of high ecosystem value “fenced off” from the wider environment. Instead they should be viewed as central cores in an outward facing ecosystem approach serving as pools of resources that need to be protected for the wider benefit. This way of looking at protected areas fits well with some of the ideas coming out of the Lawton Report and helps to cast protected areas in the context of ecosystem services. There is one strong caveat to this approach however. A number of respondents, mainly from the non-governmental conservation sector, expressed concern that the adoption of an ecosystem approach designed to deliver ecosystem services could weaken the protection available to wildlife. Biodiversity is a key component of the natural resource but it is more than just the species and habitats that can be seen to deliver direct economic benefits. The concern is that many species, especially those that are less well known, will be over-looked.

4.22. Another respondent thought that protected areas should be used as living experiments and suggested that they should be host to the most daring and radical experiments. The idea behind this suggestion seems to be that, as protected areas are already well understood and under sympathetic management, they are ideal candidates for trying out innovative methods of land management based on the ecological approach designed to protect ecosystem services. It is worth noting that the legislation providing for the designation of nature reserves and the now defunct marine nature reserves, included research in the purposes for designation. Section 15(2) of the National Parks etc.

Act 1949 defines land managed for a conservation purpose as land which is managed for the purpose of “providing, under suitable conditions and control, special opportunities for the study of, and research into, matters relating to the fauna and flora ... and the physical conditions in which they live, and for the study of geological and physiographical features of special interest in the area”. Although the research purpose is not included in the definitions of European sites or for the new Marine Conservation Zones, there is no reason why research projects should not be conducted in them provided this is in accordance with the underlying purpose of the designation. The proposed designation of Highly Protected Marine Conservation Zones in Welsh waters, for example, is, in effect, experimental, as it will provide a benchmark for assessing the effectiveness of closed areas.

Policy not Law

4.23. One of the general trends shown by the responses was broad satisfaction with the legislation; concerns were more about how the various laws and regulations are being applied. The comments point to management practices and underlying policy as causes for the concerns. The conclusion has to be that any review of the legal provisions has to be accompanied by a review of the ways the provisions are applied. The issue was neatly summed up by one respondent who stated that regulatory compliance was essential but it was a relatively minor component for successful environmental management.

4.24. As noted in Chapter 1, one of the overall conclusions from this workstream is that there is a lack of general appreciation of how legal frameworks might fit within a broader NEF policy. Some of the consultation responses do address policy and strategy and put forward suggestions for taking NEF forward. These are discussed in Chapter 12.

Need for legislative changes

Planners and developers will not consider biodiversity if there is no legal requirement to do so.

4.25. This comment is typical of a number of responses suggesting that embedding biodiversity actions in other sectors is best achieved if there is a clear, enforceable duty to do so. If limited resources are a factor in the failure to give due consideration to biodiversity, imposing a clear duty may improve matters by ensuring appropriate prioritisation. If biodiversity is not being considered because it falls outside the remit or the competence of officers involved, however, than simply imposing a duty is unlikely to be sufficient. There will also be considerable potential for disagreement over the terms of the duty. The NERC Act already imposes a duty on public bodies to have due regard to biodiversity yet several responses commented on the ineffectiveness of this provision. The difficulty lies in deciding how to measure or otherwise assess the importance of biodiversity as a matter of law. Conservation practitioners often find it difficult to judge what the effects of small interferences – such as disturbance of a listed species or loss of a small area of habitat – are likely to have at the ecosystem scale and to determine the significance of any given effect. It is likely to be much more difficult for practitioners in other disciplines and for those seeking planning permission. If properly worded, however, a duty of this type is likely to be very effective in ensuring adherence to NEF.

4.26. A suggestion made in a response from a Local Authority supports the idea that Local Authorities will only act if they are required to do so. It stated that Local Authorities should have

duties to compile and update a county LBAP, to survey all their land-holdings for biodiversity potential, and to follow these through with protective legislation.

There is a need for a detailed review of legal infrastructure to identify levers, challenges and opportunities for maximising existing systems.

4.27. Several respondents commented on the need for a review of existing laws to assess their compatibility with NEF. It was pointed out that this could not be done until the key outcomes expected from NEF had been properly defined. One of the purposes behind this particular workstream is to find out “how far would the current framework of regulation and management need to adapt to meet the new goals”. Much of the evidence from the eight projects touches directly on this question. Yet very few areas for change to meet the wider NEF objectives have been suggested. Where suggestions for amendments to the law have been made this has usually been done in order to address a perceived anomaly in the present system rather than to broaden its application so as to meet wider challenges. It is probably the case that this wider review can, as respondents state, only be carried out effectively once there are clear outcomes to achieve.

4.28. One sweeping allegation is that much of the necessary legislation for environmental protection is already in place but not the will nor the ability, skill or experience to take appropriate action. On the face of it, this is a damning criticism. The claims are supported in part by other consultation document responses and in other projects in this workstream. Several parties have referred to the lack of skill and experience of individual regulators, for example. There was no other evidence to suggest a lack of will. The comment raises another possibility, however, which is that the legislation itself is ineffective perhaps because it is too cumbersome or impracticable. In such circumstances, the law will be ignored by both regulator and regulated. Part of any review of existing legal regimes should be a check for redundancy.

4.29. One respondent commented that while current environmental legislation has developed in a piecemeal way it is nevertheless fairly comprehensive. He went on to say that the problem was with the piecemeal way in which it is applied. This comment provokes a number of thoughts. First, it was noteworthy that none of the consultation responses argued for a repeal of statutes (as opposed to sections of statutes) or suggested the need for major new legislation. There was no appetite for tailor-made Welsh legislation on a grand scale. There were pleas for a consolidation of existing laws, especially those relating to nature conservation. These responses suggest that the first respondent was correct in his analysis of the current environmental legislation. This is fortunate because it is almost inevitable that legislation will develop in a piecemeal way; indeed the practice of creating new legal measures as circumstances demand is one important way of addressing changing situations. The concerns over the piecemeal approach to implementation relate mainly to a perceived lack of coordination between the ways different pieces of legislation are implemented and point to a need for a greater mutual understanding between the different bodies responsible for different areas of environmental law. There is a clearly stated need for greater synergies between the ways laws are applied in different policy sectors. What is less clear is how this is to be achieved and whether there is a need for coordination to be legally enforceable and, if so, how.

4.30. One respondent commented that the limiting factors in successful implementation of regulatory and management approaches are not the regulations themselves but inappropriate policy

incentives and conflicting decision-making. Unfortunately, the respondent does not provide any specific examples. This comment does, however, point to the need to look at how regulations are used as well as what they contain. This should form an important part of the review of legislation.

Need for changes in practice of implementation

Enforcement issues

4.31. There were many comments about the lack of adequate enforcement of existing laws. These included comments about deficiencies in the legal instruments themselves. These often set out penalties for breach of measures and sometimes identify a body charged with policing compliance but there is no duty to enforce, merely a power to do so. Enforcement of some measures can be onerous, however, – breaches of marine wildlife protection measures provide an obvious example – and it is unlikely that there will ever be sufficient resources to police all such activities. Other methods of encouraging compliance are needed such as the use of code of practices policed by trade associations or learned societies and better education and training to explain why measures have been introduced in the first place. While it is true that a law that cannot be enforced is likely to be ignored, it does not follow that lack of enforcement activity necessarily signifies a bad law; in the best circumstances measures will be implemented and rules obeyed without the need for overt enforcement.

4.32. There were also concerns that the bodies responsible for enforcement did not make this a sufficiently high priority; failure to enforce planning conditions is an obvious example. This links back to the earlier point about legal duties and resources. There are legal rules for LPAs to follow in respect of dealing with planning applications on an appropriate timescale but no rules for them to see through the outcome of a successful planning application. Given limited resources, therefore, it is no surprise that efforts are concentrated on the front end of the development approval regime.

4.33. The key message here is that there should be an expectation that measures will be enforced and, if necessary, this expectation should be backed up by legal mechanisms to ensure that it happens. These need not be directly about enforcement. A requirement to monitor and to report on a regular basis could provide sufficient incentive, for example.

4.34. There needs to be a clear understanding of what compliance with the law means otherwise it will be impossible to enforce it through the courts. The suggestion that minimum standards of biodiversity management should be applied to development consents illustrates the potential difficulty. Will it be possible to devise such a standard with sufficient certainty and clarity to enable someone to assess whether it has been successfully complied with?

4.35. Lack of resources is said to be one of the main reasons for inadequate enforcement action. One respondent suggested that regulation could be made cheaper if there was a requirement for truthful reporting, for example in applications for licences and in any reporting requirements. Dishonest returns could lead to fines proportionate to the offence in question. My understanding is that there are already provisions making it an offence to make dishonest claims and I am not convinced that, on its own, this would lead to enhanced enforcement. It could simply add to the list of things that need to be enforced and could result in increased costs in the courts.

There is too much focus on details of particular instances whereas strategic opportunities are missed

4.36. A number of responses complained about approaches to quite small issues where over-attention to detail resulted in a failure to see the bigger picture. These concerns are linked to comments about over-bureaucratic approaches to regulation with over-reliance on a tick-box mentality rather than an individual analysis of the issue under consideration. In most cases, respondents were not critical of the legal instruments but with the way in which the law was applied. These comments suggest that a change in management approach might be called for. This will not necessarily be easy to achieve however. There is a reason why bureaucracy burgeons and rote replaces discretion; it is easier to manage! A KPI based on successfully applying a management protocol is easier to deliver and to assess than one that is based on achieving a successful outcome as a result of applying the protocol not least because it requires someone to make a judgment about what success looks like. There would also be a greater risk of failure because the outcome would not be entirely under the control of the individual concerned and performance appraisal would need to take this into account. This could prove difficult; management approaches can be difficult to adjust to take account of failures of outcomes in a positive light reflecting the effort put in to trying to achieve them. What is called for here amounts to a new approach to management that has sufficient focus on the desired outcomes to be able to accept that it may be necessary to try different ways for achieving it some of which will be less successful than others

4.37. The same criticism of too much focus on the particular at the expense of the strategic could be levied against the generality of responses to this part of the consultation document. A number of organisations including, for example, RELU, did provide information on other initiatives designed to address strategic approaches to natural environment management at the policy level. This information is discussed in Chapter 12.

The use of scientific evidence

4.38. One respondent, commenting on the application of the Habitats Directive and the Conservation of Habitats and Species Regulations, suggested that the way favourable condition is currently assessed could prove problematic for an ecosystem approach because it is too narrow with tight parameters. The respondent suggested that an ecologically driven approach was necessary with assessments being based on the expert opinion of the condition of the ecosystem.

4.39. This comment raises a number of questions specifically about the implementation of the provisions for the protection of Natura 2000 sites and more generally about the way scientific evidence is used in the decision making process. Judgments on the validity and relevance of scientific evidence differ according to the perspective of the person making the judgment but there is broad consensus on the need to keep things as simple as possible. The level of detail required for HRAs tends to be very high because of the need for the applicant to demonstrate that the proposed activity will not cause harm. Several respondents suggested that more reliance should be placed on expert opinion but this also raises questions. At the moment, there is a reliance on scientific data as objective 'fact' whereas expert opinion is challengeable for being too subjective. Unless and until there is better understanding of the relationship between scientific facts and their interpretation by

experts, it is likely that reliance on expert opinion will lead to more challenges in court and will not, therefore, improve the effectiveness of the legislation.

Scale of impact

4.40. A consideration of the scale of a potential impact is closely related to the question of how much scientific evidence is required for any particular assessment. Several respondents observed that the scale of the impact was rarely taken into account in assessments of all sorts. It was strongly argued that different scales of activity should have different levels of regulation reflecting the risk involved and the based on a common sense approach.

4.41. There is a strong case for developing a more risk based approach to decision making based on the principle that the assessment carried out and the mitigation required or conditions set should be proportional to the threat posed. However, this will necessarily amount to less detailed assessments for smaller scale proposals. It is the scale of the impact that is critical here, not the scale of the proposed project. Ecological systems are complex and dynamic and the potential impacts of a given activity may not be immediately apparent without some investigation.

CONCLUSIONS

4.42. The evidence presented in this chapter illustrates the point that however well law is drafted, its effectiveness will be strongly influenced by the way the words on the face of the Act or Regulation are interpreted and by how its provisions are implemented. It is possible, therefore, to make a given law more effective for a particular purpose simply by changing the policy context in which it is applied without the need for recourse to amending legislation. One example of such an approach is the suggestion that the perspective on protected areas should be revisited to see if they can be regarded as sustainable resource areas and/or locations in which novel management methods can be trialled under controlled conditions.

4.43. The existence of statutory responsibilities and duties is no guarantee that those charged with meeting these duties will necessarily comply with them or that they will fulfil their duties as fully as the legislators had intended. It takes more than a few words in a statute to ensure that a public body understands what it is expected to do and how much attention needs to be made to the duty, especially if this is an additional responsibility not easily bedded into its organisational culture. The evidence here, and in other projects in this workstream, points to the need to review how new responsibilities are placed on public bodies and how best to word powers and duties to ensure that they are implemented to the extent intended.

4.44. The question of how to enforce compliance with a duty is relevant here. Some commentators are of the view that it should be an offence to fail to comply with a duty but prosecution should be a last resort and there may be other ways of encouraging compliance. The inclusion of a duty to report on progress, for example, or to return monitoring statistics can provide a clear operational duty that may be easier to put into effect than a vague duty to have regard to something.

4.45. The evidence presented in this chapter and elsewhere in the report demonstrates that there can sometimes be broad satisfaction with a piece of legislation but profound dissatisfaction with one section or regulation contained within it. Putting legislation into practice generally involves dealing with each of the individual measures separately. The problem with this is that everyone can lose sight of the overall purpose of the legislation and instead get bogged down in the detail. If legislation could be applied with the outcome to be achieved in mind, this might go some way towards avoiding the problem of focussing on the detail at the expense of the strategic good.

4.46. The role of evidence is closely related to this previous point. Several people expressed the view that there was sometimes a disproportionate requirement for scientific data to be provided to inform a decision and that insufficient attention was paid to what the context in which the application was being made and the risks that might arise if permission was granted. There are a number of strands to these concerns. There is a need to accept that there will always be a degree of uncertainty in the scientific process and, although uncertainty can be reduced by carrying out further research, or obtaining more data, this will be at a cost and will never remove all uncertainties anyway. Some understanding of when it is acceptable to rely on expert opinion (and who is competent to offer it) is needed. The scale of the impact is also an important factor. It is illogical to expect the same level of scientific evidence in relation to all similar types of development regardless of their scale. These considerations lead to a further consideration of how we address risk and, therefore, the need for clarity on when it is appropriate to adopt a precautionary approach. There is a need to develop thinking on what the risks are in relation to environmental protection and use this to inform strategic thinking on how best to address them.

CHAPTER 5. INDIVIDUAL RESPONSES

INTRODUCTION

5.1. I have grouped a number of individual responses under this project heading. The original project description referred to information provided by LBAP representatives specifically for this workstream. In addition there are comments from the North Wales Police. The suggestions from the LBAPs and from the police are collated in Table 5.1 and discussed in detail below.

Table 5.1. Information from individuals

Topic	Issue	Source	Example provided	Legislation specified
Loss of unrecorded biodiversity	Some pre-application clearance falls outside EIA regulations	LAs	Yes	EIA regulations
	Access to land to check for presence of biodiversity and monitor is needed	Police	No	W&CA & CR
	Planning conditions requiring mitigation for biodiversity are not being followed up	LA	No	TCPA
	There is insufficient time to carry out biodiversity surveys and assessments for grant applications with fixed deadlines	LA	YES	
	Guidance on the best time for clearance does not take account of the requirements of different types of biodiversity	LA	NO	WCA
Disturbance of Species	The definition of disturbance and its practical interpretation need to be species specific	Not recorded	YES	W&CA; CR
	The extent to which habitat destruction amounts to disturbance is not clear	LA	NO	W&CA; CR
	Guidance on the best time for moving animals does not take account of the requirements of different types of biodiversity	LA	NO	W&CA; CR
	Need better, species based, guidance on disturbance	Consultant	YES	W&CA; CR
	Reckless, as well as intentional, disturbance should be covered by the legislation	Police	NO	W&CA; CR
	Bat breeding sites are protected but there is no comparable protection	Not recorded	NO	W&CA

	for birds returning to nest sites			
	Codes of Practice for wildlife watching as in the case in Scotland for cetaceans	Police		W&CA; CR
	Where replacement planting is required under TPO legislation it should ensure that planting is appropriate.	LA	YES	TPO
Consolidation and clarity of legislation	Wildlife & Countryside Act and Conservation of Habitats and Species Regulations are not always compatible	Not recorded	YES	W&CA; CR
	Need for consolidation of wildlife legislation	Police	NO	W&CA and others
Non-native species	Control over non-native invasive species is hampered by lack of definition of “in the wild”	Police	NO	W&CA
	Need for power of access to land to control invasive non-native species	WBP	NO	Wildlife & Natural Environment (Scotland) Act
Simplified Implementation	More use of codes of practice to assist in compliance by landowners and developers	Police	NO	
	Use of standard protocols for assessment purposes would simplify process	Not recorded	NO	
	Use of simple check lists to assist in assessment process	Not recorded	NO	
Enforcement	Stop notices should be re-introduced in relation to protected species	Police	NO	W&CA; CR
	There is a need for access powers to determine if an offence has been committed	Police	NO	W&CA; CR
	There should be an offence of breaching licence conditions	Police	NO	W&CA; CR
	There is a need for restoration orders to reinstate or replace protected places	Police	NO	W&CA; CR; Protection of Badgers Act
	Definition of serious crime	Police	NO	
	Vicarious liability	Police	NO	
	Legislation should incentivise compliance	LA	NO	
Licences	The species covered in General Licences should be amended to reflect their conservation status	Police	YES	
	Licence requirements are not well understood and this can deter landowners from carrying out nature conservation work	LA	NO	

	There should be an offence of breaching licence conditions	Police	NO	W&CA; CR
Biodiversity duty	The duty “to have regard to” in NERC Act s 40 is too weak	Police; LA	NO	NERC
	The duty in NERC Act s 42 for the NAW to publish biodiversity lists is too fiddly	LA	NO	NERC
	It should be an offence for a statutory authority to fail to pay regard to biodiversity	Police	NO	
	There is no requirement for developers to design their proposals to minimise habitat loss	LA	YES	
Habitats	The use of EDR 2009 should be strengthened so that they cover the safeguard and, where appropriate, restoration of habitats for biodiversity	LA	NO	EDR
	BREEAM does not prioritise ecosystem protection over non-native planting	Not recorded	NO	
	Third party operations likely to cause damage to an SSSI should be prohibited	Police	NO	W&CA
	It should be possible to use the SSSI legislation to designate buffer zones	Police	NO	W&CA
	Hedgerow Regulations do not protect against deterioration through neglect or mismanagement	Not recorded	NO	Hedgerow Regulations
	Hedgebanks are not covered by the Hedgerow Regulations	Not recorded	NO	Hedgerow Regulations
Planning	The study to examine planning application procedures in Wales suggests that biodiversity surveys should only be required for large projects	Not recorded	NO	TCPA
	Planning law and guidance needs to be amended to take account of TAN 5	Not recorded	NO	TCPA
Access	It should be an offence to carry out excluded activities on access land			CROW
	Closure and re-routing of public rights of way	Police	No	

LOSS OF UNRECORDED BIODIVERSITY

5.2. Evidence of site clearance prior to planning permission or where possible breaches of the EIA (Uncultivated Land and Natural Habitats) Regulations 2002 were reported was submitted collating

38 case studies from nine local authorities in Wales. Habitats listed as affected by clearance include woodland, wet woodland, scrub, hedges, heathland, and grassland. The size of the area cleared is not always stated but for those cases where it is, most are under 2 ha in size. The stated areas range in size from 0.1 ha to 22 ha. The information provided is just a summary list stating the name of the site and notes on the types of land affected. In some cases the purpose of the clearance is also indicated.

5.3. One of the major problems with clearance of this type is the lack of evidence to determine whether or not an offence has been committed, for example by disturbing protected species or damaging or destroying places used for shelter or protection by such species. Section 51 of the Wildlife and Countryside Act gives powers of entry onto land to determine whether it should be notified as an SSSI and to assess the condition of features for which an SSSI has been notified but there are currently no powers of entry to establish whether or not protected species are present or to monitor the status of protected species. Evidence from the North Wales Police states that “[i]t is often not possible to evidence offences against protected species simply because their presence has not been previously noted. On occasion this is due to landowners refusing to allow surveys aimed at establishing whether protected species might be present”. It is argued that if landowners know that the statutory authorities are aware of the presence of protected species this will deter them from committing an offence. The Police also referred to intelligence from various parts of the UK to the effect that a small number of consultants may submit survey results suggesting that protected species are absent when they are, in fact, present thereby saving developers considerable sums of money. At present the nature conservation agencies have no power to enter property to carry out surveys to challenge initial results.

5.4. It is suggested that a similar, but separate, power of entry is needed to monitor the status of protected species already known to be present on the land. The example is given of hen harriers nesting or attempting to nest on moorland where the landowner is not sympathetic to their presence. Concern over damage to the nest will generally be insufficient for existing powers of entry because these require a reasonable suspicion of an offence having been committed and this cannot be formed without gaining access to the site! A specific power of entry would allow for such a nest to be checked. There is also an anomaly with existing powers. If nests are located on open access land there is nothing to prevent anybody with a recreational interest in the birds from monitoring the nest but if this was done by a statutory authority it would not be for a recreational purpose and would not, therefore, be lawful under the Countryside & Rights of Way Act 2000.

5.5. The same concerns over lack of powers of entry were stated to apply to the Conservation of Habitats and Species Regulations as well.

5.6. Planning consents are sometimes subject to conditions relating to wildlife mitigation. It is stated by one Local Authority Biodiversity Officer that there is a lack of monitoring of planning conditions. She states: “[i]n my experience it is very rare that any checks are made that [such] conditions are monitored to check if they have been implemented and if they have been successful unless it is a large or significant development ...”. She does not provide any specific examples, however.

5.7. An Assistant Biodiversity Officer from another Local Authority identified a particular problem relating to biodiversity surveys and grant applications. She noted that towards the end of the UK and European financial years there is often a rush to get grant applications in before the window of opportunity closes. Conflicts then arise because the requirements for meeting funding application and spending deadlines do not take account of any wildlife legislation or best practice. She provides three examples:

- A planning application for renovation of an old school for community groups, without a bat survey, where approval of the plans was needed to accompany a grant application immediately.
- Application for refurbishment of and alterations to water power buildings, with an imminent grant spend deadline and, again, no bat survey.
- Funding for “safe routes” improvements which included moving a dry stone bank was only available until 31 March. It is not possible to survey for slow worms at that time because they are hibernating.

5.8. The timing of sensitive periods for different species was raised as an issue for site clearance and the need for further advice is flagged up. The problem is described as conflicts in legislation and is best illustrated by example. The Wildlife & Countryside Act protects wild birds so advice on clearance given to a developer who has not cleared the site prior to making a planning application is not to clear any suitable vegetation during the breeding season. As a result, hedgerows and scrub are often removed in the winter. However, the Act also protects common reptiles against killing and injury. Winter is the worst time to clear hedgerows and scrub if these species are present because they will be hibernating and the clearance could result in a large group being killed. It is recommended that WAG/WBP provide clearer advice on how to deal with this issue.

DISTURBANCE OF SPECIES

5.9. A number of points were raised about the legislation designed to safeguard protected species from disturbance. It was felt that the offence of intentionally or recklessly disturbing an animal which is a protected species “while it is occupying a structure or place which it uses for shelter or protection”⁵ was too imprecise and that definitions on what constitutes ‘disturbance’ and ‘place of shelter’ for individual species was needed, not just the generic requirement. Two examples were provided:

5.10. In 2005 a prosecution for disturbance of dormice (the first ever case on dormice since the Wildlife & Countryside Act was introduced in 1981) failed despite the fact that there had been destruction and disturbance of a place of shelter and acceptance by the judge that the woodland should be considered to be the resting place of dormice rather than an individual nest site. A successful prosecution for destruction of dormouse habitat was brought in Bridgend in 2007 but resulted in only a £100 fine. No further details were available.

⁵ Wildlife & Countryside Act 1981 s 9(4)(b)

5.11. A second, general, example concerns common reptiles. These are not fully protected under the Act. For the most part, common reptiles are covered by the provisions prohibiting the intentional killing, injuring or taking of protected species but the provisions regarding disturbance or destruction of habitat do not apply to adders, grass snakes, slow worms or common lizards. Only sand lizards and smooth snakes enjoy the protection offered by s 9(4). One submission asserts that there is a lack of clear guidance on how to deal with common reptiles in respect of planning applications and provides the following example: “if reptiles are translocated [there is no guidance on checking] that the translocation site is suitable for reptiles and is not already at carrying capacity for [the] species [in question]”. It is stated that Natural England has much clearer advice on this issue which should be used in Wales. The concerns are backed by information supplied by another Local Authority Ecological and Environmental Advisor who states that the limited protection afforded to reptiles under the Act “leaves habitat loss a grey area” and argues for a better link between presence of reptiles and how their habitat is treated.

5.12. For some of the offences against species, notably offences relating to disturbance and destruction of sites in the Wildlife and Countryside Act, the offence can be committed by reckless as well as intentional behaviour. The Police recommend that recklessness should be used in connection with other offences as well, namely those covered by provisions in ss 1, 9 and 13 of the Act. Sections 1(1) and 9(1) prohibit intentional killing, injuring or taking of wild birds and protected animals respectively and s 13 makes comparable provisions in respect of listed plants. The recommendation is made because “[t]here are many incidents where wildlife is persecuted but prosecutions cannot be taken because of the difficulties in evidencing intent”.

5.13. One observation from an un-named ‘stakeholder’ is that current legislation discriminates between species; specifically, bats are singled out for protection against disturbance in a dwelling house otherwise than in the living area⁶ whereas birds that return to the same nesting site year after year (e.g. swifts) do not have similar protection.

5.14. Many commentators have referred to the complexities surrounding the legislation for protected species. The Police consider that there is a need for codes of practice and suggest that these should be produced by CCW. More specifically, it is argued that the legislation should provide for the production of codes of practice relating to wildlife watching as is the case for cetaceans in Scotland⁷. It should be made clear that breach of the code would be evidence of the species being disturbed. An environmental consultant with considerable experience of species licensing also advocated better guidance which he said needed to be species specific if it was to be of any real use. He considered the present provisions to be anomalous and by way of example noted that he would need a licence to visit a hen harrier nest, but not to trawl through an area with young dolphins.

5.15. A Countryside Officer provided an example of a “specific weakness regarding TPOs and [the] Forestry Act ... in particular, but not exclusively woodland TPO”. He gives the example of a prosecution following the felling of a number of trees in an ancient woodland and subsequent re-planting in a very different location and orientation which the Planning Inspectorate nevertheless

⁶ Wildlife & Countryside Act s 9(5)

⁷ The Nature Conservation (Scotland) Act 2004 s 51 requires Scottish Natural Heritage to produce the Scottish Marine Wildlife Watching Code.

found acceptable. “This effectively resulted in loss of woodland area to development potential, [with] replaced trees in a line along [the] boundary effectively not replacing [the] woodland”. Additionally, the respondent noted that a “Forestry Commission replant (due to lack of felling licence) was not pursued due to recent Rockall case (defendant claiming that the trees felled were or will be part of a garden)”. No further details were provided.

CONSOLIDATION AND CLARITY OF LEGISLATION

5.16. One submission comments that there is a mismatch between the Wildlife and Countryside Act and the Conservation of Habitats and Species Regulations. The particular example given is that procedures for dealing with bats and other EU protected species under the Act are different from those in the Regulations and that relevant sections of the Act have not been repealed so interpretation of the legislation is both confusing and difficult. As an interim measure it is suggested that the Welsh Government should publish guidance on the interpretation of the Regulations and the Act with respect to the requirements for individual protected species, particularly bats, otter, great crested newt and dormouse.

5.17. This is not the only plea for ‘tidying up’ wildlife legislation. The Police wrote to the National Assembly of Wales in 2007 recommending the creation of a consolidated Act to replace the Wildlife & Countryside Act because the large number of amendments means that only those who deal with the subject on a day to day basis fully understand the present position. The Police believe that a consolidated Act would “undoubtedly result in enforcers being more confident when addressing wildlife crime”. It is suggested that existing wildlife legislation, including the Protection of Badgers Act, Protection of Seal Act⁸ (sic) and the various Game Laws should be repealed and that their provisions should be included in the one comprehensive and effective piece of conservation legislation. Further evidence from the Chief Constable submitted for this project, confirms the ongoing need for these changes. A similar recommendation for consolidation of the Conservation (Natural Habitats, etc.) Regulations 1994 to include subsequent amendments has been superseded by their consolidation in the Conservation of Habitats and Species Regulations 2010 although these do not include the provisions of the Offshore Marine Nature Conservation (Natural Habitats etc.) Regulations 2007 as recommended by the Police.

INVASIVE NON-NATIVE SPECIES

5.18. Concerns over the interpretation of statutory terms have been noted above in relation to the species protection measures and, in particular disturbance. The Police raised another concern over the provisions for controlling invasive non-native species. Section 14(1) of the Wildlife and Countryside Act, which relates to the release of non-native animals appears to them to be working effectively. Section 14(2) on plants, however, is described as being “widely considered to be unenforceable”. The section makes it an offence to plant or otherwise cause a prohibited plant to grow in the wild. The concern is that “in the wild” is not defined and has not been tested in the

⁸ Presumably referring to the Conservation of Seals Act 1970.

courts. “As a consequence little enforcement activity in relation to non-native invasive species is undertaken.” The Chief Constable goes on to suggest that an “ability to effectively enforce the legislation might allow issues such as the spread of Japanese Knotweed ... to be tackled”.

5.19. There is currently no power for officers of the Environment Agency, CCW or the Forestry Commission to go onto private land to control invasive non-native species without the consent of the owner or occupier. This means that it can be impossible to stop the spread of the species. The example of New Zealand Pigmy Weed (*Crassula helmsii*) spreading through a river catchment was cited. It was noted that Scotland has recently legislated to address this problem. Section 16 of the Wildlife & Natural Environment (Scotland) Act 2011 amends the Wildlife & Countryside Act 1981 by making provision for special control orders. Section 14M of the 1981 Act gives a power of entry to authorised persons for various purposes connected with special control orders.

COMPLIANCE AND ENFORCEMENT

5.20. A number of concerns were raised relating to enforcement. These included perceived problems with the wording of the law which make it difficult to obtain evidence to support a prosecution and management approaches which lead to enforcement being a low priority partly because of the lack of legal requirement to enforce and partly because of limited resources.

5.21. The Police make a number of suggestions designed to improve compliance and enforcement. In his letter to the NAW in 2007, the Chief Constable recommended the introduction of “stop notices” to prevent activities that might result in damage or destruction of protected places, included those covered by the species protection provisions of the Wildlife and Countryside Act and the Conservation Regulations. In his follow up for this project he notes that, while there has been no legislative change, the introduction of civil sanctioning provides a mechanism for halting development affecting protected species. This raises the question of whether CCW should be provided with civil sanctioning powers. CCW have pointed out that they should have been granted sanctioning powers under the Regulatory Enforcement and Sanctions Act 2008 and the Environmental Civil Sanctions (Miscellaneous Amendments) (Wales) Regulations 2010 but these are pending subject to a review of Hampton principles.

5.22. As noted above, the Police also suggest that the current scope of the law on powers of entry should be extended to cover entering land for the purposes of establishing whether or not protected species are present and entering land to monitor species. They also recommend that there should be a specific offence within the Wildlife and Countryside Act of failing to comply with conditions or a licence issued under the Act. This suggestion is made because “[w]ithout such an offence developers can breach the conditions of their licences but are unlikely to face sanction as harm or disturbance cannot in itself be evidenced nor can damage to ... protected places [of protected species].

5.23. The Police would also like to see the power to issue restoration orders which are currently available in relation to protected sites extended to apply also to sites used by protected species i.e. where the protected places of protected species have been damaged or destroyed. At present there

is no opportunity to apply the “offender pays principle” to such cases. It is recommended that similar provisions should be added to the Protection of Badgers Act 1992.

5.24. The Regulation of Investigatory Powers Act 2000 s 32 defines ‘serious crime’. The Police believe that in certain circumstances wildlife and environmental crime should be considered as being serious, thereby allowing for covert surveillance. It was suggested that criminal offences likely to affect the conservation status of BAP species and habitats at a local level should be considered as serious crime.

5.25. The Police suggest that compliance with conservation law might be improved if the concept of vicarious responsibility was introduced. This would place a greater responsibility and liability on landowners and developers to ensure that their staff do not engage in unlawful activity such as illegal poisoning of birds of prey or destruction of protected habitats.

5.26. Finally under this heading, there is a suggestion that compliance might be more effective if legislation incentivised, i.e. stressed the positive rather than the negative.

LICENCES

5.27. There are several comments on the use of licences including the suggestion for the offence of breach of licence conditions referred to above. In his letter of 2007, the Chief Constable expressed concern that WAG was issuing general licences for killing ‘red-listed’ species of birds namely starling and house sparrow whereas in England general licences have not applied to these species for a number of years. He noted that at the time when they were removed, Canada Goose was added but concludes that he has “no reason to argue that the same step should be taken in Wales”. The follow up submission of 2010 makes no reference to general licences and it may be that the problem has now been resolved.⁹ Regardless of this, it is worth recording the comment as an illustration of the need to keep lists up to date.

5.28. On a more general note, a Senior Biodiversity Officer considered that a lot of legislation appears to be inaccessible and not easily understood and cites licensing provisions as an example. She says that she has “experienced landowners who would be quite happy to do conservation works on their land but will not because of their perceptions and (lack of) understanding of licensing requirements and restrictions that may be placed on them once they are known to have a European Protected Species on their land” and goes on to give the example of pond creation for great crested newts.

⁹ WG have confirmed that house sparrow and starling were removed from the Wildlife & Countryside Act General Licence in Wales from January 2011.

BIODIVERSITY DUTY

5.29. Evidence from local authorities and from the Police raised a concern with the effectiveness of s 40 of the Natural Environment and Rural Communities Act which has come up in several other projects under this workstream. It is suggested that compliance would be greater if the duty was backed up by a requirement to report on how the duty had been discharged. A local authority representative also felt that s 42, which imposes a duty on the NAW to publish a list of important species and habitats and take such steps as are reasonably practicable to further their conservation, was “too weak and fiddly to deal with”.

5.30. On a similar point, the Police suggested that it should be an offence under the Wildlife and Countryside Act and the Conservation Regulations for a statutory authority to fail to pay regard to biodiversity and note that “[t]ime and time again instances occur ... where insufficient regard is paid to biodiversity resulting in loss or damage to protected places” (i.e. places used by protected species) much of which could be avoided “if public bodies were required to fully consider the impacts on biodiversity of licences and permissions granted by them”. The Chief Constable goes on to assert that “[l]egislation could be extended so that public bodies commit a criminal offence if a negative impact on protected species occurs as a consequence of operations being carried [out] under statutory licence or permission. Such measures would ... have a substantial impact on the planning and highways departments of local authorities in particular”.

5.31. The lack of any duty to consider biodiversity was also raised by a local authority officer in relation to planning consents. His concern was illustrated by the example of an application involving the complete loss of hundreds of metres of sandy beach and hundreds of metres of rocky shore which he suggests might have been avoided if there was a way of making developers design proposals that minimise this kind of loss. He thinks that there should be more incentive to avoid these losses. Also there should be a legal means of ensuring that semi-natural habitats and wildlife sites are taken into account in planning cases and that they should not be destroyed in the course of management. He makes the point that even those sites that are not of SSSI status are worth protecting in this way because “they are often links for connectivity and can be the main islands of wildlife in seas of improved grassland”.

HABITATS

5.32. Most of the comments from local authorities and the Police related to species protection measures but there were also references to the law relating to habitats. For example, one local authority representative suggested that the Environmental Damage Regulations 2009 need to be strengthened to safeguard and, where appropriate, restore habitats for biodiversity. Presumably this suggestion relates to habitats that are not otherwise covered by the existing Regulations.

5.33. One stakeholder (identity unknown) makes an interesting comment on BREEAM. Apparently the assessment does not prioritise ecosystems and it is possible to gain more ‘points’ from a diverse

set of non-native planting than from protecting an existing ecosystem. There is a plea for BREEAM to be updated or for an extra bit to be added for Wales.

5.34. The Police would like to see a new offence of knowingly carrying out an operation likely to damage the special interest of a protected site comparable to the existing offence applying to owners and occupiers but this time applying to any person. The Chief Constable acknowledges that the Countryside and Rights of Way Act created an offence of third party damage to SSSIs¹⁰ but notes that this required evidence of damage to the designating features and knowledge of the status of the site. He also refers to a further offence of third party damaged created in the NERC Act¹¹ where, although guilty knowledge is not required damage to the designating feature still has to be proved. He feels that this is not entirely satisfactory as shown by the following hypothetical situation. If motor cyclists drive over fragile heath over a period of time damage may result from cumulative behaviour. It is unlikely that evidence would be available to demonstrate that any one offender caused damage but an offence of carrying out operations would resolve these difficulties.

5.35. The Chief Constable would like further amendments to s 28 of the Wildlife and Countryside Act to provide for designation of land as an SSSI even if designating features are absent in those situations where there is a likelihood of operations being carried out on that land which would affect such features located elsewhere, i.e. to create buffer zones. He provides the example of the freshwater pearl mussel where the designated sites are the river channels. However, the water quality in the river is determined by activity that occurs outside the SSSI; in order to influence the quality of the water, restrictions would have to be imposed across a much wider area.

5.36. There are two comments about the limitations of the Hedgerow Regulations. Information is provided that currently the Regulations allow an individual to progressively degrade a hedgerow, through mismanagement, to the point at which it no longer meets the wildlife criteria for protection and can be ripped up. Secondly, there is no protection for hedgebanks where the hedgerow does not meet the criteria but the bank is important for wildlife. Even where a protected hedgerow is removed, there is nothing in the Regulations to ensure that a replacement bank is created to the specification of the old one and, even if it was, often it would take a lot longer for the bank to become similar to the original than it would for the replacement hedgerow.

PLANNING

5.37. There was a comment expressing concern about the Study to Examine the Planning Application Process in Wales¹² because the content suggests that planning authorities should not ask for ecological surveys except for large developments, i.e. 10 dwellings or more or over 0.5 ha. It is claimed that “[v]ery few of our applications are this size, but in combination have the potential for significant impacts on biodiversity”.

¹⁰ Countryside and Rights of Way Act 2000 s 75 and Schedule 9 introducing s 28P in the Wildlife and Countryside Act 1981.

¹¹ NERC Act 2004 s 55 amending s 28P by the addition of s 28P(6A).

¹² Published by the NAW in June 2010

5.38. The same author thought that changes were required to the Town and Country Planning Act and related circulars to bring them up to date with wildlife legislation and policy, especially with regard to planning conditions and obligations for biodiversity enhancements in light of TAN 5 etc.

ACCESS

5.39. The Police raised issues relating to access. It was suggested that the legislation on public rights of way should be amended to allow for a diversion or closure in the interests of nature conservation. It was noted that a footpath passes within 100 m of the Wales (then) only pair of breeding ospreys and there were no provisions to allow closure or diversion in order to prevent the birds being disturbed during nesting.

COMMENTS

5.40. This project has provided a wealth of information often relating to specific pieces of legislation. In some cases there may be no need for changes to the law itself, merely to its interpretation and/or implementation. In others changes will necessitate amendments to the legislation. All of the examples given should be followed up and this recommendation is noted in later chapters.

CHAPTER 6. COMMITTEE REPORTS

INQUIRY INTO BIODIVERSITY IN WALES

6.1. The National Assembly for Wales Sustainability Committee conducted an Inquiry into Biodiversity in Wales in 2010 and reported in January 2011. It received written evidence from 24 organisations and individuals, and held four evidence sessions. The Report makes 19 recommendations including recommendations on legislation and planning. My approach to this project was to read the report, all the written evidence and the oral transcripts of the oral evidence sessions to identify information of relevance to this workstream.

6.2. The report makes a number of recommendations emphasising the need for high level strategic changes to ensure that the protection of biodiversity and the ecosystem approach are integrated across all policies. Recommendation 1 refers directly to the need to mainstream biodiversity across Government and Recommendation 2 calls for sub-targets on biodiversity for all Government departments to ensure the integration of targets across Government in an accountable manner. Unequivocal support for NEF is given in Recommendation 6 which states:

The Welsh Government should adopt a strategic ecosystems approach to the management of biodiversity in the wider countryside through the [NEF]. This ecosystems approach should be central to the Government's efforts to achieve the 2020 targets, and its effectiveness should be reviewed in 2015.

6.3. The written response to the report made by the Minister for the Environment, Sustainability and Housing¹³, accepts Recommendations 1 and 6 and accepts Recommendation 2 in principle subject to further work on indicators and targets.

6.4. Chapter 8 of the Report covers legislation. It focuses entirely on the evidence received in connection with the duty on public bodies contained in NERC Act requiring them 'to have regard to biodiversity'. The evidence showed that the duty was generally welcomed but there was a strong feeling that the duty did not go far enough and that implementation of the duty had been patchy. The concerns came from across the range of sectors giving evidence. For example, a number of wildlife organisations thought that the duty had not been given a high enough priority within the planning system, while a local authority stated that it was not comprehensive enough for it to have a real effect because it did not apply to private companies. The WANPA described the duty as weak and woolly and called for the duty to be strengthened from a duty 'to have regard to' to a duty to support and promote, a view shared by Wales Environment Link (WEL). The report also notes that the then Minister also recognised the need to amend this legislation. In response to this evidence, the Sustainability Committee made the following recommendation:

¹³ Available at <http://www.assemblywales.org/gen-ld8491-e.pdf>.

The Welsh Government should legislate ... to place a duty to support and promote biodiversity on relevant organisations, building on the duty to have regard to biodiversity established by the Natural Environment and Rural Communities Act (Recommendation 18).

6.5. The Minister notes this recommendation in her response and refers it to a future Government.

6.6. Chapter 7 of the Report covers planning. It identified three main issues relating to planning that had an impact on biodiversity. The first was the lack of ecology expertise within local planning departments which resulted in a lack of capacity to take opportunities for pre-planning discussions to protect and enhance biodiversity.

6.7. The publication of TAN 5 was welcomed by some local authorities but, again, lack of expertise was having a detrimental effect on its application which was inconsistent. In particular, both local authority and NGO witnesses referred to insufficient understanding of how to use the planning tools with confidence and it was suggested that a more formalised approach was needed to ensure that mitigation, compensation and enhancement are fully pursued where necessary.

6.8. The Sustainability Committee shared the concern that current planning regulation may not be being applied properly and made the following recommendation, in line with the recommendations made in the Committee's report on Planning in Wales, which is discussed below:

The Welsh Government should ensure that local authorities have access to sufficient resources and expertise to be able to ensure the proper implementation of biodiversity legislation through the planning system ... (Recommendation 15) .

6.9. According to the Minister, this recommendation has already been fulfilled. Her response refers to updates and consolidation provided in TAN 5 Nature Conservation and Planning Policy Wales and notes that funding is available through the unhypothecated grant and other specific sources.

6.10. The second issue, raised by local authority witnesses, was the increasing problem of site clearance prior to the submission of an application for development. Several local authorities stated that there were loopholes in the planning regulations which meant that developers or landowners could clear sites of potential biodiversity importance before making a submission for planning consent. In the absence of an ecological survey of a site prior to clearance, planning authorities did not have sufficient information to ensure proper compensation or mitigation for damaging activities. The problem was said to occur because the current EIA regulations for uncultivated land only require the surveying of land that is being improved for agricultural purposes. The Committee recommended that this loophole should be closed:

[T]he Welsh Government [should] work with the European Commission to ensure the current loophole in the EIA regulations allowing development sites to be cleared prior to the submission of a planning

application is closed. To prevent an further biodiversity loss in this way, this should be done as a matter of urgency ... (Recommendation 16).

6.11. This recommendation was rejected in the Government's response which states that the EIA Directive has been transposed fully for the purposes for which it was intended. However, the response makes specific reference to the work of this workstream stating that 'Any further need for strengthening of our approach would be considered in the report on the effectiveness of the current regulatory approaches and proposals for changes in December 2011'. Given this comment, the text of the response from the Minister is provided below so that this can be taken into account in any further work:

The planning system cannot anticipate development coming forward, other than where this is promoted as part of an adopted plan, and it cannot exert any control over land unless a proposed activity requires planning permission. While planning permissions can include conditions or obligations that manage the clearance of vegetation on site, it can only do this while a consent is being implemented, or once the development is operational.

There is a suite of other controls available that will influence whether and how sites are cleared. These include felling licences, tree preservation orders and conservation area status that manage the removal of trees as well as the Hedgerow Regulations that will regulate clearance activities. Under the Birds Directive, Habitats Regulations and Wildlife and Countryside Act 1981 particularly sensitive sites have statutory protection and individual species are also protected from disturbance which prevents damaging clearance activities.

Where prior clearance takes place on a designated site or a protected species site prosecution action can be taken under this legislation. Any further need for strengthening of our approach would be considered in the report on the effectiveness of the current regulatory approaches and proposals for changes in December 2011.

6.12. The third issue raised in the evidence was the issue of net planning gain. Witnesses from the NGO sector thought that encouraging more spatial planning of biodiversity by identifying key areas for protection and key opportunities for developers to contribute to biodiversity enhancement could provide a way for the planning system to deliver biodiversity gains. The Committee took evidence from the Environment Bank which proposed that landowners should be required to buy biodiversity credits as a form of compensation for biodiversity lost as a result of development and, while not committing themselves to the approach, members expressed an interest in the concept. The Committee was more persuaded by the NGOs support for the Networked Environmental Regions concept, developed under the Wales Spatial Plan, as a way of delivering positive planning through a green infrastructure and made the following recommendation:

The Welsh Government should take the opportunity provided by the development of the Natural Environment Framework to further develop the Networked Environment Regions concept under the Wales Spatial Plan. Ministers should ensure that NEF priorities are incorporated into the WSP and WSP Regional strategies so that biodiversity is given greater priority within them (Recommendation 17).

6.13. This recommendation is accepted in the Government's response.

INQUIRY INTO PLANNING IN WALES

6.14. The Sustainability Committee conducted a broad-ranging inquiry into planning policy focussing on the development of planning policy at national and local levels and how successful these policies are at delivering Welsh Government objectives. As noted in the report of the biodiversity inquiry (see above), the role of the planning system in biodiversity protection was raised in the evidence as well as broader issues around environmental sustainability. The Committee made 30 recommendations in their Report on the planning inquiry. While none of these specifically addresses biodiversity issues, the recommendations for a more sustainable approach could be said to encompass these issues.

6.15. The way that biodiversity is addressed within the planning system was raised in evidence. The first comment echoes the concerns expressed in the biodiversity inquiry about the lack of technical expertise and capacity within the planning community. The Committee summarises these concerns as follows: "as the inquiry progressed we were struck by the fact that the fundamental principles of the planning system still operating in Wales were originally designed for an immediate post-war Britain. Since that time what is essentially a system about managing the use of land has been asked to deliver an ever increasing range of diverse policy objectives". One consequence of this widening remit is the need for more technical knowledge across more sectors of interest and the concern is that this need has not been met. Expertise in biodiversity is one of the sectors in question. As one local planning authority stated: "... we do not have the technical expertise to consider all the landscape issues, biodiversity issues, noise impact issues, or the highways issues, although it is down to the local authority to juggle those issues and to gain an understanding of them". The Committee made the following recommendation in response to this evidence:

We recommend that the Welsh Government should carefully review any further proposals to deliver strategic objectives through the mechanism of the land-use planning system to ensure that it is the most appropriate vehicle for delivering those objectives and that it has clear delivery mechanisms related to them (Recommendation 2).

6.16. The Government's response to the report¹⁴ accepts this recommendation noting its intention to introduce an impact test to consider whether the planning system is the most appropriate vehicle to deliver new strategic objectives and policies.

6.17. The issue of skills, resources and training was taken up in more detail later in the report. The lack of resources was identified as a recurrent theme in the evidence. The lack related both to numbers of staff and to their skills and knowledge in an increasingly technical arena. The Committee made a number of recommendations to address this issue under the following headline recommendation, all of which were accepted by the Government:

the Welsh Government should encourage the sharing and development of expertise on planning policy and proposals for development (Recommendation 29).

6.18. The Report goes on to recommend a number of ways in which this could be done including the continued provision of funding for training and access to technical support; encouraging joint working and collaboration between local planning authorities; and setting up expert advisory teams to support local planning authorities.

6.19. There was conflicting evidence on the interpretation of national planning policies, notably on the balance to be assigned to the economic, social and environmental considerations. Whilst the Planning Inspectorate thought that priorities had been clearly identified, other witnesses were less convinced and thought that greater clarity was needed. The CBI, for example, did "not think there is any balance in the way that [economic, social and environmental] pillars are taken into account in planning decisions". It was suggested by a local planning authority officer that the attention afforded to legal requirements resulted in extra weight being given to environmental and habitat considerations. He stated: "... there is a lot of pressure on us to deal with environmental and ecology matters. ... this is reflected in the fact that there are other appraisal mechanisms, not just the sustainability appraisal, that include the environment and we now also have to deal with strategic environmental assessments and habitat regulations assessments, which may throw up another assessment, the appropriate assessment. That all seems to be weighted towards making sure that we do not harm the environment". There was also a particular concern about how National Park Authorities were supposed to weigh their 'special purpose' in relation to national planning policies and the need for some clarity on relative priorities was highlighted. In addressing these concerns the Committee recommended that:

the Welsh Government should amend chapter 1 of Planning Policy Wales to provide a clearer statement of its strategic priorities and to clarify how conflicting objectives should be resolved where they occur in the planning system (Recommendation 7, in part).

6.20. This recommendation was accepted by the Government which made a commitment to further consideration of the approach suggested.

¹⁴ <http://www.assemblywales.org/gen-ld8470-e.pdf> .

6.21. The link between planning policy and local development plans was raised as an issue of concern by WEL who stated that the “main problem ... is that Planning Policy Wales and TAN 5 are not set out in the form of development plan policies, with clear criteria by which development proposals can be judged, being instead in the form of a generic and often somewhat open-ended narrative [which] creates a high degree of uncertainty”. The Committee picked up on this point and recommended that:

the Welsh Government should revise the chapters in Planning Policy Wales to ensure that the national development control policies are expressed in full as policies that can be clearly cross-referenced in Local Development Plans and Supplementary Planning Guidance (Recommendation 10).

6.22. This recommendation was noted in the Government response but referred for consideration by the incoming Government.

6.23. There was a lot more evidence presented in relation to LDPs. One issue of particular relevance to this workstream was the need for robust evidence to support LDP policies. Some witnesses expressed concerns that the evidence base was not as robust as it might be especially in respect of flooding and biodiversity, echoing the concerns raised in the biodiversity inquiry. WEL stated that “[t]here is little evidence that LDP formulators are including biodiversity evidence for example beyond statutorily designated sites and legally protected species in their evidence base”.

COMMENTS

6.24. The two reports of the Sustainability Committee were informed by a large body of evidence that is of relevance to NEF. The work of the Committee in these two areas could be regarded as preparation for this workstream and it is suggested that the recommendations referred to in this section are taken forward.

CHAPTER 7. CCW LEGISLATION CRITIQUES

INTRODUCTION

7.1. CCW officers analysed a selection of legal instruments of particular relevance to conservation. Assessments were made against principles for good legislation in section 1.2 of the Regulation and Management Workstream Project Plan, i.e. *“in principle, regulation should generally be necessary, relevant, proportionate, timely based on risk, enabling rather than discouraging, as simple as possible, transparent for the user”*. The legal instruments analysed are shown in Box 7.1.

Box 7.1 Legislation Analysed by CCW	
Habitats Directive	also covers Birds Directive and Convention on Biological Diversity
Water Framework Directive	also touches on implementing regulations
Marine and Coastal Access Act	
Marine Strategy Framework Directive	
Protected Landscape legislation	mainly National Parks etc. Act
Species legislation	mainly Pt I of the Wildlife and Countryside Act
Wildlife and Countryside Act	
SSSI legislation	Pt II of the Wildlife and Countryside Act

7.2. For the most part the completed critiques each follow the same format with a section on the key facts, a commentary on compliance with the principles for good legislation and some concluding remarks. The commentary questions are listed in Box 7.2.

7.3. For each of the critiques I have picked out salient features from the analyses relating to the principles of good legislation but have also tabulated additional and/or explanatory comments according to whether these are positive or negative. Please note that there is no read across between the left and right hand columns in this tables (i.e. the positive comments do not relate to adjacent negative comments). The extent of the comments appears to be dependent on who conducted the critique. I have finished with a list of issues that have arisen or which occur to me as points that might be followed up, either in this report or as recommendations for further work.

Box 7.2 CCW's criteria for considering compliance with principles for good legislation

1. Necessary?
2. Relevant?
3. Proportionate?
4. Timely?
5. Based on risk?
6. Enabling rather than discouraging?
7. As simple as possible?
8. Transparent for the user?

HABITATS DIRECTIVE

7.4. The author of this critique sets out some key facts detailing the origin of the Directive and its main provisions. The analysis covers the Birds Directive to the extent that it is affected by the provisions in the Habitats Directive. There is also reference to the Habitats Directive's part in meeting the EC's ratification of the Convention on Biological Diversity (CBD).

7.5. One of the key facts listed is that both the CBD and the Habitats Directive incorporate the precautionary principle into decisions affecting biodiversity. The author states that the "directive does so in a very specific way, by reversing the traditional burden of proof in environmental planning and management, requiring that actions affecting protected sites and species demonstrate absence of harm before they can proceed, rather than requiring harm to be demonstrated before permission can be refused". The extent to which the Directive incorporates the precautionary principle is considered further in the conclusion to this report.

7.6. The critique concludes "that rigorous and properly resourced implementation of the Directive, in particular the management and protection of SACs and SPAs and the development of wider measures in accordance with Article 10, should form a key part of the legislative toolkit for implementing the NEF". The Directive scores quite highly against the criteria for assessing good legislation although this is conditional on the way measures are interpreted and implemented. It is claimed that, as the Directive is still in the process of being implemented, it is too early to determine its overall effectiveness.

7.7. Table 7.1 summarises the comments made by the author on this Directive, grouping them into positive and negative comments.

Table 7.1. CCW Critique of Habitats Directive – Positive and negative comments

Positive comments	Negative comments
• Consistent approach to CBD in Europe providing level playing field re opportunity costs • Arts 6 & 10 provide means to address threats from land use (1 of 2 main threats to EU biodiversity) • Monitoring and reporting requirements highly relevant • Inclusion of re-consideration procedures in Cons Regs (but not Directive) allows for additional restrictions and hence promotes mitigation • Arts 6.3/6.4 work best for sustainable development if there is a meaningful comparison between harm and benefits (as opposed to requiring all failed AA applications to meet the same high standard of public interest etc.) • Perceived delays in decision making because of directive and regs could be avoided by great collaboration between developers, CAs and conservation agencies at early stage. • No reason why information re EIA/SEA cannot be used for AA as well. • Birds & Habitats Directives in their entirety based on risk assessment • Can be viewed as enabling if there is sufficient resource for positive management schemes. • Ref to Lord Sullivan in Dilley Lane Judicial Review referring to Habs Regs as a tool to aid effective environmental decision-making not a legal obstacle course • For large developments, developers are scoping out entire assessment process from the beginning, i.e. anticipating need for Art 6.4. This approach allows for more collaboration between developers, regulators and conservation agencies and avoids lengthy disagreements over conclusions of AA and standard of proof applied. • Nothing in directives or regs that make them inherently opaque or difficult to understand	• One of biggest weaknesses is lack of specific obligations re Art 10, especially re climate change (2 of 2 main threats to EU biodiversity) • Any weaknesses in monitoring and reporting down to poor transposition and/or inadequate resources • For widely dispersed and relatively common habitats and species disproportionately small response in protection by designation • Over emphasis on particulars and insufficient emphasis on sustainable use and management of wider environment (but thinks slightly unfair criticism) • Higher standard for species derogation than site derogation under Art 6.4. Suggests that intervention that would not be detrimental to FCS of species should not have to satisfy same standard of public interest as one which would cause damage to a designated site. • Case law limited on extent to which legislation is proportionate so down to interpretation by RAs (applies to Art 16 and Art 6.4) • Directives do not target conservation action on useful components of biodiversity – all important • Common criticism is that directive (and protected site legislation generally) is too static, especially with climate change • Process for amending network and annexes untested and probably complex and long-winded • May need to give more thought to way in which conservation objectives are set to accommodate variability in natural systems. • Regs are lengthy and complex, unlike Directive, but over-simplification would render them toothless or draconian or would empower decisions based on discretion without constraint, consistency or accountability

7.8. Table 7.2 summarises the comments on the criteria for good legislation.

Table 7.2. CCW Critique of Habitats Directive – criteria for good legislation

Criterion	Comment
Necessary	Given decline in EU biodiversity, measures are needed. EU scale has added benefit of even playing field
Relevant	Highly relevant for addressing threats of ill-considered land use; less obviously relevant for addressing threats from climate change
Proportionate	<i>(i) Extent and effect of network:</i> good for rarest; may be insufficient for less threatened <i>(ii) Burden of proof in Art 6.3:</i> strong arguments to suggest over-onerous but does not necessarily agree <i>(iii) Overriding public interest test:</i> IROPI seen as a necessary ‘concession’ but would work better if could be applied proportionately <i>(iv) Species derogation requirements:</i> possibly over-protective; again identifies need for proportionate application <i>(v) Review of consents;</i> no comment because outside remit
Timely	Directive is “of its time”. Timeliness of decision making could be improved with greater collaboration and forward thinking
Risk-based	Yes. May need to address concerns over static protected areas.
Enabling rather than discouraging	Need not be a legal obstacle course; designed to be encouraging
As simple as possible	Probably yes
Transparent to user	Yes; nothing in legislation that makes it inherently opaque or difficult to understand

Comments

7.9. The analysis raises a large number of points as illustrated by the information summarised above. The following points are discussed in more detail in the conclusions to this report because (1) they represent a point of view that is shared across evidence streams or which is strongly disagreed with in other projects; and/or (2) they raise matters that require further consideration in this workstream.

- The extent to which the Habitats Directive incorporates the precautionary principle.
- The interpretation and implementation of Article 6, including the level of scientific information required and the proportionality of measures in relation to risks posed.
- The interpretation of terms such as favourable conservation status and how they are applied when faced with scientific uncertainty.
- Mechanisms for the implementation of Article 10.
- The implementation of species protection measures in comparison with SAC protection given the paucity of European case law.
- The need for advice on how to interpret case law.

7.10. The analysis did not address all aspects of the Directive of potential relevance for NEF. There is little coverage of marine aspects of the Directive, for example, yet this is one of the areas where scientific uncertainty is causing particular difficulties. Nor is there any comment on the way in which alternative sites are considered in relation to Article 6 decisions.

7.11. In their response to the first draft of this report Dwr Cymru state that they would have welcomed an impartial review of the Environment Agency's review of consents. This is an area of work relating to the Habitats Directive that might be taken forward in a more detailed assessment of the Directive and its implementation.

WATER FRAMEWORK DIRECTIVE

7.12. The commentary traces the history of European water legislation culminating with the adoption of the Water Framework Directive, "the primary purpose of which is to establish a framework for the protection of inland surface waters, coastal waters and groundwater which prevents further deterioration, protects and enhances the status of aquatic ecosystems". The commentary focuses on addressing the question of whether the WFD is necessary and provides data on the status of water bodies in Wales in support of its conclusions that it is. The report is less detailed than the commentary on the Habitats Directive but it has, nevertheless, been possible to draw out a number of positive and negative attributes as summarised in Table 7.3.

Comments

7.13. The commentary presents a view of a Directive whose objectives are both worthy and necessary. For the most part it is considered to be an example of good legislation but this conclusion is let down by the complexity of the legislation which makes it both complicated and difficult for the non-expert to understand. The critique raised a number of questions for further consideration:

- The WFD provides an example of inbuilt flexibility and a cyclical approach to both objectives and measures that should allow for feedback. However, these characteristics may be hampered if the Directive is too complex to work with
- As with the Habitats Directive, there is a need to consider scientific requirements and whether these are proportionate and achievable
- What links are there with the Habitats Directive and how can the two instruments be used to complement each other?

7.14. In their response to the first draft of this report, Dwr Cymru commented on the last bullet point. They note that sites designated under Habitats Directive legislation enjoy protected area status under the Water Framework Directive and that there is a clear obligation under the WFD to deliver Favourable Conservation Status by 2015. In Dwr Cymru's view this obligation should have been given a much higher priority in the first cycle of WFD delivery. They comment that while the WFD is inherently complicated, its application in England and Wales has unnecessarily exacerbated this complexity.

7.15. The critique did not consider the implementation of the Directive in Wales and, in particular, did not discuss the classification of water bodies and whether this is satisfactory in terms of meeting NEF objectives.

Table 7.3. CCW Critique of Water Framework Directive – Positive and negative comments

Positive comments	Negative comments
• Extending consideration of impacts from factors in addition to water quality was necessary • Extends protection beyond main rivers • River Basin Management Plans involve interested parties • WFD establishes systematic way of measuring ecological status • Requires MS to take appropriate measures to achieve environmental objectives • Measures to implement other water environmental objectives must be integrated into RBMP • Proportionate to gaps in previous legislation • Added advantages over previous legislation, e.g. RBMP, comparative reporting on ecological status, public engagement • Previous legislation was single issue based • Previous legislation used water quality as surrogate for wider ecological quality • Water quantity and physical environment missing from previous legislation • Previous legislation was command and control with EU setting objectives and MS setting emission limits and minimal public involvement • 2009 status of Welsh water bodies shows only 30.1% at good or high status	• Could argue that minimal UK legislation could have brought about the improvements required by the objective (i.e. plugged the gap) • Not as simple as possible • Not transparent to users

7.16. Table 7.4 summarises the comments on the criteria for good legislation.

Table 7.4. CCW Critique of Water Framework Directive – criteria for good legislation

Criterion	Comment
Necessary	If model for describing ecological status in the directive is accurate, then figures for status in Wales demonstrate that it is necessary
Relevant	In as much as it is drafted to consolidate and rationalise achievements of existing water legislation and tackle impacts not otherwise covered, then it can be regarded as relevant
Proportionate	Probably proportionate to the gaps in environmental protection before its adoption and extends further advantages over existing legislation such as coordination at RBD level
Timely	Yes, given that improvements under pre-existing legislation were plateauing out
Risk-based	Yes; requires actions to be based on risk and there is a need to take account of probability of impacts in prioritising activity
Enabling rather than discouraging	Yes
As simple as possible	No; partly because of need to meet mixed criteria – e.g. to be based on risk and to be enabling – and partly due to presence and use of multiple alternatives and exceptions and derogations that make RBMP complex
Transparent to user	No; complexity makes it extremely hard to understand and challenging for stakeholders

MARINE AND COASTAL ACCESS ACT

7.17. The critique provides an overview of the Act and its main provisions i.e. the creation of the Marine Management Organisation, marine planning, marine licensing, marine nature conservation, managing marine fisheries, reform of migratory and freshwater fisheries, and access to coastal land. The rest of the critique focuses on the criteria for good legislation, the results of which are summarised in Table 7.6. Table 7.5 lists the comments made in the course of this analysis.

Comments

7.18. From the above summaries it can be seen that the author believes the legislation does comply with the principles of good legislation and concludes that it can make a valuable contribution to the development of NEF. In many ways marine planning and management is now ahead of terrestrial environmental measures in that it attempts to provide a simplified approach to regulation while at the same time addressing issues from a holistic perspective. It is too early to tell whether the Act will be successful in meeting these objectives but it does provide a possible model. One of the main issues for further consideration is how the link between marine and terrestrial environmental protection is to be taken forward. The Marine and Coastal Access Act does not address this question and it has only limited coverage in the Water Framework Directive. These and other points are listed below:

- As a general point, what do we mean by a network of protected areas? Although the legislation is concerned with a marine network, similar concepts are used for terrestrial designations.

- How do we address the limitations of the existing national and European legislation for protecting marine species?
- How do we balance costs of marine management against benefits and how do we measure these benefits?
- How is the link between marine and terrestrial environmental protection to be taken forward?
- What place, if any, is there for marine stakeholder fora? Do they have a role comparable to RBMP groups?
- Is public involvement (as opposed to stakeholder engagement) needed? Can democratic accountability deliver this?

Table 7.5. CCW Critique of Marine & Coastal Access Act – Positive and negative comments

Positive comments	Negative comments
• Sustainable, flexible management framework approach intended in Act, together with better regulation agenda adopted, all directly relevant to NEF • In theory provides tools necessary for delivery of Marine Strategy Framework Directive • Integrated strategic approach through marine planning and licensing • First attempt to integrate marine designations governed by range of legislation to achieve network • New fisheries orders and byelaws have broader scope for addressing marine environmental management and therefore could be less sectoral • Provisions for planning, licensing, MPA network and fisheries orders all have potential to contribute to securing ecosystem services and health of wider environment • Act is strong on broad powers; light on specific duties • Key purpose of Act could be described as addressing continued risk of not having it in place	• Broad powers for creating Marine Conservation Zones but only duty is that they should be designated to contribute to the network • Legislation has been criticised as not being sufficiently prescriptive

Table 7.6. CCW Critique of Marine & Coastal Access Act – criteria for good legislation

Criterion	Comment
Necessary	Called for for many years; need to address piecemeal approach of previous fragmented, complex legislation; acknowledged growing pressures on marine space. Overall aim is to deliver sustainable development; builds on principle of good management
Relevant	Highly relevant to wider policy and pressures including its measures for marine planning, MPAs, marine licensing and MSFD, fisheries regulation
Proportionate	Act is designed to be enabling rather than prescriptive and as such could be considered to allow a proportionate approach to be taken in implementation; mixed comments as to whether measures are sufficiently specific to be proportionate; concludes that question can only be answered once implementation is further underway
Timely	Yes; but some would consider long overdue; particularly timely for addressing need for measures to secure good environmental status under the MSFD
Risk-based	Not having this legislation presented a risk to the marine environment. Broadly enabling nature of legislation allows adaptation in response to risk; specific examples include delegation of nature of marine plans to individual planning authority and risk-based approach to MCZ management through interim measures
Enabling rather than discouraging	Yes; a key principle of Government in the development of the Act
As simple as possible	Key purpose was to simplify previous measures and introduce simple ones but, e.g. marine licensing did not completely simplify process
Transparent to user	Simple language but broad framework approach leaves much to interpretation making it hard for reader to understand precise requirements. Places strong reliance on subsequent secondary legislation and guidance

MARINE STRATEGY FRAMEWORK DIRECTIVE

7.19. The critique describes the background to the Directive and identifies its main goal, i.e. to establish a framework within which Member States shall take the necessary measures to achieve or maintain good environmental status in the marine environment by the year 2020 at the latest. The Directive requires the application of an ecosystem approach to the management of human activities. The key requirements of the Directive are shown against a timeline. These requirements include the development of a marine strategy (at UK level), regional cooperation, initial assessments of the current status including a socio-economic analysis, determination of good environmental status (GES), the establishment of a management programme and a programme of measures to be developed by the Member State. It was noted that the UK government intends to use existing measures as far as possible to achieve GES. The Directive applies to all EU marine waters which, in the UK context, means all territorial and coastal waters and out to the 200 nm limit of the UK continental shelf.

7.20. The critique also refers to the Marine Strategy Regulations 2010 which transpose the requirements of the Directive into UK law. Although overall responsibility rests with the Secretary of

State, devolved administrations have specific responsibilities to make proposals for monitoring programmes, the programme of measures and their review and update and to provide information to support the initial assessment and determination of GES.

7.21. Although the critique is broadly supportive of the Directive and regards it as being a ‘good’ piece of legislation there are a number of negative as well as positive comments. These are summarised in Table 7.7 and the assessment of the legislation is provided in Table 7.8.

Comments

7.22. The aims and objectives of this Directive are clearly of relevance to Wales and to NEF thinking but the extent to which implementation will match these aspirations remains unclear. There are opportunities for working between the Directive and OSPAR and for working between the Directive and the Marine and Coastal Access Act. These may provide examples of flexible working and collaboration of wider application across NEF. The key messages to take forward from consideration of this Directive are:

- The potential to use the Directive as a model for developing a strategic framework for the terrestrial environment
- The need to consider the specific requirements of this Directive and other marine measures when developing NEF further.

Table 7.7. CCW Critique of Marine Strategy Framework Directive – Positive and negative comments

Positive comments	Negative comments
• EU marine environment is declining in quality and Directive fills legislative gap as no other directive is specifically concerned with marine environment • National boundaries can create artificial boundaries so Directive could help tackle large-scale marine ecosystem pressures • Broad framework – could help deliver broader ecosystem-scale approach of NEF • More specific environmental drivers than Marine & Coastal Access Act; • Potential for Directive and Act to complement each other. • Legal framework for supporting delivery of other regional and international commitments like OSPAR and CBD	• Scope to integrate MSFD actions at Welsh level hampered by requirement for development at UK level with coordination across Europe • 11 high level descriptors of GES set very high standard that may be difficult to achieve • Broad level of descriptors leaves much to interpretation • Requirement for cooperation at regional level removes autonomy making setting of targets and programmes of measures directly relevant to UK (let alone Wales) difficult • Tight timescale for delivery requiring lot of detailed work

Table 7.8. CCW Critique of Marine Strategy Framework Directive – criteria for good legislation

Criterion	Comment
Necessary	Depends on whether you think a coordinated approach is necessary at EU level; there is a clear environmental pressure and, unlike other environmental issues, no other EU measure specific to it
Relevant	Yes. A number of requirements and objectives are directly relevant to NEF: • ecosystem approach to management • sustainable use objective with sustainable use defined as sustainable use of marine goods and services by present and future generations • encourages/allows adaptive approach • strategic approach across whole environment • network benefits of MPAs
Proportionate	Yes because • no need to achieve GES but to take necessary measures to achieve or maintain; includes get out clauses • not overly prescriptive in describing GES; large degree of interpretation possible • Commission Decision paper on criteria and methodological standards leaves details to MS and does not address targets • targets can be qualitative or quantitative recognising knowledge limitations • 6 yearly reviews allow for revision
Timely	Yes, largely; times nicely with Marine & Coastal Access Act giving opportunities for integration
Risk-based	In part in that it is based on continued risk to marine environment; however measures are not specifically based on risk but instead on the concept of GES
Enabling rather than discouraging	Partly; aim is to achieve something and not tightly prescriptive but high level descriptors of GES could be interpreted as discouraging because aspirational and may lead to prescription
As simple as possible	Partly; simpler than WFD because deals with waters at MS level rather than individual water bodies but determining what is actually needed from the broad framework provisions is not likely to be straightforward
Transparent to user	Partly; transparent in terms of overall steps but not in what is necessary for compliance or what GES is; may improve through interactive approach

PROTECTED LANDSCAPE LEGISLATION

7.23. The critique on this topic is not organised in the same way as the previous critiques which makes it more difficult to draw out significant points. Although a range of legislation is covered, the analysis seems to be restricted to National Parks and AONBs and not all protected areas. The critique covers both national and international legislation. The following pieces of legislation are listed as being covered:

- European Landscape Convention
- National Parks & Access to the Countryside Act 1949

- Countryside Act 1968
- Local Government Act 1972
- Wildlife & Countryside Act 1981
- Environmental Protection Act 1990
- Environment Act 1995
- Countryside & Rights of Way Act 2000
- Natural Environment & Rural Communities Act 2006

7.24. The critique does not cover Town & Country Planning legislation.

7.25. The major part of the critique is focused on a description of the history of protected landscapes which is then used as evidence for assessing the legislation against a number of criteria. These assessments are summarised in Table 7.10. Positive and negative comment are summarised in Table 7.9. In so far as these relate to legislative provisions the legislation is the National Parks etc. Act.

Comments

7.26. The critique is strongly supportive of the legal regime for protected landscapes but the references to its history and development gloss over many issues of conflict that have not all been resolved. For example, there is no consideration of the following issues and questions which may be worth exploring further:

- The critique does not consider how other protected area designations fit with the protected landscapes designations. To meet NEF objectives, it would be useful to look at the full suite of protected area designations to see how, together, they contribute to the protection and enhancement of the natural environment.
- Is 'natural beauty' still a useful term and can it be defined more precisely (and would this be beneficial)? How easy in practice has it been to incorporate cultural heritage within the definition of natural beauty? Note that, in their response to the first draft of this report, the Campaign for National Parks (CNP) suggested that the Meyrick judgement¹⁵ and CCW consultation [on the extension to the Clwydian Range AONB] should have helped to define the term and advised leaving this issue well alone! However, the present legal position cannot be considered to be satisfactory and there may be merit in a more detailed analysis of the meaning and use of this term. If its interpretation is contentious, it may be better to remove it.

7.27. Writing in response to the first draft of this report, CNP have made a number of comments on the CCW critiques of protected area legislation. These are recorded in the Comments Log (Annex 3) but, because some additional information is provided, the comments are also set out here:

- It is suggested that the boundary review process should, and could, be made more efficient. CNP suggest that the review of the Clwydian Hills AONB could offer some lessons in

¹⁵ *Meyrick Estate Management & Others v Sec St for Environment, Food and Rural Affairs* [2005] EWHC 2618 (Admin), upheld in Court of Appeal in *Meyrick Estate Management & Others v Sec St for Environment, Food and Rural Affairs* [2007] EWCA Civ 53.

simplification although they go on to say that the process got caught up in the pre- and post-election hiatus.

- CNP repeat their comment on the duty to have regard to the purposes of protected landscapes (see Chapter 3) to the effect that strengthening the duty will not, in itself, be sufficient to improve the situation. They also suggest that the experimental powers are not being using enough.
- They also note that the Sandford Principle only applies in situations where the conflict is irreconcilable.¹⁶

Table 7.9. CCW Critique of Protected Areas Legislation – Positive and negative comments

Positive comments	Negative comments
• Intention to form integrated approach to landscape & wildlife conservation has been achieved	• Boundary review is a lengthy, resource intensive and legal process
• The legislation does not constrain ecosystem approach	• Duty on public bodies and statutory undertakers to have regard to the purposes of protected landscapes in the conduct of their business is generally weak
• Sandford Principle enacted to give primacy of conservation over public enjoyment	
• Duty to foster economic & social well being of local communities within National Park provides scope to engage with commercial sector	
• Requirement for management plan to coordinate activities of protected landscapes and their partners	
• Numerous examples of protected landscape projects delivering or moving towards an ecosystem approach – case studies of Clwydian Range AONB and Llyn AONB cited	
• Experimental powers in legislation for National Parks and AONBs	
• Planning control powers of National Park Authorities	
• Duty to produce a Management Plan (National Parks & AONBs)	
• Implementation of legislation largely successful in delivering current system of designated areas	

7.28. There are two examples in this area of law of amendments being made to legislation to meet changing circumstances. These are the addition of the conservation and enhancement of cultural

¹⁶ National Parks etc. Act s. 11A states that “if it appears that there is a conflict between ... purposes, [public bodies] shall attach greater weight to the purpose of conserving and enhancing the natural beauty, wildlife and cultural heritage ...”.

heritage to the purposes of National Parks (National Parks etc. Act s 5(1) as amended) and the incorporation of the Sandford Principle into the management of National Parks (National Parks etc. Act s 11A). One suggestion for exploring ways in which legislation can be made more appropriate for NEF objectives might be to make similar minor changes to existing legal instruments and it would be useful to review how effective this has been as a mechanisms for updating law.

Table 7.10. CCW Critique of Protected Areas Legislation – criteria for good legislation

Question	Comment
Is the legislation designed to or can it contribute to delivering healthy ecosystems and the services they provide?	• Legislation dates back to 1949 Act which was informed by Hobhouse Committee; intended to form an integrated approach to landscape and wildlife conservation with protected areas delivering across a range of issues including conservation, recreation and land use. • Concludes that legislation has achieved this in terms of delivering a system of landscape protection. • Because of integrated nature of landscape the protected area legislation can contribute to healthy ecosystem.
How successful /effective is it at delivering an ecosystem approach? Does it help or hinder?	• It has always been the intention that natural beauty and nature conservation should be mutually supportive • Conservation of landscape relies on conservation of biodiversity • Therefore biodiversity lies at the heart of protected landscapes actions
How is it implemented? What are the current dependencies?	• Integrated approach is implemented through a range of legal powers & duties, WAG policy framework, grant aid support to National Parks & AONBs • Experimental powers used to test innovative approaches to sustainability • Local authority functions of National Park Authorities provides planning control opportunities
How can it be improved?	It does not get in the way of an ecosystem approach but opportunities could be enhanced through existing drivers, especially the policy framework
What other measures are needed to make this legislation effective at delivering healthy and resilient ecosystems and their services?	• Acknowledgement of principle that people are fundamental component in achieving ecosystem approach • Closer cooperation across environmental sectors • Developing more integrated management practices for multiple objectives and for efficiency and effectiveness benefits • Clearer evidence and advice where there are conflicts in ecosystem approach and an agreed mechanism to support decision making • Agreement of an integrated approach and shared outcomes across the environmental sector with less emphasis on who delivers and more on outcome • Move away from site based approach towards managing at an integrated, landscape scale together with addressing connectivity issues

WILDLIFE AND COUNTRYSIDE ACT PART I

7.29. The Critique begins by briefly overviewing the history of species protection law and then summarises the main features of Part I of the Act including the offences relating to birds, animals and plants, the quinquennial review measures, and licensing. The author notes that there have been “some remarkable success stories” in Wales since 1981 when the Act was passed although no clear link between the two is shown. The conclusion is that this legislation serves the purpose of species conservation in a pragmatic and effective way despite being perceived to be somewhat cumbersome and complicated. Further, its few shortcomings could be addressed by enacting a simplified version applicable just to Wales which would make it easier to understand and apply. There is a long list of positive and negative comments as shown in Table 7.11.

7.30. The critique reverts to the previous format for considering whether the legislation complies with the principles of good regulation. The assessment is summarised in Table 7.12.

Comments

7.31. This is a very positive view of Part 1 of the Act. It largely ignores most of the controversies that have arisen over the interpretation of the Act and hardly touches on the difficulties of implementation and subsequent enforcement. I would challenge the assertion that this legislation is enabling rather than discouraging. Its whole basis is on prohibiting activities, albeit in a proportionate way. There is nothing in it to encourage changes in behaviour.

7.32. The Commentary section in the Report cites the recovery of red kites in Wales (from 35 to 600 pairs) and the recovery of otters (present in 58.8% of grid squares) as examples of remarkable success stories. However it is not clear that this is due to the Act. Red kite numbers increased through a mixture of fortuitous breeding patterns and protection organised by dedicated individuals; the protection afforded by the Act may have contributed through a decline in persecution but it certainly was not the main cause of the success. Similarly with otters, water quality, especially pollution control was a major contributing factor. It is stated that Greater Horseshoe Bats *were thought* to have declined by 90% in the 20th century but are *now recovering extremely well*. The Pembrokeshire population is stated to have grown from 350 in the 1990s to 1100 in 2010 but this cited as pers. com. Again it is unclear how the Act contributed to the increases and, in this case, how great the increase actually is. Great Crested Newts are listed as a question only, perhaps indicating our continuing lack of knowledge of the demographics of this species.

7.33. As noted, licences are not available for developments; instead work can be done under advice from CCW following an agreed method statement. It is claimed in the Critique that there are ‘numerous cases’ of case by case adaptations resulting in opportunities for education as well as conservation – win-win outcomes for all. But this is not provided for directly by the Act.

Table 7.11. CCW Critique of Part I of the Wildlife & Countryside Act – Positive and negative comments

Positive comments	Negative comments
- Species are on schedules 5 or 8 only when it is necessary and effective - Amendments resulting from CROW Act which was described as the “first time since 1949 that new wildlife laws were introduced because they were a good idea rather than when Europe forced it on a reluctant British Government” - Species protection is extremely relevant to conservation today. - British context and allows flexibility at the devolved level. - Robust in a changing climate. - Regulation is proportionate for each species. - Win-win outcomes from use of agreed method statements drawn up on a case by case basis for developments - Law does not expect unreasonable precautions and does not hinder legitimate activities - Legislation is highly adaptable through quinquennial reviews; examples include the addition of water vole being given full protection and bluebell protection against sale - As relevant today as when enacted and probably far more so as our knowledge of species has increased dramatically - Example of joined up legislation – amendments to complement Conservation Regulations - House of Commons Select Committee says fit for purpose	- HC Select Committee says legislation fit for purpose but inadequately enforced – issues of priorities, resources and practical difficulties - Act does not confer extended powers of entry to establish presence or absence of species - Gaining evidence to support prosecution can be extremely time-consuming and difficult so police focus on raising awareness and gaining compliance - Wildlife crime historically under-recorded so difficult to assess real risks to protected species - No protection to habitats that species depend on - Legislation appears ‘somewhat complex’ following numerous amendments and variations to Schedules - Act is perceived to be somewhat cumbersome and complicated - While CCW is a statutory advisor on protected species the public do not seek its advice mainly because of its low public profile

7.34. The quinquennial reviews work well in theory but they usually been way behind schedule and the decisions on changes to listings – especially the addition of new species – appear to be as much a political as scientific judgment.

7.35. This critique raises a number of issues for further consideration:

- It is important to distinguish between measures to protect individuals, populations, and species. The recent Supreme Court judgment in *Morge* makes this point, albeit in the context of the Habitats Directive.

- Is it still the case that Part I of the Act is necessary to meet the obligations of Art 3(1) of Bern given that the Habitats Directive now meets this obligation?
- It is interesting to note the way different types of biodiversity are dealt with under the Act with birds, other animals and plants all having their own measures. This approach is largely, if not entirely, due to historical accident. Could it be amended to give a more streamlined yet comprehensive system?
- A related question is the choice of species for listing. While this is done on clearly defined scientific grounds – as listed in the report – it is important to recognise how artificial this is because it is based not only on scientific knowledge about the distribution etc. of a given species but also on our ability to identify it. There is a strong element of subjectivity here which is abundantly clear if the numbers in each phylum or class are matched against the overall numbers of known native species within these taxa.
- Licences are available for a range of different activities with a range of different licensing bodies. There is scope for some rationalisation here.

Table 7.12. CCW Critique of Part I of the Wildlife and Countryside Act – criteria for good legislation

Criterion	Comment
Necessary	Yes, given the objective of halting the loss of biodiversity. Protected areas alone cannot provide protection nor can an ecosystem approach. Reasons include the fact that the species is highly mobile, widely dispersed but rare, or targeted for commercial reasons. Land use changes put numerous plants and animals under threat. Legal protection is the most efficient and effective means of safeguarding them. Part I implements Art 3(1) of the Bern Convention which requires the UK to 'take steps to promote national policies for the conservation of wild flora, wild fauna and natural habitats, with particular attention to endangered and vulnerable species, especially endemic ones, and endangered habitats ...'.
Relevant	Species protection is extremely relevant to conservation and the Act provides a British context. Relevance is maintained through regular statutory reviews (good for climate change issues) and Wales can respond according to its own needs
Proportionate	Yes, protection is on a sliding scale with 9 levels of protection for animals and birds and 2 for plants. Exceptions are provided for through licensing and there is also a defence of the act being the incidental result of a lawful operation which could not reasonably have been avoided.
Timely	Yes, because of the quinquennial reviews and the ability of the Secretary of State to make changes at any time in response to urgent threats or new international obligations.
Risk-based	Part I is a risk-based approach
Enabling rather than discouraging	Permits legitimate activities but ensures they are carried out without undue adverse effects
As simple as possible	The Act and its schedules have been amended several times and there is the added complication of similar legislation to meet European obligations. So it could be simpler but this would need to be done in a way that retains the different levels of protection.
Transparent to user	A lot has been done recently including Planning Portal with a Biodiversity Toolkit and Bat Protocol. No information is withheld from the public on licensing matters etc.

- The ‘incidental result’ defence has been difficult to apply because it is so subjective and the addition of the caveat of ‘not reasonably avoiding’ merely compounds the problem. Similar wording in the Conservation Regulations led to action in the ECJ which resulted in a change of wording. The case of *Morge* shows just how difficult this sort of legislation is to interpret in practice.
- The suggestion that CCW could do more to advise the public on species protection issues, needs to be balanced against its role as a statutory advisor and as a licensor.

WILDLIFE AND COUNTRYSIDE ACT S 28

7.36. This is the legislation pertaining to SSSIs. Originally enacted in 1949, provisions for the notification and protection of SSSIs have been amended several times since then. The Critique concentrates on the current amended version and notes, in particular, that in recent years there has been an increased emphasis on maintaining and improving the condition of existing SSSIs rather than notifying new ones. The Critique concludes that the “SSSI legislation should form a part of a comprehensive legal framework for delivering sustainable and integrated management of land and sea” albeit acknowledging that there is a need for some improvement. Unusually in these Critiques there are more negative than positive comments as shown in Table 7.13 below.

Table 7.13. CCW Critique of s 28 of the Wildlife and Countryside Act – Positive and negative comments

Positive comments	Negative comments
• SSSIs provide a variety of ecosystem services • SSSIs generally have highest concentrations of species or support rare species • SSSIs are core areas • Without SSSI legislation rare and vulnerable habitats and species would be in far greater decline • The SSSI mechanism is a key factor in enabling the preservation of traditional land use practices • Lawton report concluded there was a clear case for retaining SSSI mechanism	• Recognised gaps in coverage – geographical gaps for some habitats; some habitat types poorly represented in series • Known gaps for some species groups – guidelines for grassland fungi not published till 2009; algae; soil-living organisms • Act’s requirements may seem onerous initially • Guidelines require re-evaluation, especially re climate change. • The SSSI incentives (carrot) are very much dependent upon adequate resourcing. • Legislation is difficult to navigate and needs consolidating. • Complexities arise from fragmented legislation; different approaches to designation and bureaucratic nature of the process; legislative process of achieving appropriate management where there has been neglect or inappropriate management

7.37. The Critique concludes that the legislation “fares well against the criteria for ‘good’ legislation” as indicated by the responses shown in Table 7.14. The author quotes the recent Lawton report¹⁷ in support.

Comments

7.38. This Critique is heavily influenced by the Lawton Report which is used to justify many of the positive claims for SSSI. This is fine at the broader scale and has obvious relevance to NEF but it does not help in the analysis of the SSSI legislation and the form of regulation that it encompasses. The author states that it is clear that without SSSI legislation rare and vulnerable habitats and species would be in far greater decline. This may be true but it begs the question of what caused the decline and whether there is counter-productive legislation and/or policy that drives the decline (e.g. agricultural law and policy including CAP). Is the SSSI legislation merely a rearguard action doomed to ultimate failure?

Table 7.14. CCW Critique of s 28 of the Wildlife and Countryside Act – criteria for good legislation

Criterion	Comment
Necessary	The conclusion of the Lawton Report is that s 28 is a very important mechanism for achieving in delivering NEF
Relevant	As relevant today as it was in 1949 despite losses of habitats and species and failure to meet 2010 targets. This assessment is based on Lawton’s conclusion that the loss would have been far greater without current protected areas series
Proportionate	Yes because designated systematically following <i>Guidelines for the Selection of SSSIs</i> ; generally selected to protect the largest and most representative habitat examples in each area of search (corresponding to old county systems in Wales) so have good geographical spread; notification does impose duties on landowners but the system works well in most cases as evidenced by the fact that CCW pursues only a small number of management schemes/notices
Timely	Remains an important foundation for establishing a coherent and resilient ecological network
Risk-based	SSSI selection is arguably risk-based because it targets habitats and species based upon their rarity, uniqueness, distribution, geographical extent and coverage but there is a need to re-visit guidelines, especially because of climate change
Enabling rather than discouraging	There is provision for financial incentive through management agreements
As simple as possible	Consolidation would be an advantage; the SSSI legislation is difficult to navigate as it is spread over a number of Acts
Transparent to user	Well established and supported by a good level of information; CCW are proactive in maintaining contact with owners and occupiers; open council meetings

¹⁷ *Making Space for Nature: A review of England’s wildlife sites and ecological network*, a report commissioned by Defra from a group chaired by Sir John Lawton.

7.39. My reading of this Critique triggered a number of ideas for points that might be worth pursuing under NEF:

- It is claimed that, without SSSIs, biodiversity declines would have been far greater. The fact that declines have continued despite the presence of protected areas, however, is a strong indication that reforms may be needed including, for example, incorporating policy and management mechanisms to ensure that SSSIs are more effectively conserved and enhanced.
- The SSSI Guidelines do not give a clear indication of how many examples or how large an area should be designated and this leads to the need for case by case comparisons and judgments to be made. It is not always clear that decisions are made on biological need as opposed to compliance with guidelines –or rather, it is not clear how this can be demonstrated. The approach to geological SSSI designation is more prescriptive. Is it worth reviewing the basis of the guidelines to check their validity against climate change? It is not clear to me that the light touch review of Parts A (Rationale) and B (Operational Approach and Criteria) will be sufficient although it is acknowledged that the outcome may have implications for Part C (detailed Guidelines for Habitats and Species Groups)
- The author regards the fact that there are few management schemes/notices as a measure of success; other commentators point to this as a failing. It would be useful to gain a clear understand of why these new tools are not being used by CCW.
- The Act does not define criteria for site selection on basis of rarity or range. The sole criterion is scientific interest. This criterion has been interpreted in practice following the SSSI Guidelines. Query whether there is scope to re-open these criteria and, indeed, the IUCN approach to site protection. Query whether it would be necessary to change the legislation in order to be able to designate buffer zones.
- Consolidation would make for clarity but a new Act could do more than this. As for being as simple as possible, there may be scope for reviewing some of the change mechanisms and processes, especially in relation to opportunities to make representations and appeal procedures. This raises the question of a possible ‘tribunal’ to hear environmental representations and/or appeals.
- Noting that some habitat types are poorly represented raises the question of whether all habitat types are of equal importance and, further, whether the typology is appropriate in scientific terms.
- As with the species protection mechanisms in Part One, there is a strong bias towards larger, known and identifiable taxa and this is only now being addressed – in part. It begs the question of why we designate what we designate. Is it the case that the species covered are regarded as keystone or is there an element of unintended scientific bias?
- Some of the key problems with s 28 are hidden in a list of causes of complexity. The fragmented legislation could be remedied simply by consolidation but the other causes are more difficult to address. These include the different approaches to designation and the bureaucratic nature of the process and the legislative process for achieving appropriate management where there has been neglect or inappropriate management

CHAPTER 8. LITERATURE REVIEW

INTRODUCTION

8.1. WSP Environment and Energy were commissioned to condense existing literature reviews and research into a streamlined form and make recommendations for reform. The Report, supervised by Terry A'Hearn, consists of a literature review and a policy map. The latter was produced using 'mindmap' technology which is not readily available to all readers. A one page summary matrix of the Policy Map is shown in Fig. 8.1.

8.2. As stated in the Introduction to the WSP Report, "the purpose of [the] report is to provide a crisp and concise summary of the existing system of management and regulatory approaches ('Policy Map'), to identify the key concerns and issues, and to draw some powerful and useful reform recommendations from them". Their approach was to start by streamlining some key themes for reform from the existing extensive literature review, rather in the way that I have tried to identify key themes from the evidence presented in the other projects. The second phase of the work was to construct a Policy Map "to provide a simple and structured way of looking at the current management and regulatory systems, highlight themes for change, and propose ideas and solutions which can be taken forward to the next stage". The Policy Map was drawn up using the outcomes of the literature review, feedback from the public consultation and interviews carried out for NEF, and WSP expertise.

8.3. The outcomes of the literature review are summarised in bullet form. WSP have drawn out key themes arising in ecosystem protection so it is no surprise that the list is dominated by observations on ecosystem quality and issues arising from management. Several of the points raised relate to economics and funding but only one refers specifically to legislation: "even with large amounts of EU wide policy and legislation covering habitats and biodiversity protection, it has often been seen as an 'optional extra' and a 'nice-to-have'". The main conclusion that WSP draw from the literature review is that despite the fact that a huge amount of progress has been made, "ecosystem degradation is still a problem" and "[c]learly something needs to change". They go on to assert that a "new approach is needed that not only protects the natural environment, but actually enhances it and the services that it provides". Their key message in the report is that "ecosystem services inclusion is not a separate process but is something that can and should be applied throughout the policy decision-making process". The author then refers to six simple steps for doing this which are set out in *The Economics of Ecosystems and Biodiversity for Local and Regional Policy Makers*, one of the studies considered in the literature review. These steps are:

1. Specify and agree on the policy issue with stakeholders
2. Identify which services are most relevant
3. Define information needs and select appropriate methods
4. Have ecosystem services assessed
5. Identify and appraise policy options

6. Assess distributional impacts

8.4. The Policy Map is an attempt to find a structured way to look at the complexity of the current system which has enabled WSP to draw out some clear themes for change and identify some initial opportunities where change can be made. It is suggested that the six-step process referred to above could be applied here.

8.5. The Policy Map organises the current system according to three levels: strategic, legislation, and tactical/implementation and assesses these against governance in place, themes for change, and opportunities for change.

Comments

8.6. The format used in the Policy Map provides a very useful concise means of identifying the key issues on a single page and the Map could be a powerful tool for capturing ideas. It could be accompanied by traditional SWOT analysis diagrams to expand on the detail that is covered – e.g. to include information on potential problems and limitations as well as opportunities. This project is an important contribution to the workstream because it provides a different perspective to the analysis in that its main purpose is to identify opportunities for change. This is a refreshing approach but it must be remembered that it cannot provide a rounded view and has to be considered alongside a more negative approach.

8.7. One potential limitation of the Policy Map project is the range of literature informing it. WSP refer to “an extensive literature review” of the “vast amount of literature available”. The full list of documents reviewed is given in an appendix to the WSP report; this is described as broadly consisting of “papers by governments, not-for-profit organisations and academics writing on the subject of ecosystem services, biodiversity and environmental legislation, and policy decision-making and prioritisation”. This is a very broad scope and it is surprising that only 68 items are listed in the Bibliography. With respect to the academic literature, the review seems to be somewhat limited as there are so few references to environmental law journals despite extensive coverage within these of topics of relevance to NEF in general and this workstream in particular. Given that this workstream is about regulatory and management approaches this is somewhat surprising.

CHAPTER 9. 1:1 INTERVIEWS

INTRODUCTION

9.1. The second piece of work undertaken by WSP Environment & Energy was a “focused 5-6 week project to generate recommendations to help the workstream to investigate some breakthrough, rather than incremental improvements to regulatory performance in Wales”. WSP’s approach to this task was to conduct interviews with 12 individuals drawn from regulated businesses, NGOs, and the regulatory agencies and to review the *Living Wales* consultation submissions. In conducting the interviews, WSP assumed that observations were being provided anonymously. It has not been possible, therefore, to attribute observations to particular bodies or individuals. The results were presented to a workstream workshop in February 2011 and in a report entitled *NEF Regulatory Reform*.

9.2. According to WEL’s response to the first draft of this report, the limitations of this project were discussed by the workstream, in terms of the small number of interviewees and what they were commenting on in the interviews, with much focus on regulatory process rather than outcomes, for example. I do not think that these alleged limitations detract from the usefulness of the project. This is one of the few evidence strands to address regulatory reform per se and it attempts to draw out some high level conclusions and recommendations. It will be worthwhile exploring these further and this will provide an opportunity to test the conclusions against a wider audience.

9.3. WSP’s Report presents the broad conclusions and conclusions from each interview and goes on to make recommendations. Key views from the interviews are presented as bullet points in an Appendix. Rather than attempting to summarise this here, I have focused on any common threads coming from the interviews and, where possible, matched these against the interviewees’ work sector. The comment section considers whether any of the examples presented are likely to be representative of generic issues and, if not, whether they are of sufficient relevance to be considered further by NEF. It concludes with some suggestions for developing ideas further.

9.4. WSP summarise four overall impressions, the first two relating to positive comments made by interviewees and the second two relating to opportunities:

- It was almost impossible to find anyone who disagreed with the broad objectives of environmental regulation in Wales.
- A small number of people also cited positive experiences in the way they are regulated.
- Nearly everyone expressed frustration, often very significant frustration, with the way in which regulatory objectives are pursued.
- Most people felt that regulation has become expensive, complicated and unwieldy.

9.5. They go on to illustrate these general impressions with 12 examples. I have grouped these under three categories in this report as shown in Tables 9.1, 9.2 and 9.3. The comments in italics in

the final column are my comments; where there is no other content in this column this means that the example cited did not offer any solutions or identify any particular issues.

Table 9.1. NEF Regulatory Reform Report - Examples of biodiversity regulation

Example	Cited by	Description	Issue (comments)
Species Protection - Bats	Service provider	Dual assessment and decision-making process between WAG & local authority.	Could be streamlined into a single decision-making process
Species Protection - Dormouse	Regulated Business Professional Association Service Provider	Regulation inflexible & impracticable in their drafting and implementation; over-prescriptive; incompatible with protection of species and business interests	? <i>revision of legislation or would it be enough to change way it is implemented</i>
Species Protection – Badgers	Regulated Business	Need for badger licence when felling trees near sett; always granted	Bureaucratic hoop; suggestion of company general licence. <i>WG have advised that licences are not always granted</i>
Tree Felling Regulations	Professional Association	Regulations focus on wrong outcomes because they are out-dated – focus on acreage rather than protection of specific trees	<i>Presumably seeking legislative change but could be down to implementation</i>
Forestry Codes of Practice	Regulated Business	Much forestry practice regulated by adherence to standards. Regulatory burden arises when consultation is required; much of this consultation is unnecessary;	Establish codes of practice between industry and CCW and thereby eliminate need for FCW approvals for all new planting schemes or felling programmes
Woodland Certification	Regulated Business	Woodland certified to international standards has external auditing; therefore could be used to reduce regulation	Idea for reducing regulation through a certification system

Table 9.2. NEF Regulatory Reform Report - Examples of pollution control regulation

Example	Cited by	Description	Issue (comments)
Catchment Management	Water industry organisations; Farming community	Need to deal with diffuse pollution through improved catchment management; shared view of need to work together to improve understanding;	Cooperative working
Point Source v Diffuse Pollution	Regulated Business	Point source is over-emphasised; diffuse under-emphasised	World problem – <i>no suggestions for addressing it were provided</i>
Air Quality Regulation	Regulated Business	Large expenditure for little material benefit but deemed necessary to meet technicalities of the air standards; too little room for pragmatic negotiation	

Table 9.3. NEF Regulatory Reform Report - Examples of working relationships

Example	Cited by	Description	Issue (comments)
Working Well	Regulated Business	Effective working relationship with regulator at local level	Enabled resolution of regulatory implementation issues in a pragmatic way
Stay Quiet	Two Regulated Businesses	Do not raise issues with regulators for fear of intransigent response – especially re protected species where regulation is particularly inflexible & prescriptive; fear of invoking significant compliance costs	Would prefer to have discussion with regulator to achieve twin wins of species protection and successful business
Steadily Improving Relationship	Regulated Business	Improvement by working closer with regulator at local level; but noted reduction in ‘industry expertise’. Improvement could be down to one individual	<i>Importance of establishing good working relationships, especially at local level</i>

9.6. WSP drew three main conclusions from this study:

1. There is too much regulation and, therefore, a resultant opportunity to deliver better environmental outcomes at lower cost to regulated businesses. However, they explain that they do not have enough information to say whether or not there are too many regulations on the statute book or too many things or issues being regulated. By ‘too much regulation’ they mean there are too many regulatory processes which have developed in isolation and are not integrated and often appear to be inflexibly drafted.

2. There is some scope to deliver better environmental outcomes at lower cost to regulated businesses through redrafting some regulations. This conclusion is based on comments that the quality of regulations as drafted was “sometimes okay; sometimes impractical”. Two examples are provided. The first, on Forestry legislation is shown in Box 9.1. The second on the Conservation Regulations is shown in Box 9.2. WSP note that the redrafting of regulations needs to be approached with care but nevertheless feel that there are “significant opportunities to be had by carefully reviewing and redrafting some regulations.

3. There is some scope to deliver better environmental outcomes at lower cost to regulated businesses through changing the culture of the interaction between regulatory agencies and regulated businesses. WSP

felt that some of the most significant comments they received related to the somewhat nebulous concept of culture but accept that it can be difficult to improve relationships between regulators and regulated. The key, they believe, is to recognise that “opportunities need to be carefully identified where genuine trust can be harnessed and developed”.

Box 9.1. Example of legislation needing updating – The Forestry Act

Headline comment

The Forestry Act 1967 as amended, as a set of regulations based on an earlier regulatory system, was drafted to deliver objectives relevant in earlier times, but which are somewhat out-dated today.

Example

The regulations specify outcomes in terms of cubic metres, which made sense in the 1960s when the primary objective was managing the amount of cleared land, but largely ignores issues [regarded] as important today such as protecting important individual trees. ... Whilst there are now Tree Protection Orders which deal with important individual trees, it was evident that the regulations had been developed in a piecemeal fashion which leaves organisations unclear as to how best [to] interpret and apply them.

Box 9.2. Example of poorly drafted legislation – The Conservation of Habitats and Species Regulations 2010

Headline comment

It was suggested that the ... regulations are an example of poorly drafted regulation in terms of how they apply to the protection of the hazel dormouse. It was argued that the level of protection and prohibition in the regulations renders them virtually impossible to comply with under any form of best practice without risk of committing an offence, even if the land management action/intervention was designed as a positive conservation measure.

9.7. WSP Recommendations are summarised in Box 9.3. Fuller detail, particularly of the possible trials, can be found in the WSP report. Rather than merely repeat the information provided there, I have attempted to add value by drawing out some key points from the interviews and collating these by topic as shown in Table 9.4.

Box 9.3. NEF Regulatory Reform – WSP Recommendations

Recommendation 1: Guiding Principles

1. Regulations should drive both positive environmental and positive economic outcomes
2. Process should be rationalised and outcomes should be bolstered
3. Most businesses and citizens should find regulatory compliance to be cheaper, easier and quicker.

Recommendation 2: Quick Wins

- small set of trials to generate significant gains from outputs to WSP work.
- not suitable for all suggestions received

Recommendation 3.1: Regulatory Innovation Trials (RITs)

- Using a mix of different ‘innovation access points’:
 - A specific regulation
 - A specific policy process
 - A specific location or region
 - A specific regulated business
 - A specific development project
 - A specific activity
- “Design exercises” (working up a project proposal) or “live exercises” (trialled in practice)

Recommendation 3.2: Suggested Regulatory Innovation Trials

- Engage with non-environmental agencies to get much stronger uptake of sustainability and environmental issues in a particular economic policy, plan or strategy
- Estimate the cost of a regulatory system and explore two or three alternative management approaches to achieve the policy aims of the regulations
- Explore ways to reduce the cost and increase the value of the existing regulatory requirements for a single regulated company
- Explore options for reform of the regulation of species protection and, specifically, the way in which bats are protected in Wales
- Combine the environmental monitoring programmes of key agencies

Recommendation 3.3: Suggested Factors to be considered in designing Regulatory Innovation Trials

- Using the Policy Integration Tool where it will add value
- Ensuring that synergies with and implications for planning systems are assessed
- Making sure that the contribution of environmental regulations to non-environmental objectives is captured
- Adopting a clear and practical Sustainable Development decision-making framework is critical
- Cross-border issues should be considered and effort should be made to identify any potential quick wins
- Any RITs need to be led by an identified representative of the workstream so that responsibility is clearly assigned

Table 9.4. NEF Regulatory Reform: Some Key Points from Interviews

Topic	Point	Comment
Regulatory Culture	In the past, regulators were local people who knew the site & the business inside out. Now distant, lack local knowledge, take longer	Large Manufacturing Company
	Decline in technical knowledge & skill of regulators; used to be industry experts, now inexperienced & under-qualified	Large Manufacturing Company
	Many guidelines are difficult because of dogmatic way in which CCW interprets & applies them; helpful outcome-focussed discussions with senior staff in regulatory agencies but these don't translate into interactions with operational staff who are normally highly risk-averse and routinely follow by-the-book interpretations rather than 'achieve best results' interpretations	SME Representative Organisation
	Increased openness & willingness to discuss how to generate environmental improvements in a practical way could create substantial gains	SME Representative Organisation
	Benefits all round if industry had confidence that they would not risk being 'beaten up' if they raised issue for resolution	SME Representative Organisation
	More collaboration with one other agency since mid-1990s but unable to strike up more productive, collaborative relationship with the other one	Agency Officer
	Difficulties between the 3 agencies from entrenched cultural differences and lack of mutual understanding; secondments suggested	Agency Officer
	CCW requirements often ignore practical realities; need to be more pragmatic	Agency Officer
	Challenge in improving regulatory & management regimes is as much, or more, about changing culture as re-drafting	Agency Officers
	Cultural change is difficult but good e.g. from B&Q re its diversity policy – start small with 1 issue addressed in 1 store; learn from trial and apply progressively to other issues across the business	Agency Officers
	Try to include local people in regulatory innovation trials, reflecting citizen-centred agenda for Wales	Agency Officers
	Weakness that much expertise resides in 1 or 2 officers, therefore apparent slow decision-making	Agency Officers
	Very good working relations with regulator, especially at local level which means issues can be resolved pragmatically through negotiation	Large Manufacturing Company
Process	Determination process is often lengthy & inefficient; process stops when further information requested	Large Manufacturing Company
	Disproportionate regulatory focus on less relevant areas	Large Manufacturing Company
	Data submission to OFWAT takes 200 man days; working with Drinking Water Inspectorate easier – smaller & more efficient	Water Supplier
	Big picture of achieving environmental outcomes lost in the detail of process and box-ticking; everything is process-laden	Association representing natural

	& complicated	resource management professionals
	Lots of opportunities to input into regulatory development but does not feel genuine because so many processes often appear unwieldy & unsophisticated; long-winded with large discussion papers; resource implications for business	Association representing natural resource management professionals
	Would like regulation to hold businesses to outcomes & therefore reduce micro-management	Association representing natural resource management professionals
	Far too much effort on micro issues and far too little on macro issues	Agency Officer
	NEF should lead to more effort at macro and less at micro levels; e.g. incorporate habitat protection issues in National Infrastructure Plan so that key sites could be excluded from development.	Agency Officers
	Encourage macro approach by requiring each WAG department and agency to develop, measure & report against KPIs for ecosystem, biodiversity and conservation aims	Agency Officers
	Often easier to see results from micro while macro could take years	Agency Officers
	Too much focus on contribution and problems of regulation to achieve environmental aims	Agency Officers
	Existing systems characterised by too many surveys, duplication of decisions	Professional Service Provider
	Survey & assessment work can cost tens of thousands of pounds and developer bears full risks	Professional Service Provider
	System often requires 2 decisions – LA and then WAG. Suggested reform options for bat protection – combine LA & WAG decisions; remove LA & WAG involvement and assign role to private sector with quality assurance built in; 2 track system with standard bat assessment; only proceed to existing procedure if rare or large number of bats; otherwise rely on building code; introduce offset mechanism whereby developer mitigates offsite to achieve same level of protection; introduce deemed consent if no decision within fixed time	Professional Service Provider
	Regulatory regimes tend to be reactive and boundaries of regulatory compliance based on risk-return assumptions	Environmental NGO
Guidance and Regulation	Regulatory guidance can be so exhaustive that difficult to understand what is needed	Water Supplier
	Some get swamped by complexity & scale of regulatory requirements and end up choosing to ignore some	SME Representative Organisation
	Regulatory over-burden in part because 4 tiers of government – EU, UK, Wales, LAs	SME Representative Organisation
	Complexity partly due to multiple sources of law –EU, UK, Wales	Association representing natural resource management professionals

	Do UK & Welsh governments and regulators underestimate how much flexibility there is in implementing EU legislation?	SME Representative Organisation
	Scope to be less prescriptive & more flexible in implementing EU laws	Agency Officer
	Changing EU law is long-term job; focus on seeing if there is scope for more flexibility	Agency Officers
	Belts and braces approach to EU law is unnecessary	Professional Service Provider
	Regulation discourages bad behaviour but not good at encouraging good behaviour and need more of this	Environmental NGO
Science and Biodiversity	Species protection work mainly from development projects and planning system	Professional Service Provider
	Species protection can now be a show-stopper, but often not for right reasons; 20-30 years ago hard to get species conditions into planning consents; says due to W&C Act	Professional Service Provider
	Key factor for inefficiency is that, while species legislation is independent of planning, it is the planning system which operationalises the species protection	Professional Service Provider
	LAs typically spend little money on ecology because it is not a core issue; employ young, inexperienced staff on short-term contracts. Leads to reliance on letter of the law	Professional Service Provider
	Whilst some decisions by agencies are not based on credible scientific evidence, they don't necessarily need to carry out fundamental scientific analysis to make decisions	Water Supplier

COMMENTS

9.8. WSP's conclusions on the positive side were that there was almost total agreement with the broad objectives of environmental regulation in Wales. The report does not elaborate what these objectives were, however, or whether all interviewees were working to the same objectives, so it is difficult to conclude that a consensus exists. It is not clear whether and, if so, how these objectives were presented to interviewees. The second positive conclusion, that a "small number of people cited positive experiences in the way they were regulated" is presumable considered positive because there were some positive experiences. The fact that this response came from a small number of people is probably not significant given the small sample size but reading through the bullet point summaries of key points from the interviews does reveal a preponderance of criticisms with few positive comments. This could be because interviews give the interviewees a chance to air their concerns and it is likely that these are going to be uppermost in their minds.

9.9. WSP does not refer to overall negative impressions, preferring to state these as "opportunities". This way of looking at the issues is clearly very useful in directing thinking towards resolving an issue but there are limitations – principally due to the limited amount of data for identifying the opportunities. By design, "opportunity" comes across as more positive than "negative" but it also implies the possibility of a broader more integrated approach – just what NEF is looking for – than might arise from an attempt to address a number of negative issues in isolation. Developing trials to test ways of addressing the points raised may be a good way of testing options but the conclusions

must be tied to the original issue raised; it could be dangerous to extrapolate from the specific to the generic on the basis of these examples.

9.10. WSPs three main conclusions all have the potential to lower costs to businesses. Each of the conclusions links lower costs to businesses with better environmental outcomes but this link has not been demonstrated as a general conclusion. Conclusion 1 refers to the quantity of regulation. It is not clear that a reduction in the amount of legislation would deliver better environmental outcomes, however. At best it enables time and money saved on burdensome regulation to be redirected to other environmental works. But the benefits of savings might just as likely be directed elsewhere.

9.11. Re-drafting of regulations (Conclusion 2) could result in more streamlined regulatory processes and could introduce a degree of flexibility to enable regulatory regimes to be applied to new circumstances without lengthy legislative change. The downside would be that increased flexibility might lead to the need for more detailed guidance which might, in turn, result in greater bureaucracy and a more rigid system in practice. Whether the re-drafting would result in better environmental outcomes is less clear. There is certainly no simple direct relationship between the two objectives. From the examples stated, the only one that clearly points to potential environmental improvements is the Tree Felling Regulations. In many other cases there is much less scope for re-drafting because of the need to comply with European directives.

9.12. The third conclusion, on the need to address the culture of the regulatory agencies and how they work with the regulated, has the greatest potential for better environmental outcomes. It should free up regulators' time and, given their environmental role, this should enable their time to be used more productively for environmental improvements. It also provides an incentive for collaborative innovation for dealing with a given environmental issue by focusing on the desired outcome not simply the process. The key factor in this relationship is trust. The responses have referred to the advantages of good local relationships but this is only part of the answer. There is also a need for trust within the regulatory body to enable staff to make decisions that are not always straight out of the book. From the regulators' perspective there is also a need to keep a distance and not 'go native' and also potential risk of creating legitimate expectations.

9.13. The idea of setting some guiding principles (WSP's Recommendation 1) is worth pursuing but these principles would need to be very high level. The suggestion that regulations should be positive for both environmental and economic outcomes is entirely dependent on how society values the environment and its services. In principle fine; in practice it could require a major culture change. Rationalising processes (Recommendation 2) is clearly advantageous to all concerned provided it is done effectively – i.e. it works. The need to make further changes if the rationalising process leads to unintended consequences has to be avoided. Ideally outcomes need to be the focus of the regulation; I'm assuming this is what is intended by "bolstering" outcomes. Recommendation 3, that regulatory compliance should be cheaper, easier and quicker for the regulated, is a positive outcome in terms of NEF but there needs to be a further recommendation that the consequential burden on the regulators is (i) not disproportionate and (ii) resourced appropriately.

CHAPTER 10. MANAGEMENT APPROACHES WORKSHOP

INTRODUCTION

10.1. A workshop was convened as part of this workstream on April 5 2011. Informed by the National Ecosystem Assessment, the workshop was set up to consider the state of the Welsh environment, pressures and levers available within the governance and policy framework in Wales. Its aims were to identify solutions in relation to shared outcomes and integration in the context of sustainable development across all sectors of existing Government policy and management frameworks with respect to improvement in process, tools and gaps. The commentary below is based on questions posed at the workshop in a short paper identifying key messages and action points. I have not had access to any fuller material relating to the workshop. The outputs of the workshop are summarised in Table 10.1.

Table 10.1. Key Messages from Management Approaches Workshop

Question	Reponses
How should we optimise the multifunctional use of land and sea in Wales?	• Spatial planning at a range of scales • Supported by robust evidence (availability of evidence is a constraint) • Capability (of land/sea) – drives what one can optimise for • A menu, or framework, could usefully drive analysis • Delivery depends upon participation at an appropriate scale (stakeholder analysis is useful here) also adds to knowledge and baseline
How do we demonstrate the synergy between economic, social and environmental well being?	• Monetisation has a comparative function • Lots of existing evidence and research • RIA – may be worth exploring • Synergies may exist at different spatial levels
What are the tools and mechanisms available to use nationally, regionally and locally?	• Integration tools (SD-Tool) (is it open and available to all?) • Maps, lots of maps ... • Public registers of permits etc. • Cost-benefit analysis tools (should we have ONE for Wales?) • Subsidies and grants (various)
What gaps do we have in our evidence base, partnership mechanisms and policy decision making frameworks?	• *What is the question?* • Integrating economic social and environmental (map overlay?/language/opportunities) • Knowledge sharing and avoidance of duplication • No monitoring of prescribed outcomes (benefits not proven) • Cross border/UK/EU issues? • Evidence needs to be comprehensively catalogued • Engagement with people other than “the usual suspects” ... e.g. talk to SMEs?
How do we “future-proof” to ensure a long term	• Climate change is a big one • Foresight and scenario work

perspective for decision making?	• Risk is subversion by short term goals • Some mitigation from overriding EU legislation, e.g. WFD • Education works long-term • Transparency of decision making will engender support • Adaptive management is important but balance with economic efficiency
What are the knowledge, skills and training issues for WAG, ASPBs and wider civic society?	• Need policy cohesion between NEF, ERP and education strategy • Organisational culture has a role to play in delivering policy • Social capital = cooperative management?

COMMENTS

10.2. The questions discussed at the workshop touch on some key factors of relevance for this workstream. The two most fundamental messages that come across to me are the identification of spatial planning at a range of scales as a tool for achieving multi-functional use and the recognition of the need for integrative approaches from a range of perspectives.

CHAPTER 11. ADDITIONAL SOURCES OF INFORMATION

INTRODUCTION

11.1. The main focus of this report is the output from the eight projects in this workstream. During the course of preparing this report other information became available and was used to a greater or lesser extent to inform the conclusions and help shape the recommendations. A list of these other sources is shown in Table 11.1. It has not been possible in the time available to do justice to all of this extra information and it is suggested that a more thorough analysis should be carried out in due course. The table also includes other potential sources of information on regulation from projects that have not yet commenced and these will also need to be considered in due course. Further information on some of these projects is given below.

Table 11.1 Additional Sources of Information for Workstream

Information	Details
<i>Biodiversity 2020: A strategy for England's wildlife and ecosystem services</i> ¹⁸ August 2011	Contains high level outcomes designed to halt overall biodiversity loss, support healthy well-functioning ecosystems and establish coherent ecological networks, with more and better places for nature for the benefit of wildlife and people
Cabinet Office <i>Red Tape Challenge</i> ¹⁹	As of 26/08/11 1084 responses on biodiversity have been logged
Defra <i>The Natural Choice: securing the value of nature</i> (Natural Environment White Paper for England) CM 8082, June 2011 ²⁰	The first White Paper dealing with the natural environment in over 20 years. It sets out the government's vision for the environment. Although the White Paper will not lead to new legislation, it sets a new direction for environmental action. There are also a large number of actions and initiatives.
<i>EC Guidelines on the Implementation of the Birds and Habitats Directives in Estuaries and Coastal Zones</i> ²¹ , January 2011	Includes recommendations; refers particularly to port development and dredging.
Law Commission <i>Eleventh Programme of Law Reform</i> LAW COM No 330, HC 1407, 19 July 2011 ²²	Topics include wildlife and conservation covenants and Wales is expressly included.
<i>Nature's Tapestry</i> The Grassland Trust ²³ 2011	Report on the state of England's grasslands including case studies.

¹⁸ Available at <http://www.defra.gov.uk/publications/files/pb13583-biodiversity-strategy-2020-110817.pdf>

¹⁹ Available at www.redtapechallenge.cabinetoffice.gov.uk/environment

²⁰ Available at www.archive.defra.gov.uk/environment/natural/documents/newp-white-paper-110607.pdf

²¹ Available at http://ec.europa.eu/environment/nature/natura2000/management/docs/guidance_doc.pdf

²² Available at www.justice.gov.uk/lawcommission/docs/lc330_eleventh_programme.pdf

²³ Available at www.grasslands-trust.org

<i>Our life insurance, our natural capital: an EU biodiversity strategy to 2020</i> ²⁴ , June 2011	Includes 6 targets: • Full implementation of EU nature legislation to protect biodiversity • Better protection for ecosystems, and more use of green infrastructure • More sustainable agriculture and forestry • Better management of fish stocks • Tighter controls on invasive alien species • A bigger EU contribution to averting global biodiversity loss
Scottish Environment Link <i>Scotland's Environmental Laws since Devolution - from Rhetoric to Reality</i>	Review of 8 pieces of legislation to ascertain whether outcomes in practice match up to the expectations at the time when the legislation was drawn up. Includes National Parks (Scotland) Act 2000, Nature Conservation (Scotland) Act 2004, Environmental Assessment (Scotland) Act 2005 and Marine (Scotland) Act
TEEB <i>The Economics of Ecosystems and Biodiversity in National and International Policy Making</i> , February 2011 ²⁵	Produced as part of The Economics of Ecosystems and Biodiversity (TEEB) international study.
UKELA <i>The State of UK Environmental Legislation in 2011: Interim Report</i> from UK Environmental Law Association and King's College London ²⁶ , August 2011	The interim report is a scoping study to determine whether there are identifiable problems of integration, coherence and transparency and the potential role of environmental principles in UK environmental law. It concludes that there is scope for a separate study for each devolved administration
<i>UK National Ecosystem Assessment. Synthesis of Key Findings</i> June 2011 ²⁷	The supporting technical reports have not all been finalised but are available on the internet. Chapter 27 <i>Response Options</i> is of greatest relevance to this workstream
Welsh Government Statement by the First Minister on <i>Legislative Programme for 5 year term</i> ²⁸	Announcement of intention to • introduce a Sustainable Development (Wales) Bill to put in place a new independent sustainable development body for Wales • introduce an Environment (Wales) Bill to provide for a more integrated management of the environment in Wales with greater environmental protection, economic and social benefits and for connected purposes • introduce a Planning (Wales) Bill to consolidate existing planning legislation, make it more transparent and help deliver economic renewal.

²⁴ Available at <http://ec.europa.eu/environment/nature/biodiversity/comm2006/2020.htm>

²⁵ For details see www.teebweb.org

²⁶ Available at www.ukela.org/rte.asp?id=43

²⁷ For further details see <http://uknea.unep-wcmc.org>

²⁸ (<http://cymru.gov.uk/legislation/programme/?lang=en> and links therein)

BIODIVERSITY 2020

11.2. Defra's biodiversity strategy for England sets out the strategic direction for biodiversity policy for the next decade and covers both terrestrial (including freshwater) and marine environments. Its missions for the next decade is

to halt overall biodiversity loss, support healthy well-functioning ecosystems and establish coherent ecological networks, with more and better places for nature for the benefit of wildlife and people.

11.3. The strategy resonates with some of the objectives of NEF. For example, one of its four action areas is 'a more integrated large-scale approach to conservation on land and sea. Under this heading, it is proposed to create Nature Improvement Areas, to improve the condition of SSSIs. To establish a coherent network of Marine Protected Areas and to agree a programme of target action for the recovery of species.

11.4. The strategy addresses the contribution of other sectors under the heading of 'reducing environmental pressures' and identifies key sectors to work with and the actions to be taken. For agriculture, the intention is to improve delivery of environmental outcomes by, for example, reviewing the use of advice and incentives and the use of agri-environment schemes. There is also a commitment to bring a greater proportion of existing woodlands into sustainable management to expand the area of woodland in England.

11.5. There is an intention to take a strategic approach to planning for nature by introducing reforms to the planning system. One initiative will be the piloting of biodiversity offsetting.

RED TAPE CHALLENGE

11.6. The Red Tape Challenge is a UK Government initiative to reduce the overall burden of regulation. A dedicated website invites everyone to 'join the debate' by commenting regulations and rules. The site is designed to promote discussion of ways in which the aims of existing regulation can be fulfilled in the least burdensome way possible and has the purpose of opening up the exercise to the public. A note is added to the effect that the presence of any particular legal instrument on the website should not be taken to imply any intention on the part of Government to remove it from the statute book. The process is scheduled to continue until April 2013. Different areas of regulations are being spotlighted in turn.

11.7. The consultation covers UK regulations and regulations limited to England. The Government is not considering or consulting on regulations that are the responsibility of the devolved administrations but it is stated that the Government "will look to work with the devolved administrations and hope that they will also see the benefits of the deregulation agenda".

11.8. Environment is one of the cross-cutting themes that will be open for comment throughout the process although it is being 'spotlighted' in September 2011. The Environment section of the website covers 278 regulations relating to the environment, broken down into seven areas:

- air quality
- biodiversity, wildlife management, landscape, countryside and recreation
- energy labelling and sustainable products
- industrial emissions and carbon reductions
- noise and nuisance
- waste
- environmental permits, information and damage.

11.9. The biodiversity, wildlife management, landscape, countryside and recreation section covers 165 legal instruments including four Acts and 158 pieces of secondary legislation in the form of statutory instruments. Three Welsh statutory instruments are included. At the time of writing (August 26 2011) 1084 responses had been recorded. These individual responses could provide useful further evidence for taking NEF forward.

THE NATURAL CHOICE: SECURING THE VALUE OF NATURE

11.10. This White Paper, launched by Defra, is the UK Government's response to the National Ecosystem Assessment and is claimed by the Secretary of State to place the value of nature at the centre of choices relating to environmental enhancement, economic growth and personal wellbeing. It was informed by *Making Space for Nature: A review of England's wildlife sites and ecological network*, a report commissioned by Defra from a group chaired by Sir John Lawton.

11.11. Although the White Paper has a narrower scope than NEF and is directly relevant to England only, it shares with NEF the aspiration to develop a better approach to management of natural capital. It makes no commitments for regulatory reform but does include a number of commitments design to engage the public and businesses in working to safeguard and enhance the natural environment.

EC GUIDELINES ON THE IMPLEMENTATION OF THE BIRDS AND HABITATS DIRECTIVES IN ESTUARIES AND COASTAL ZONES

11.12. The European Commission has released guidelines on the implementation of the birds and habitats directives in estuaries and coastal zones with particular attention to port development and dredging. Recommendations from the guidelines include:

- The design of plans or projects should always be based on mutually beneficial strategies with a view to achieving dual goals of both Natura 2000 conservation objectives and socio-economic objectives

- Damage prevention or avoidance measures should always be preferred to compensation measures.
- Pre-assessments to evaluate the potential for impact of a plan or project on Natura 2000 sites should always be foreseen.
- Thorough and timely stakeholder consultation is always recommended.
- Maintenance of ports and navigational access should be dealt with in the context of integrated management plans for the entire waterway or the affected Natura 2000 site.
- Capital dredging operations should be designed as a part of sustainable dredging and sediment management schemes.

11.13. These guidelines will need to be considered in more detail in any review of the implementation of the Habitats Directive. Although they are designed for a particular marine sector, some of the recommended actions are of broader relevance. The reference to ‘mutually beneficial strategies’ is of particular interest.

ELEVENTH PROGRAMME OF LAW REFORM

11.14. The Law Commission has included two projects on the environment in its latest programme of law reform: conservation covenants and wildlife. Defra is leading on both of these projects. The Law Commission will seek to ensure appropriate involvement by Welsh political institutions and Welsh stakeholders and note that their recommendations may be addressed to both Welsh and UK governments. They also note that there may be specific Welsh dimensions in projects involving largely or wholly devolved and will look to the Welsh Government to assist in identifying and considering these issues.

11.15. The project on conservation covenants is scheduled to start early in 2012 with a consultation paper being issued later that year and a final report and draft Bill by late 2014. The project follows from previous work by the Law Commission which concluded that, in most cases, restrictive obligations burdening land must benefit other nearby land. Where there is a conservation objective, however, this limitation might not be appropriate and the project is designed to investigate the case for a new statutory interest in land to be called a Conservation Covenant which could be enforced by a particular body rather than a neighbour. It is claimed that the reform would benefit both regulators and the regulated by providing a more efficient and flexible system and provide a mechanism for regulating the use of land.

11.16. A consultation paper on wildlife is scheduled for summer 2012 and the final report and draft Bill are scheduled for summer 2014. The Law Commission describe the present legal structure regulating human dealings with wildlife as made up of ‘succeeding geological strata of legislation with no coherent design’. The aim is to provide a modernised and simplified framework with an appropriate balance between primary and secondary legislation and guidance.

NATURE'S TAPESTRY

11.17. This report published by the Grassland Trust and endorsed other environmental NGOs, describes the different types of wildlife rich grasslands and their values before going on to look at their current status and the drivers for change. Although the report covers English grasslands, it contains a wealth of scientific, social and legal information and illustrates its arguments with case studies all of which could be of relevance for future development of the workstream.

EU BIODIVERSITY STRATEGY

11.18. The strategy rates biodiversity loss alongside climate change as the most critical global environmental threat. It aims at reversing biodiversity loss and speeding up the EU's transition towards a resource efficient and green economy. The 2020 biodiversity target is underpinned by the recognition that, in addition to its intrinsic value, biodiversity and its services have significant economic value that is seldom captured in markets. It advocates building on the biodiversity knowledge base and proposes to develop an integrated framework for monitoring, assessing and reporting on progress in implementation of the strategy.

11.19. It includes six mutually supportive and interdependent targets. Target 1 focuses on conserving and restoring nature and looks to the Birds and Habitats Directives to deliver the target. It states:

Target 1

To halt the deterioration in the status of all species and habitats covered by EU nature legislation and achieve a significant and measurable improvement in their status so that, by 2020, compared to current assessments: (i) 100% more habitat assessments and 50% more species assessments under the Habitats Directive show an improved conservation status; and (ii) 50% more species assessments under the Birds Directive show a secure or improved status.

11.20. The second target is designed to maintain and enhance ecosystems and their services:

Target 2

By 2020, ecosystems and their services are maintained and enhanced by establishing green infrastructure and restoring at least 15 % of degraded ecosystems.

11.21. Target 3 and 4 contain a number of detailed commitments for integrating biodiversity protection into agriculture, forestry and fisheries:

Target 3

A) Agriculture: By 2020, maximise areas under agriculture across grasslands, arable land and permanent crops that are covered by biodiversity-related measures under the CAP so as to ensure the conservation of biodiversity and to bring about a measurable improvement in the conservation status of species and habitats that depend on or are affected by agriculture and in the provision of ecosystem services as compared to the EU2010 Baseline, thus contributing to enhance sustainable management.

B) Forests: By 2020, Forest Management Plans or equivalent instruments, in line with Sustainable Forest Management, are in place for all forests that are publicly owned and for forest holdings above a certain size ... that receive funding under the EU Rural Development Policy so as to bring about a measurable improvement in the conservation status of species and habitats that depend on or are affected by forestry and in the provision of related ecosystem services as compared to the EU 2010 Baseline.

Target 4:

Fisheries: Achieve Maximum Sustainable Yield by 2015. Achieve a population age and size distribution indicative of a healthy stock, through fisheries management with no significant adverse impacts on other stocks, species and ecosystems, in support of achieving Good Environmental Status by 2020, as required under the Marine Strategy Framework Directive.

11.22. The fifth target addresses the problem of invasive alien species:

Target 5:

By 2020, Invasive Alien Species and their pathways are identified and prioritised, priority species are controlled or eradicated, and pathways are managed to prevent the introduction and establishment of new IAS.

11.23. The sixth target addresses the EU's contribution to resolving the global biodiversity crisis and sets a target for the EU to step up its contribution by 2020.

11.24. The section in the strategy on partnerships is of particular relevance for NEF. It refers to the need to expand and promote a number of key partnerships including the EU Business and Biodiversity Platform and promises to encourage further collaboration between researchers and stakeholders involved in spatial planning and land use management.

SCOTLAND'S ENVIRONMENTAL LAWS SINCE DEVOLUTION - FROM RHETORIC TO REALITY

11.25. This study bears comparison with the review of the legislation undertaken by CCW and the questionnaires on legislation. Although different legal instruments are involved, some of the concerns are comparable to those covered in the projects for this workstream. For example, with reference to the Nature Conservation (Scotland) Act, there was “some evidence that the biodiversity duty introduced in the Act has influenced the behaviour of public bodies ... but in general it has not altered priorities significantly”.

THE ECONOMICS OF ECOSYSTEMS AND BIODIVERSITY (TEEB)

11.26. Outputs from TEEB informed the Policy Map project and were influential in Defra's White Paper. A series of TEEB reports was launched at the CBD COP-10 meeting in Nagoya, Japan. Reports published by Earthscan include the TEEB for business and TEEB for policy makers reports both published in 2011. A further report on TEEB for local and regional policy makers is scheduled for 2012. The next stage of TEEB implementation (referred to as “TEEB Phase III”) will extend the TEEB initiative at least until the Rio+20 Conference and CBD COP-11 meetings in 2012.

11.27. In particular, TEEB Phase III will focus on the following three areas: policy; business; and communications/outreach. The objective is to mainstream TEEB beyond the biodiversity policy sphere while ensuring scientific credibility.

THE STATE OF UK ENVIRONMENTAL LEGISLATION IN 2011: INTERIM REPORT

11.28. The report is the first output from a project by the UK Environmental Law Association (UKELA) and King's College London. It is a scoping study that aims to review the state of environmental legislation and to isolate potential problems with its quality. It attempts to ascertain whether or not the legislation is problematic in terms of lacking:

- Coherence, so that it is problematic to implement and enforce;
- Integration and coordination, giving rise to similar problems and potentially confusing the underlying goals of various environmental law regimes;
- Transparency, in the sense of being inaccessible and incomprehensible to business, the public or even practitioners.

11.29. The report raises issues over the EU law and notes that, for example, the Habitats Directive has created coherence problems through confusion in applying the directive particularly in respect of development proposals. The interaction between the Habitat Directive and EIA regimes and the scheme of planning controls was identified as particularly legally awkward.

11.30. The report concluded that there would be value in environmental principles having a higher profile in UK environmental law and considered seven environmental principles in this respect:

- Principle of sustainable development
- Polluter pays principle
- Preventive principle
- Rectification at source principle
- Precautionary principle
- Integration principle
- Principle of intergenerational equity

11.31. The report goes on to make a number of detailed comments and suggestions for improvements to existing systems including what it describes as ‘some different and radical suggestions for reform’ which are included to stimulate debate. These include the establishment of specialised commissions to overview environmental legislation.

11.32. The report is currently open for consultation by UKELA members and a final version is expected to be available in January 2012. The report is 178 pages long and I have not had time to read it in detail but I have seen enough to persuade me that it will be of use in taking forward the agenda for this workstream not least because it has separate sections dealing with issues from a Welsh perspective.

UK NATIONAL ECOSYSTEM ASSESSMENT

11.33. Although a *Synthesis of the Key Findings* Report has been published the 27 chapters of the UK NEA Technical Report are still being typeset. The most relevant of these for this workstream is Chapter 27 *Response Options*. It considers challenges facing biodiversity, water, agriculture, forestry, fisheries, marine and coasts, recreation and tourism, urban planning, transport and energy. Most importantly in the NEF context, it also includes a section on adopting an ecosystem approach through integrated responses.

11.34. Kathryn Monk (Environment Agency Wales) provided an extract from the *Response Options* chapter in her response to the first draft of this report. The extract is taken from the section on cross-sectional synergies and integration and is repeated here in full because it gives a good indication of the approach taken and its relevance for NEF:

In the context of legislation, the most significant opportunities for integration discussed in previous sections emerge from discussions around reforms to the CAP (see Section 27.4) and the CFP (see Section 27.6). In both cases, embedding ecosystem-based thinking in proposals for reform will allow for a more cross-sectoral approach to be adopted, which will deliver multifunctional and resilient habitats, and recognise the importance of these activities in broader ecosystem management.

There are a number of areas of policy-, institutional- and governance-based responses discussed in a sectoral context that are beginning to reflect a more integrated approach. Adopting principles of Integrated Water Resource Management and strategic flood risk management allow for a more coordinated approach to manage water and land resources to secure ecosystem health and human well-being, and to minimise vulnerability (Section 27.3). The impact of forested land uses on water quality and quantity is an important consideration in both the Water and Forestry sectors. The recognition of a holistic approach to land use may require collaboration between farmers to achieve landscape-scale benefits that secure habitats for certain mobile species such as butterflies and birds (Section 27.4); this complements more integrated land use planning such as Scotland's Land Use Strategy. Multifunctional forested landscapes have scope to deliver potentially synergistic recreational, conservation and climate change mitigation outcomes, and are being promoted (Section 27.5). Within the Marine context, marine spatial planning and Integrated Coastal Zone Management can reflect integrated ecosystem-based thinking and deliver substantial benefits (Section 27.7). Spatial planning in an Urban context and the promotion of GI also provides potential benefits for ecosystem functioning and human well-being (Section 27.9).

11.35. Section 27.10.2 on legislation makes reference to attempts at a European level to incorporate ecosystem principles into legislation and refers specifically to the WFD and the Marine Strategy Framework Directive in this respect but observes that neither systematically recognises the economic value of ecosystem services. It goes on to note that, although an integration principle is enshrined in European law such that environmental protection requirements must be integrated into the definition and implementation of the EU's policies and activities, integration is still to be achieved.

WELSH GOVERNMENT LEGISLATIVE PROGRAMME

11.36. The First Minister announced the Welsh Government's Legislative Programme 2011-2016 in a statement to the National Assembly for Wales on July 12 2011. The announcement starts by stating that sustainability lies at the heart of the Government's agenda and its legislative programme. There is a commitment to embed sustainable development as the central operating principle in all government and public body actions by bringing forward as sustainable development Bill. Among other things, this Bill will provide for the establishment of an independent body to continue the legacy of the Sustainable Development Commission.

11.37. There is a clear commitment to take the NEF process forward. As the First Minister stated, development of a new natural environment framework to enable more integrated management of the Welsh environment is a Government manifesto commitment. The environment Bill will enhance environmental protection and deliver ecological gains while reducing regulatory burden. It is noted

that further development of proposals for legislative changes are likely to evolve from the ongoing NEF work over the next 12-18 months.

11.38. Debate on the Statement questioned the merit of, and necessity for, an environment Bill. Kirsty Williams AM, Leader of the Liberal Democrats, described it as 'curious' noting that when the Assembly's Sustainability Committee was taken evidence on the failure to meet biodiversity targets, no one proposed a new law to address the situation. She questioned whether the Bill would make a difference. The First Minister's follow up remarks to comments on the environment Bill were limited to noting that the intention was, inevitably, to protect the environment and that the intention is not to impose new burdens on agriculture and that he did not anticipate any negative effect, financially or otherwise, on agriculture. He pointed out that almost all of the rules governing agriculture are determined at European level although he acknowledged that there was scope for some interpretation.

11.39. The intended planning Bill will consolidate existing planning legislation, making it more transparent and accessible. The opportunity will be taken to reconsider roles and responsibilities in order to develop a planning system to help deliver economic renewal. There is a commitment to publish a White Paper setting out Government proposals in 2012, followed by a Bill in 2014. The Planning Bill attracted more attention in debate than the other two Bills, most of it seeking reassurance that the Bill would be more than a mere consolidation exercise. The First Minister confirmed that this was the intention and said that the Bill will look at all aspects of planning.

CHAPTER 12. CONCLUSIONS FROM THE WORKSTREAM PROJECTS

INTRODUCTION

12.1. This section of the Report draws together the main conclusions from the eight projects noting in particular any general conclusions and goes on to add some suggestions that the workstream might like to consider in taking this workstream forward.

COMMENTS ON EVIDENCE

12.2. The great strength of the approach taken by the workstream is that the choice of projects has ensured that evidence comes from a wide spread of different sectors and reflects many different viewpoints. All of the evidence presented is based on opinions. Whether these are the opinions of individual experts whose day to day work requires them to use their expertise to make judgments, the collated responses of organisation working with or affected by particular regulations, or the views of interested individuals, is largely irrelevant at this stage. The important point is the issue raised rather than who made it or in what context. If it is decided to take any of these issues further it will, of course, be important to understand the context in which points were raised. I have attempted to include sufficient information to enable this to be done.

12.3. Most of the information supplied relates directly to biodiversity. The coverage includes comments on the drafting and implementation of particular pieces of legislation. The sectors commenting include NGOs, regulators, local authorities and business interests. The NGO perspective is strongly supportive of the legislation; where critical comments have been made these most often relate to the legislation not going far enough. The evidence from local authorities, which has usually been submitted by biodiversity officers or their equivalent, shows similar concerns but also notes the limitations imposed by lack of resources. Businesses commenting on biodiversity have directed their comments mainly to two issues – the licensing provisions relating to protected species and the operation of environmental assessment procedures included appropriate assessments. CCW's views on the nature conservation legislation are similar to that of the NGOs but they seem to have more confidence in the legislation as it stands and give fewer comments on its failings. The aspect of biodiversity that attracts the widest attention across stakeholder groups is the species protection legislation. In contrast, there is relatively little attention paid to site protection measures.

12.4. In comparison with the coverage afforded to biodiversity law and management, there are relatively few comments on planning law and policy and those that have been made tend to be closely linked to a biodiversity issue. Very little evidence was submitted on strategic planning issues apart from references to previously published work referred to in consultation responses. There

were more comments on the implementation of planning law and policy, typically in relation to planning applications and the use of environmental assessments; resourcing issues provided a common thread in responses.

12.5. There was little coverage of legislation on other environmental issues, such as pollution control or cultural heritage, for example, the main exception being the questionnaire responses, which covered a number of other topics and, the critiques provided by CCW which included commentaries on the Water Framework Directive.

12.6. One very significant gap in the evidence amassed to date is any detailed consideration of marine environmental management. It is important that this gap is filled, not just because it results in whole areas of human activity and several ecosystems being overlooked or marginalised, but because marine environmental management has already developed in parallel to NEF. For example, the concept of the ecosystem approach is enshrined within the Marine Strategy Framework Directive, interpreted within the transposing regulations and re-iterated within the statutory Marine Policy Statement which will govern the development of marine plans. The work done in developing these marine measures could be extremely useful for the development of NEF and will, in any event, have to be taken into account to avoid inconsistencies between marine policy and NEF.

12.7. The evidence tends not to be very specific; comments are more often than not very general in nature and, even when they do refer to specific legal or regulatory issues, they do not usually give sufficiently precise detail to enable the matter to be followed up without further information. In some instances, it is not even clear which particular piece of legislation is being referred to. The same difficulty arises with the references to regulators. The desire to protect individual identities means that it is not always possible to tell which regulatory body any given regulator works for. The roles and function of CCW, the Forestry Commission and the Environment Agency are very different and it would be useful to know which one was being referred to. The position with respect to business interests is clearer because most of those providing evidence from a business perspective have identified the sector of the business, the size of the company and whether it is in the private or public sector.

12.8. Although most of the evidence is not specific as to details of the issue raised, it is usually related to a particular piece of environmental legislation. No attempt was made to canvas views on the relevance of non-environmental legislation to the NEF process and it was not unexpected that these wider contextual areas were not raised in the evidence. What was not expected was the scant reference to 'higher level' policy mechanisms that could be used to instil NEF principles into the top level of strategic thinking or legal devices that could be used to embed these principles into the functions and duties of public bodies.

12.9. As noted in Chapter 1, the Workstream's report to the Programme Board Meeting (see Annex 2) notes that one of the broad conclusions from the evidence presented in this report is that even those who are engaged with the *Living Wales* development seemed to find it difficult to address the wider picture and consider improvements to the current legislative framework to deliver an ecosystems approach. Some of the responses to the consultation document did set out the

principles for delivering an integrated ecosystems approach (e.g. the RELU report) but these were mainly references to previous work and not specifically prepared for the Welsh situation.

12.10. It is the case that stakeholder interests are not all represented to the same extent in the evidence covered by this report. The predominance of biodiversity based interest groups is not surprising given the initial positioning of the NEF consultation and the fact that so many of the respondents in this sector are NGOs simply reflects the great number of these and their important role in managing protected areas and promoting interest in particular biological taxa. Whilst there is a reasonable spread of responses from trade associations and comparable bodies, their comments tend to be general rather than specific. There are few responses from individual businesses, even from those working predominantly in the natural environment sector such as farmers. It is suggested that further work should include attempts to engage with and involve other sectors including stronger involvement with local government and with the agricultural sector. Engagement with the farming community will be particularly important in considering broader land management issues and it will be important to consider how agri-environment schemes can be used as part of the toolkit. The prospect of increased environmental protection may cause alarm for those engaged in agriculture but it is unlikely that NEF will be successful if agricultural practices do not engage with the process. As the First Minister stated in his statement announcing the legislative programme, there is no intention to make the burden on farmers more onerous.

12.11. Because of the lack of details provided, it is impossible to come up with definite examples of problems with the way in which legislation is drafted or implemented. Most of the information provided could be describe as “anecdotal”. This does not, in itself, render it less persuasive than evidence supported by “facts” or make it anyway incorrect. In many instances, it is a party’s perception of how a piece of legislation is implemented or a process is managed that governs the effectiveness of the measure. In some cases there is a difference of opinion over how a piece of legislation works. Without specific examples it is not possible to evaluate the evidence where there these differences of opinion occur. I have therefore prepared a list of potential issues that need to be followed up. At the very least, these examples suggest a lack of understanding and/or communication failures that need to be addressed.

12.12. The NEF consultation and the workstreams set up to take NEF forward provided an opportunity for issues to be raised –indeed, this was one of the purposes for the interviews and surveys in this workstream. It is not surprising that most of the comments made are critical – anyone working in customer relations will confirm that letters of complaint are far more numerous than thank you letters. So there is another bias inherent in some of the evidence streams considered here and it will be important to remember that there may be unrecorded broad satisfaction with the regulatory and management approach. Balancing this, CCW’s legislation critiques did consider positive as well as negative aspectss and a similar approach was followed in the management options workshop.

12.13. The aims of the workstream were to obtain a range of different types of evidence to inform future work; there was no intention to be fully comprehensive and cover all aspects of regulatory and management approaches in a single exercise. Nevertheless, it is worth considering why the evidence has not been as comprehensive as it might have been so that lessons can be learned for

future projects and plans can be made to fill the gaps where necessary. A number of reasons have been identified:

- The launch of the NEF consultation at the Wales Biodiversity Partnership conference ensured that the nature conservation sector, and especially the NGO sector, was fully aware of the exercise from the outset and felt empowered to participate. The launch also placed the whole exercise firmly in the biodiversity 'box' and may have created an impression in other sectors that it was not of relevance to them.
- There has already been a regulatory review designed to reduce the regulatory burden on industry and improve efficiency for the regulators. NEF may, therefore, have been seen to be directed at a different sector of environmental management. Note, however, that the workstream is linked into this regulatory review.
- The term 'NEF' and the use of the term 'A Living Wales' in the title of the consultation document automatically shapes the perception of NEF as something focusing on wildlife and countryside issues rather than the industrial sector.
- The consultation document was not easy to read or respond to. There is unequivocal, and forceful, evidence that this put members of the public off from responding to the questions posed and it may be that it put many parties off from even letting the Welsh Government know that they found it inaccessible.
- One of the issues that NEF is supposed to deal with is the sectoralisation of ecosystem management. The ecosystem approach, and its application to the management of ecosystem services, aims to embed natural resources into the decision-making process. The fact that this not happening now is reason enough to explain why many organisations chose not to respond. Local authorities' responses provide an interesting example here. A number of these did respond to the consultation document but in the majority of cases the submission was made by an ecologist or biodiversity advisor rather than the Chief Executive and there is no indication of whether NEF was discussed by elected representatives and, if so, whether these discussions were taken account of in the submissions. As noted elsewhere in this report, the involvement of local authorities in taking the NEF agenda forward is extremely important.

12.14. These limitations notwithstanding, it is possible to distil some key points from across the range of evidence supplied for this workstream and these are discussed in more detail in the sections that follow below.

ACKNOWLEDGEMENT OF NEED FOR MANAGEMENT AND REGULATION

12.15. There was broad acceptance of the need for regulatory and management measures for the protection of biodiversity. Whilst this is not altogether surprising given that the bulk of the consultation responses came from the nature conservation sector, similar views were expressed by industry; see, for example, the one-to-one interview reports. What the need actually amounted to and why it had arisen was not covered except in the most general terms noting a decline in biodiversity and a failure to meet biodiversity targets. There was no discussion of the various

reasons why we need to conserve biodiversity which is somewhat surprising given the emphasis on the ecosystem approach. Maybe it was simply taken for granted by most people. Although individual aspects of legislation attracted criticisms, there was a general acceptance that the present legal framework was comprehensive, despite being piecemeal. The main issues were about implementation. As noted by WSP, the interest in implementation provides an opportunity for addressing any deficiencies through changes to the regulatory culture; something that should be easier to achieve than legislative change.

THE REGULATORY CULTURE

12.16. There were many comments on the way that regulation was implemented, most of them critical in nature. As can be seen from the following paragraphs, the overarching message of these criticisms was one of frustration.

Frustration at bureaucratic approach

12.17. There were examples of dissatisfaction/frustration at the approach to implementing the law. These complaints come from across a wide range of different sectors and different players. So, for example, both large and small businesses cited instances where the process for obtaining regulatory approval seemed to be unnecessarily complicated and protracted. There was even evidence that organisations which benefited from the bureaucracy because it generated work felt that it was unnecessary. Overall, this concern could be expressed as a feeling that the process was a 'waste of time'.

Frustration at poorly directed effort

12.18. Closely related to the previous concern is the complaint that efforts are being misdirected so that time and money is being spent on minor improvements or on unnecessary research or in carrying out useless work when there are important things that could be done instead.

Broad satisfaction with regulator:regulated interface

12.19. Despite these complaints, there was overall a broad satisfaction with the working relations between the regulators and those being regulated. Several people commented on improved relations over recent years. There are some caveats to this general statement however. The interface between regulator and regulated appeared to be more satisfactory with some regulators than others. Some commentators put considerable emphasis on establishing good relations at the local level; others pointed to the need to gain good mutual understanding at the senior level.

Dissatisfaction at regulator:regulator interface

12.20. There was some evidence of a lack of joined up thinking both between different regulatory bodies and between individuals working within a given regulatory body. This resulted in duplication of effort, not only by the regulators but by the regulated, who were sometimes required to go through essentially the same regulatory process more than once for no apparent reason. It also sometimes delivered mixed messages as where a local member of staff did not follow agreed procedures discussed between senior members of staff and the regulated business.

12.21. One particular issue raised was the need to ensure that where more than one regulatory body is involved it is clear to all concerned how the various roles will be coordinated. It was suggested, for example, that provision for designating a lead competent authority should be added to improve the effectiveness of Regulation 65 the Conservation of Habitats and Species Regulations.

One approach suits all

12.22. Several people commented that regulation could come across as very heavy handed with no real difference in the way major impacts and minor impacts were treated. Examples of industrial permits were provided and the same issue also arises with the Habitats Directive and other nature conservation law. There is no easy way of distinguishing between the impacts of proposals for major or minor projects but this is in the spirit of the Directive; it is the impact that matters not its cause. But it is unfortunate that there is no acknowledgement that some impacts may be less severe than others and possibly require less attention. There were several comments to the effect that permissions were only given conditional on the applicant carrying out regular sampling and/or monitoring but that these requirements were disproportionate to the level of harm that *might* arise. The need for a risk-based approach seems obvious.

Micro-management

12.23. A number of the issues raised above involve some element of micro-management. There will no doubt be occasions where such an approach will be appropriate as, for example, in the case of a new industrial site finding its way with new regulations. But in many instances, micro-management and following the letter of the law down to the most detailed level can lead everyone to lose sight of the main objective. I think the Habitats Directive provides an example of this. The aim of the Directive is simple: “to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora” but this broad ambition gets broken down into very many individual objectives that do not necessarily add up to the whole.

12.24. WSP considered that some of the most significant comments made during the 1:1 interviews were about the culture of regulation and they concluded that there is scope for improving both the effectiveness and efficiency of regulation by changing the culture of interaction between regulatory agencies and regulated businesses. Concerns over, and complaints about, these interaction were raised in several of the projects. The main cultural issues were over-bureaucracy coupled with a lack of skills and expertise in the regulatory bodies. The problems of poor interactions appear to be felt across a number of different regulatory and management regimes and affect more than one regulatory body. The issue raised most often, however, was the process surrounding licensing applications in relation to protected species. There was some questioning of the efficacy of the legislation itself, but the majority of the complaints were about how the law was implemented rather than what that law was. Comments typically referred to the need to supply information more than once, sometimes to more than one regulator; the lack of consistency of approach between regulators, the level of detail that had to be supplied in the information required; the refusal to admit any flexibility into the regulatory process even when it could be argued that this would result in a more satisfactory environmental outcome. Solutions for addressing these issues included fostering closer working relationships between regulators, perhaps through secondments and job exchanges, fostering better relationships between regulators and regulated in order to build and

maintain an environment of trust; and provision of clearly and timely guidance on the regulations under consideration.

THE NEF PROCESS

12.25. Some comments on the process of obtaining evidence in support of the NEF process have been noted above, under sections 12.2-12.14. There is a need to redress the balance of information if NEF is to become more than a review of nature conservation. This means that some considerable effort will need to be put into obtaining the views of, and extracting specific examples from, a wider range of interest sectors including, in particular, the business community and the general public. My conclusion from the eight projects is that they were never going to yield a full spread of information and this was probably never the intention anyway. Although they did provide opportunities for everyone to contribute in one way or another, they did not incentivise involvement. If busy people for whom the natural world is seen as, at best, an add-on item are to engage in NEF they will have to be persuaded that it is in their interest to do so. There is considerable experience in the techniques of stakeholder engagement as applied in the environmental sector and there is no reason why these should not be applied here²⁹.

THE NEED FOR REGULATORY CHANGE

12.26. Table 12.1 lists the legal instruments referred to in each project of this workstream. Many pieces of law were only referred to in the Questionnaires. Although it looks quite lengthy, it needs to be judged against the list of 278 regulations listed in the Red Tape Challenge. The questionnaire project invited respondents to comment on any law that they considered was of relevance to NEF and this particular workstream. The comments on pollution control were most detailed in response to the questions on the effectiveness of the legislation. Various laws were regarded as not completely effective although, where more than one person covered the same piece of legislation, the reasons given for the lack of effectiveness were usually different. In most cases defects were held to lie in the implementation rather than the drafting of the law but there were a few comments specifically about the need for amendments. Where these comments did occur there was generally insufficient detail in the project report to identify the issues precisely. Nevertheless, the evidence does indicate that there is a need to look at the drafting of the instruments to determine whether amendment would address the issues raised.

²⁹ WEL have recommended the National Principles for Public Engagement in Wales (Participation Cymru). Further details are available at www.participationcymru.org.uk.

Table 12.1 Legal instruments referred to in projects

Legal Instrument	Project Number							
	1	2	3	4	5	6	7	8
Bathing Water Regulations	•							
Carbon Reduction Etc. Order	•							
Climate Change Act	•							
COMAH	•							
Conservation Regulations	•						•	
Conservation of Seals Act			•					
Controlled Waste (Registration of Carriers and Seizure of Vehicles) Regulations	•							
Control of Pollution (Amendment) Act	•							
CROW Act			•					
CRCEES	•							
EDR			•					
EIA Regulations			•	•				
EIA Regulations (Forestry)	•						•	
End of Life Vehicles Regulations	•							
Environment Act	•							
Environmental Permitting Regulations	•							
Environmental Protection Act	•							
Environmental Protection (Duty of Care) Regulations	•							
Flood and Water Management Act	•							
Forestry Act	•						•	
Greenhouse Gas Emissions Trading Scheme Regulations	•							
Habitats Directive					•			
Hazardous Waste Act	•							
Hedgerow Regulations			•					
Land Drainage Act	•							
Marine & Coastal Access Act	•				•			
Marine Strategy Framework Directive					•			
Marine Strategy Regulations	•							
National Parks etc. Act		•						
NERC Act		•	•	•				
Nitrogen PP (Wales) Regulations	•							
Offshore Marine Nature Conservation Regulations			•					
Persistent Organic Pollutants Regulations	•							
Plant Health Act	•							
Protection of Badgers Act			•					
Radioactive Substances Act	•							
Regulation of I Powers Act			•					
Reservoirs Act	•							
Salmon & Freshwater Fisheries Act	•							
Sludge (Use in Agriculture) Regulations	•							
TCPA	•		•					
Tree Preservation Order			•					
Wales Waste Measures etc.	•							
WEEE Directive	•							
Water Framework Directive	•				•			
Water Resources Act	•							
Water Resources (Control of Pollution) (Silage, etc.) Regulations	•							
Wildlife & Countryside Act	•		•					

1 = Questionnaire; 2 = Consultation response; 3 = Input from Individuals; 4 = Committee Reports; 5 = CCW legislation critiques; 6 = Literature review; 7 = 1:1 interviews; 8 = Management approaches workshop

Control of Pollution (Amendment) Act 1989

12.27. The report states that “all respondents believe the legislation does not have correct and necessary powers” in respect of ‘gifted waste’, registered/unregistered waste carriers and penalties for unregistered carriers.

End of Life Vehicles Regulations 2003

12.28. One respondent thought that further definition of terms was needed, particularly regarding length of time vehicles can be kept before de-pollution and appropriate storage for vehicles not fully de-polluted.

Environmental Permitting Regulations 2010

12.29. There were concerns expressed by half of the respondents that the regulations did not have the correct and necessary powers. Particular concerns included the wording of Regulation 12(1)(b) which is about the offence of causing or knowingly permitting a water discharge activity and replaces s 85(1) of the Water Resources Act 1991; and the provisions for suspending permits which refer to ‘risk of significant pollution’ but do not define what significant pollution is.

Waste Electrical and Electronic Equipment Regulations 2006

12.30. The legislation was said to be ineffective because it only applied to WEEE that is separately collected and does not ban landfilling.

12.31. The CCW Legislation Critiques is the other major source of references to named pieces of legislation, most of which could be described as nature conservation law. The only suggestion for redrafting was in relation to the Wildlife and Countryside Act where it was suggested that consolidation would help.

12.32. With the exception of these two projects, it is remarkable that so few pieces of legislation are specifically referred to. The most commonly cited legal instruments are the Habitats Directive and the Conservation of Habitats and Species Regulations which transpose it but the concerns raised are more to do with implementation rather than drafting issues. This might be, in part, because respondents are assuming that European legislation cannot be amended so there is little point in offering this as a solution for problems raised.

12.33. There are, however, two pieces of legislation where the need for change was voiced by a range of respondents across the projects. These are NERC Act 2006 s 40(1) and the EIA (Uncultivated Land and Semi-Natural Areas) (Wales) Regulations 2002.

12.34. NERC Act s 40(1) states that “every public authority must, in exercising its functions, have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity”. The imposition of this duty on public bodies was broadly welcomed in principle but was found to be ineffective. Mick Green, for example, commented that he had seen no

examples of where NERC has led to real changes in approach³⁰. Suggestions for improvement included amending the section to strengthen the duty and adding further duties to monitor and report on compliance with the duty although there were also comments to the effect that these would not make any appreciable difference in practice.

12.35. The duty to 'have regard to' something is a commonly used legislative device. It is an easy way to add a function to an existing body without having to spell out in detail what is required. There are advantages in this approach because the duty is sufficiently widely drawn for it to be interpreted differently as circumstances change and thereby stand the test of time but it is only likely to be effective as a device for change if it is embedded in the culture of the organisation or organisations in question. Unfortunately this is not usually the case. Simply bolting on a 'vague' duty will not work on its own.

12.36. The problem with the EIA regulations is rather different. There does not appear to be any problem with the way the Regulations work, despite the claims that there is a loophole in the legislation. The issue is that the Regulations only apply to land that is being cleared for the purpose of agricultural improvement and not to land cleared prior to other types of development. The existence of a legislative gap is not in question; the Sustainability Commission has already made a strong recommendation for change which this workstream should endorse. Note, however, that the Government did not accept this recommendation but consider that if a problem does exist it should be addressed by some other mechanism rather than by the planning system.

12.37. As shown in Box 12.1, the legal measures for regulation are, of course, only part of the regulatory and management approaches. Ideally, legislation should follow policy but this not practicable given the time and resources needed to make primary legislation. Regulations are simpler to enact because they are a form of secondary legislation but they are limited in scope to the framework set by the governing Act. An analysis of existing laws to see if they meet requirements such as compliance with the principles of good legislation or can contribute to the wider goals of NEF is the only realistic option, given the impossibility of working with a clean sheet. However, this exercise is only the first stage. As several commentators noted, a more detailed review of key legislation is needed once there are clear outcomes to meet. A SWOT analysis would be one way of doing this.

PURPOSE

12.38. There is much talk about making legislation more appropriate for the NEF approach to environmental management by defining this purpose on the face of the legislation. However it is important to distinguish between the outcomes that the legislation is being employed to deliver and the purpose of the legislation, two things that are often confused. Legislation tends to provide a purpose on the face of the statute but is silent on the reason behind it. The reason for using the legislation may change with time. This makes it more flexible but only to an extent and there may

³⁰ In support of this claim he cites his research on oil and gas drilling which is reported in M Green & M Simmonds, 2008, 'Riding the waves – lessons from campaigning on oil and gas' *ECOS* 29(3/4) 72-79.

come a point when the statutory purpose is being distorted to meet a new objective. The difference is best illustrated by example as shown in Box 12.2 using the example of the marine nature reserve legislation. (Note that marine nature reserves provisions have been repealed by the Marine & Coastal Access Act 2009 and replaced with provision for Marine Conservation Zones).

Box 12.1. Legislating to Implement Policy

This is a generic diagram applicable to any area of policy that requires legislation to give it force.

Stage 1 Identify need for action

Stage 2 Formulate policy to address need

Stage 3 Develop strategy for implementing policy

Stage 4 Make statute and/or regulation to deliver
implementation strategy (in part)

Stage 5 Produce guidelines for interpretation of legislation in
practice

Stage 6 Enforce compliance with legislation

Stage 7 Review effectiveness of legislation and amend if
necessary

12.39. The differences are not merely semantic because it is the purpose as defined (explicitly or implicitly) in the statute that dictates how the regulations for implementing it will be drafted and put into effect. This does not mean that the legislation is necessarily faulty or badly drafted because the purpose behind the legislation is not clearly defined. By not specifying what the goals for conservation or research are, the legislators have built in a degree of flexibility allowing a range of different objectives to be catered for.

12.40. There is an inherent difficulty, however. Because a purpose is clearly stated, there is a tendency not to look behind the wording for a broader purpose so the element of flexibility is not apparent either. Compare this with the wording in the Town & Country Planning Act 1990 s 70(1) which states that

where an application is made to a local planning authority for planning permission—

- (a) they may grant planning permission, either unconditionally or subject to such conditions as they think fit; or
- (b) they may refuse planning permission.

12.41. Although there are limitations to the discretionary powers of the local authority, the wording makes it clear that there is the possibility of discretion.

Box 12.2. Purpose and Outcome

The example of Marine Nature Reserves (Wildlife & Countryside Act 1981 s36)

Where ... it appears to the Secretary of State expedient, ... that ... land and waters covering it should be managed ... for the purpose of—

- (a) conserving marine flora or fauna or geological or physiographical features of special interest in the area; or
- (b) providing, under suitable conditions and control, special opportunities for the study of, and research into, matters relating to marine flora and fauna and the physical conditions in which they live, or for the study of geological and physiographical features of special interest in the area,

he may by order designate the area ... as a marine nature reserve; and the appropriate conservation body shall manage any area so designated for either or both of those purposes

A number of different purposes are embedded in this section.

1. It empowers government to designate MNRs
2. The stated purposes are to conserve and provide research opportunities
3. It provides for the management of MNRs for the stated purposes.

What it does not say is what the purpose of the conservation and/or research is. Without this information it is impossible to set a meaningful outcome or to measure success in achieving it. The wording explains the criteria for selecting a site but it does not explain why MNRs should be designated. In other words it provides a practical purpose but not a reason for doing so. There is no explicit reference to what MNRs are supposed to achieve although it can be implied from the purpose. There is nothing in the statute to indicate what the measure of success is, i.e. what the desired outcome is.

12.42. At the point of implementation there is an obvious tendency for the parties involved to see the legal provision in question as the be all and end all of the process. In planning law, there will be a need to look behind s 70 in order to determine the scope of the discretion to set conditions; there is abundant guidance in circulars and planning statements to assist in this respect. Contrast this with the wording of the MNR provision which appears to be self-contained.

FLEXIBLE OUTCOMES

12.43. It follows from Box 12.2 that the best environmental law will be shaped by the desired outcome and should include sufficient flexibility to allow that outcome to be amended as circumstances change. As is noted above there is more than one way to embed flexibility into a

piece of legislation. The most obvious way is to include express reference to discretion, as in the words ‘as they think fit’ in relation to planning conditions. If the legal provision is worded in general terms, there is an implied flexibility allowing those responsible for implementation to include or exclude things. For example, the scope of ‘opportunities for research’ in the MNR legislation is wide enough to include basic research into the biodiversity, research into conservation measures, and even research into broader issues such as the impact of climate change on marine biota. Contrast this with the definition of ‘natural beauty’ in s 5(2) of the National Parks etc. Act. The courts held that s 114(2) of the same Act, which refers to ‘flora, fauna, and geological and physiographical features’ did not extend the definition of natural beauty and neither did the reference in s 5(1) to ‘wildlife and cultural heritage’.

12.44. Flexibility in action can be provided for by the choice of terms directing action by the parties. The MNR provision again provides a good example. The Secretary of State *may* designate an MNR but the nature conservation body *must* manage it. The distinction is the difference between a duty and a power but there are also shades of responsibility within both duty and power. The duty to manage, for example, is rather different from a duty ‘to have regard to’ or ‘to take account of’ something because only the first mandates a practical outcome.

12.45. There is a common perception that European legislation is less flexible than domestic legislation. This is something of a misconception because most environmental law originating in Europe takes the form of Directives and Directives are binding only as to effect. Member States are free to implement them in their national legislation in whatever manner they choose. This does allow for a degree of flexibility and discretion. It is true that the European Commission often has strong views as to what does and does not meet the requirements for implementation and the European Court of Justice (ECJ) has tended to support the Commission in this respect but this is not always the case. One of the main criticisms levied against the Habitats Directive in the evidence received for this workstream was that it required strict protection and proof that there would be no adverse effects. A careful reading of the Directive suggests that this is not strictly true.

12.46. At the Regulatory and Management Approaches Workstream meeting on June 17 2011, CCW provided examples of ways in which they felt the EC directives can be applied to secure positive outcomes for both conservation and development, including the Wales Scallop Order and the Tidal Energy Ltd Ramsey Sound scheme.

12.47. Most of the controversy over the Directive has focused on the measures for the protection of Special Areas of Conservation (SACs) in Article 6 but similar concerns have been made about the species protection measures and the way these are implemented in this country. The recent Supreme Court case of *Morge (Morge (FC) (Appellant) v Hampshire County Council (Respondent))* shows that the Courts are prepared to accept that there is a strong element of discretion in the application of these measures and that a common sense approach, delivered on a case by case basis, is appropriate. The case concerned Article 12(b) of the Habitats Directive, its transposition in Regulations and the implementation of these Regulations.

12.48. Article 12(1) provides:

Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV (a) in their natural range, prohibiting:

...

(b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration.

12.49. Regulations to transpose Article 12(b)(1) have been amended several times to take account of the fact that the article does not refer to ‘significant’ disturbance but appears, on the face of it, to cover any disturbance to animals however trivial. The judgments in the Supreme Court point out, however, that the absence of the word significant does not carry this connotation. As Lord Brown explained “whilst it is true that the word ‘significant’ is omitted from Article 12(1)(b) – in contrast to article 6(2) and, indeed, article 12(4) which envisages accidental capture and killing having a “significant negative impact on the protected species” – that cannot preclude an assessment of the nature and extent of the negative impact ... and, ultimately, a judgment as to whether that is sufficient to constitute a “disturbance” of the species”.

12.50. The downside of this more flexible approach is that it creates greater uncertainty and this is not popular with businesses and developers. As Mick Green commented in his response to the first draft of this report, *Morge* left ‘disturbance’ about as clear as mud (which is, perhaps, a good summary of the courts’ thinking as well)! He pointed to a need for better guidance on disturbance but there is a danger here that this could simply re-introduce rigidity.

12.51. The evidence of claims of bureaucratic handling of applications and the refusal to consider alternative approaches all seem to be about ‘people’ problems rather than legal ones. However tightly drawn the legislation is, there is always an element of discretion in interpretation even if only in the decision of whether to prosecute or not. If regulatory and management approaches are going to meet the objectives of NEF, the staff involved will need to be able to work flexibly. This is likely to prove more important than ensuring the regulations themselves are Hampton compliant because it is the personal interface that largely determines the efficiency of the system. The suggestion here, then, is that regulating more effectively is as much a management issue as a legal one and in some instances it is almost entirely about management. The way in which regulators go about their business and manage their staff is likely to have as great an impact on how effective a measure is seen to be as the way the measure is drafted.

UNDERSTANDING THE LAW

12.52. The wording of a piece of legislation is only the start of the process of legal regulation. The words of the legal instrument have to be interpreted by those applying them and it is this interpretation which is the subject of many legal challenges. The interpretation of the Habitats Directive has led to a considerable body of case law. One aspect that came up repeatedly in the evidence is the assumption that the Directive applies the precautionary principle and thereby puts an unacceptable burden on an applicant seeking to carry out a project in an SAC. A strict interpretation of the Directive, however, suggests that the only precautionary element is the need to consider potential adverse effects at an early stage. The Directive does not set up SACs as ‘no go’

areas. Article 2, which states the objectives of the Directive, encompasses both environmental and social aspects and states:

1. The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.
2. Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.
3. Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.

12.53. Article 6 requires an Appropriate Assessment of plans or projects likely to have a significant effect on an SAC. The claim for the precautionary element comes from the next clause which states that “the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned”. As it is impossible to prove a negative, it is claimed that this amounts to a strict application of the precautionary principle. Note, however, that the Appropriate Assessment only comes into play if the effect is likely to be significant in the first place so there cannot be a requirement to show ‘no harm’ at all. Furthermore, if it is ascertained that there will be adverse effects, there is still the possibility that the project may proceed subject to conditions. The fact that these conditions (the provision of compensatory measures) tend to be onerous is a result of the way the Directive is implemented rather than the wording in the Directive itself. All that is required is that the “Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected”. It is possible to envisage circumstances where there is no need for compensatory measures to ensure overall coherence although guidance on how to implement the Directive does not support this interpretation.

OVER-INTERPRETATION AND OVER-RELIANCE ON SCIENCE

12.54. The case of *Morge* makes it clear that it is not always possible to refine the interpretation of a legal provision so that it can be stated as a rule to apply in every situation. Council in *Morge* went to great lengths to define what was meant by ‘disturbance’. The judgment, however, points to the futility of taking this too far. Lord Brown states that it is “difficult to take the question of the proper interpretation and application of article 12(1)(b) much further than it is taken in the Commission’s own Guidance document” and decides against referring the issue to the ECJ for clarification because it would be “unrealistic to suppose that the Court of Justice would feel able to provide any greater or different assistance”. There seems to be a tendency in this country to fear making any decision that might run counter to the perceived wisdom of the Commission but as, their Lordships observed, guidance is intended to guide not direct.

12.55. The consequences of this tendency to over-interpret are exacerbated by the need to rely on scientific evidence. The protection envisaged under the Directive is predicated on an understanding of the conservation status of the feature or species in question and the ability to identify whether that status is favourable or not. Favourable status is a measure of the ‘health’ of the feature which is made up of a large number of individual aspects. Much work has been done on developing these

concepts and producing guidance material but these are often of no help when it comes to determining the effect of a proposed activity. One result is that applicants may be required to produce evidence at a level of detail that is not matched by the background information held by the nature conservation body. It seems that the increased emphasis on the use of 'best scientific evidence' has raised the status of science to unrealistic levels; admission that we do not have a scientific answer is judged as failure or incompetence rather than a fact of life that will apply in many situations. The regulators address this problem by relying on their own scientific expertise to enable them to form an opinion. The applicant is not usually in the same position and may have no choice but to commission expensive research in order to answer specific questions raised by the regulator. It is not surprising that this is often viewed as unfair; the regulator can make do without the detail but the applicant must supply it.

12.56. An alternative approach is to acknowledge that in some circumstances it is impossible to determine likely impacts in advance but, rather than refuse the application, to allow it to proceed under close monitoring and thereby learn more about the most effective management programme. The Welsh Government's approach to selection of Marine Conservation Zones follows this approach. Rather than setting up a large number of MCZs, as is being planned in England, a mere handful of MCZs will be created in Wales but they will be 'highly protected' no-take zones. The idea is for the effect of this high level of protection will be determined by regular monitoring; something that would not be possible if a large number of sites were to be designated.

12.57. The suggestion of an over-reliance on science is likely to be controversial. I am certainly not suggesting that it is not necessary to base decisions on the best available information. It is just that there appear to be some situations where there is a reluctance to admit that it is impracticable to obtain more information and/or an attempt to place too much reliance on limited data. One approach would be to adjust the level of proof required to the level of possible impacts although I acknowledge that this is a somewhat circular argument!

LAND USE AND SPATIAL PLANNING

12.58. Despite the comparative paucity of evidence on planning, there was a clear underlying assumption that NEF objectives could only be achieved if they were central to planning regimes. A clear flag for an analysis of the planning structure was made in the policy map work and in the management approaches workshop, building on the wider ecosystem services community's call for this internationally. Strategic level thinking on these inter-relationships is discussed further in chapter 13.

12.59. One of the specific issues raised in the evidence was that there was not enough of a link between planning and other environmental regulation – something that might explain why so few pieces of evidence were submitted. It was suggested that planning application and permitting applications should be undertaken in parallel so that progress could be tracked thereby making the process more efficient. A further suggestion was that applications for planning permission should not be accepted for consideration unless and until the necessary supporting information was

supplied. The most significant suggestion though was the need for the Wales Spatial Plan to fully adopt NEF.

CHAPTER 13 USING THE EVIDENCE TO SUPPORT NEF

13.1. The NEF process started over a year ago and thinking on NEF has developed since then. The project analyses pulled out emerging ideas which were then discussed in workstream meetings so that their implications for NEF could be considered. The suggestions put forward in this Chapter are designed to take the process forward in accordance with the ideas and that have been developed within the workstream. Discussions with the NEF Project Team have helped me to channel my thinking and bring the various threads together with a view to looking forward to the next stage of NEF.

13.2. Regulation plays an important role in the delivery of the environmental management and there can be no doubt that it will continue to do so even if the NEF process results in a drastically different way of managing our activities. There is a large body of legislation on environmental matters ranging from international obligations down to regulations applying to Wales only. The strong influence of European legislation in the environmental field limits the scope for radical legislative change but does not prevent changes in the ways in which legal requirements are delivered. This report has identified a number of areas of dissatisfaction with details of the law. Where these can be rectified by amending the legislation this may be possible to achieve in the relatively short term. In many cases, however, the dissatisfaction is caused by the way a particular measure is implemented which is more a matter for management rather than regulation. The NEF process is ideally suited to address these areas of dissatisfaction; indeed to do so will help to achieve the overall aims of the process. One of the key areas for further consideration, therefore, will be the way in which regulators work and how they engage with those they regulate. It may be that there is a need for top level, strategic policy to be enshrined in law to ensure that the new framework is taken forward effectively. Ideas of this sort have been put forward in a number of studies into integrated environmental management and may well be of relevance for NEF.

13.3. The workstream has adopted an approach that looks at the regulatory and management framework at three levels – strategic, legislation and tactical. The following suggestions and recommendations for further work are arranged using this same classification. This is not necessarily hierarchical. In an ideal world the strategy would be developed first and then legal and management frameworks would be fleshed out to deliver it. For NEF, the strategic development has to be done against a background of existing law and policy, some of which is outside the control of the Welsh Government. Table 13.1 summarises the suggestions which are described in more detail in the following sections of this chapter.

STRATEGIC LEVEL

The Policy Framework

13.4. Changes at the strategic level are likely to be the most effective in terms of delivering NEF because they set the context in which everything else can develop but the evidence in this report shows that there is also a need for changes to individual regulations and/or the way they are

implemented. These changes may not, of themselves deliver NEF but they will bring the regulations into a form that is more compatible with it and will provide a clear indication that NEF is not about more regulation. Nevertheless, the evidence in this report supports the view that the priority needs to be to address the strategic policy framework and point it in the direction of an ecosystems approach before attempting to change the legislative framework to support its delivery.

13.5. The First Minister's announcement of a Green Paper is an important first step in taking NEF forward. This Green Paper should confirm the scope and purpose of NEF and set out its underlying principles. It will also need to set out the policy framework needed to implement the ecosystem approach together with links to any necessary changes to the legislative framework that should be included in forthcoming Bills. The Green Paper is also important for providing a strategic opportunity to engage with wider stakeholders across the economic, social and environmental sectors thereby drawing a wider sector of society into the debate.

Achieving Greater Integration

13.6. The need for greater and more widespread integration at all levels, strategic, legislative and tactical has been more widely identified as a significant approach. The Workstream Group highlighted the importance of a strategic, integrated approach to identifying priority environmental outcomes, spatially expressed at a national, regional and local level with the aim of identifying environmental opportunities and the right development or activity in the right place or location.

13.7. An important first step in achieving integration should be a review of Government policy and guidance (both devolved and non-devolved) to ensure that it meets NEF objectives or is, at least, compatible with it. Sectoral policy statements may need to be revised to reflect the ecosystem approach. These policies include:

- A Low Carbon Revolution: Wales' Energy Policy Statement
- Climbing Higher: Creating an Active Wales
- Communities First
- Economic Renewal Programme
- Environment Strategy for Wales
- Planning Policy Wales and TANs
- Wales Fisheries Strategy
- Wales Rural Development Plan
- Waste Strategies
- Wales Transport Strategy
- Woodland for Wales

Table 13.1. Summary of Conclusions and Suggested Further Work

	Headline Comment on Evidence	Current Position on Evidence	Areas identified for Improvement	Opportunities / Possible Avenues for Change
Strategic Level	Lack of strategic thinking on application of ecosystem approach	Ecosystem approach identified as key in principle but little evidence of practice • Biodiversity is main focus of evidence • More information needed on planning • More information needed on agriculture	• Need to embed ecosystem approach into strategic thinking at all levels of government and regulation • Need to explain difference between using ecosystem approach to protect biodiversity and protecting biodiversity as part of a wider ecosystem approach designed to safeguard environmental services • Need to articulate clear NEF outcomes	The first step is to articulate desired NEF outcomes The next step is to identify tools for delivery. At strategic level these could include: • Sustainable development strategies • Infrastructure planning • Spatial planning • Marine planning • Economic Renewal
Legislative Level	Focus on detail of individual instruments	Extent to which law meets ecosystem outcomes not addressed • Broad satisfaction with legislation with some exceptions • Gaps identified • Need for more detailed evidence on conflicting legal measures	• Review legislation against NEF outcomes • Strengthen duties on public bodies to apply ecosystem approach • Close gaps where these are confirmed to exist • Consolidate legislation to simplify application in practice	Principle of ecosystem approach could be enshrined in law as top level tool for embedding NEF – potential in Environment, Sustainable Development and/or Planning Bills Review interpretation of EU Directives and its implications for application in Wales
Tactical Level	Seen as key to successful regulation	Working relationships between and within regulatory bodies and between regulators and the regulated are key to efficient delivery of outcomes • Too much bureaucracy • Greater use of voluntary measures including codes of practice • Increased levels of regulatory competence needed • More inter-agency coordination	Better co-ordination is needed; key issues are • Links between planning and permitting regimes • Links between terrestrial and marine planning, licensing, nature conservation • Need for lead agency where more than one involved, e.g. competent authorities acting in response to appropriate assessments	Set up case studies as prospective pilots by: 1. Identify possible case studies based on complex multi-agency, multi-regulatory issues 2. Analyse legal and institutional framework and identify issues 3. Set up pilot scheme to consider and test ways of addressing issues

13.8. The workstream projects all pointed to a need, at the tactical level, for closer collaboration and/or coordination between public bodies. There may also be opportunities at the legislative level to encourage closer working between public bodies and even to base that work on integrated outcomes – i.e. to have integrated, multifunctional objectives as well as processes.

13.9. One of the key advantages from wider engagement in NEF at the earliest possible opportunity is that it will help inform the development of policy objectives and, in particular, the clarification of desired outcomes. Once the clear objectives have been identified it should be possible to use this approach to analyse the current regulatory and management approaches and to identify and gaps in information. Several of the initiatives referred to in Chapter 11 are of relevance here including the TEEB guide; the UK NEA Response Options chapter and the RELU guide (which has now been included in the UK NEA chapter).

13.10. The responses to the consultation included some detailed advice on how to build a framework such a framework including, for example evidence from the Rural Economy and Land Use Programme (RELU). This programme is taking a rounded perspective of land use, covering economic, environmental and social aspects from an inter-disciplinary perspective and has examined how several policy mechanisms currently operate. The wealth of information produced by projects within this programme could be extremely useful to the NEF process.

13.11. Environmental assessment is an important tool for ensuring that environmental, social and economic objectives are integrated in such a way as to achieve a sustainable outcome. A number of separate assessment processes are required at the moment as part of plan or project approvals at different stages during their development. At the moment each plan or project still tends to be treated in isolation. If, for example, Strategic Environmental Assessments were used to integrate strategic thinking across national, regional and local levels of planning or if the interface between environmental and other policies could be captured in the assessment process, it might be possible to use the assessment tool as an important mechanism for achieving NEF objectives.

Spatial Planning for Integrated Land Use Management

13.12. Workstream discussions identified an integrated approach to spatially identifying and prioritising environmental outcomes as a key theme for ensuring the delivery of ecosystem services. The evidence, however, did not raise many questions about land use planning. This major gap in the evidence base in this workstream points to the need for further work to address the relationship between the protection of biodiversity and the process of planning for and controlling development. One objective should be to investigate the potential value, in terms of NEF objectives, of a detailed system of spatial planning.

13.13. An integrated land use policy based on spatial planning could be the top level strategy on which to hang other NEF policies and delivery mechanisms. This approach is similar to that being employed in relation to the marine environment under both European and domestic law. There will also be a need to look at other land use/management policies and make changes to these where necessary. Agriculture and nature conservation are obvious candidates. Further discussion here is limited to nature conservation but this does not mean that agriculture is seen as any less important.

Embedding Nature Conservation in the NEF Framework

13.14. There is clearly a need to re-assess nature conservation law and management from a NEF perspective and to establish a position in relation to what an interconnected, resilient and coherent ecological network will look like in the face of drivers of change identified in the UK NEA. At the moment there is no clearly expressed common understanding of why we are conserving what we are conserving. Conservation should only exceptionally be about the preservation of individual animals or plants or the artificial retention of a habitat that would naturally change. In far too many cases, decisions are made on the basis of the circumstances of a particular project proposal alone and the bigger picture is lost. This is made possible because we never consider the bigger 'why'.

13.15. On a practical basis there is a need to explore ways in which measures can be interpreted and implemented in a flexible way so as to achieve a larger purpose without necessarily losing the original purpose. The SSSI legislation might provide a useful starting point. The only legal criterion for notification of an SSSI is that the site is scientifically interesting. Guidance on what constitutes 'interesting' for different habitat types has been drawn up and refined over the years but it is questionable whether it meets the requirements of climate change adaptation. It would be worthwhile looking at re-casting the guidance to make it more useful for NEF objectives. The SSSI has long been regarded as the foundation block for protected designations and its scope could probably be extended. The Marine Conservation Zones provisions in the Marine & Coastal Access Act may offer a good comparison with the old MNR provisions and might provide another useful example for looking at how to widen the scope of the provision to include details of management, monitoring and review.

13.16. It is also necessary to re-examine species protection measures and, in particular, the listings of species. The quinquennial reviews required under the Wildlife & Countryside Act were cited as examples of flexibility in the system but in practice this is a cumbersome process, influenced as much by politics as by science. A quick glance at the listings will show that there is not a good balance of protected species across the phyla. Understandably, the emphasis is on relatively large, easily identifiable species. There is little point in listing species that no one can identify because this makes a mockery of the law but, rather than ignoring them, more effort should be put into finding ways in which they can be safeguarded. One of the main criteria for listing is rarity. The desire to 'preserve' vulnerable and threatened species has obvious appeal but given the likely impact of climate change there may be a need for a different approach which acknowledges that species will be lost. This suggestion is controversial and will not be welcomed across the board. One important underlying principle that might help to resolve differences of opinion is that all species should be given appropriate protection.

Addressing Cultural Differences

13.17. A comparison between the current regimes for nature conservation and pollution control illustrates a fundamental point that will need to be taken into account in NEF. While both are governed by statutory obligations, the nature of the legal requirements is very different. Much of the law on nature conservation – and agriculture for that matter – is about incentives and agreement; this contrasts with pollution control where the emphasis is on control. There are fundamental differences between industrial processes with an inherent potential for harm that need

to be regulated and rural processes where there is a need to ensure that the most appropriate management is applied. There needs to be an appropriate balance between the different types of tools used to implement NEF and, furthermore, a 'meeting of minds' so that different players can understand why different sectors may require a different suite of management tools.

13.18. In response to an earlier version of this comment, Dwr Cymru made the following observation in relation to the Water Framework Directive which serves to illustrate the need for a careful balance between voluntary and statutory measures. They observe that the *first cycle of the WFD (2009-2015) should be used to try voluntary or elective measures to achieve good status in the aquatic environment. Should these fail, the second and third cycles provide the opportunity to apply regulatory measures to drive compliance with the Directive. The question arising from your position is whether "appropriate management" will be sufficient to achieve the desired outcome for (mostly) 'diffuse' pollution or whether more prescriptive measures need to be applied at a later date. This also raises the danger of an inappropriate burden being placed upon the (already) regulated point source discharges as they may have a greater certainty of delivering a particular environmental outcome. Dŵr Cymru continues to believe that some diffuse pollution is sufficiently damaging that it may require much more direct regulation than has been the case hitherto.*

13.19. A further point about cultural change was raised in the evidence. The extent to which any given body can adapt itself to adopt and implement an ecosystem approach will be dependent on the capacity and capability of its staff. Resources will need to be allocated appropriately so that staff can be trained and/or recruited where necessary to deliver the new approach. The evidence suggests that this might be a particular issue for some local authorities where ecology is treated as a service function for other areas of work. Consideration should be given to the need to encourage local authorities to put more resources into ecology teams and ensure that ecological advice is taken into account in all areas of work; the possibility of establishing an ecosystem champion at member level should be considered.

Reducing the Regulatory Burden

13.20. Several people giving evidence sought opportunities to reduce regulatory burdens by allowing a degree of self-regulation for businesses that could demonstrate competence through the award of some sort of recognition for standards achieved. For example, the UK Forestry Standard is a voluntary standard that is linked to grant awards and therefore provides a strong incentive to meet the standard. The BREEAM building standards were referred to in evidence in chapter 4. If these or similar standards could be adapted to incentivise developers towards biodiversity protection, for example, they might provide a means of demonstrating environmental compliance. The use of codes of practice is a similar approach commonly used in relation to pollution control and health and safety for example. Although a code need not be statutory, its effectiveness can be enhanced if compliance with it can be used as a defence against prosecution or, alternatively, demonstrated failure to abide by it can be used as evidence of a breach of duty. Again, however, there is a need for caution. Biological processes are complex and complicated and it can often require an expert view on a case by case basis to decide what the consequences of a particular act may be. This may sometimes be the case in pollution control but in other cases it is simply a matter of applying emission standards etc. It is also important to realise that reducing the regulatory burden does not necessarily reduce costs and there will be a need to consider the resource implications. The

initiatives on regulatory reform and better regulation need to be applied more widely to fully encompass the regulation of controlled activities in the natural environment.

LEGISLATIVE LEVEL

13.21. Some of the suggestions for strategic level change may require legislation for their delivery. If the NEF process is to become central to the development and delivery of policy for a sustainable Wales, it is likely that the principles behind the process will need to be enshrined in legislation in such a way as to put responsibility on public bodies at all levels to deliver what is required, with clearly enforceable duties.

13.22. Complete integration of all strategic policies in a single piece of legislation would not be appropriate because it would have to be at such a level of generality that there would also be a need for further sectoral measures as well. However, depending on the way that NEF develops, there may be a need to legislate to provide for integration of processes defined under separate legislation, for example, to integrate planning, permitting and consenting processes and mechanisms, environmental and land use planning, and terrestrial planning with marine planning.

13.23. Legal powers and duties can be a valuable tool for ensuring that policies are delivered by public bodies but there is a need to ensure that these powers and duties are expressed in the most appropriate way to enable the public body to use them effectively. Key pieces of legislation used in the regulation of natural resource management should be reviewed to assess their performance against clearly defined NEF outcomes with a view to making amendments where necessary. This review should consider the interaction between different pieces of legislation in order to identify and address any conflicting measures and to build on any synergies. A checklist approach to doing this might include the following questions:

1. Why was the measure enacted?
2. What outcome is sought?
3. What response is required from those who are regulated?
4. Is there flexibility in the wording of the measure?
5. Does it allow for discretion in implementation?
6. What is the nature of the responsibility?
7. Is the measure being used in practice?
8. How does it relate to other legal measures affecting the same issues?
9. Would it be possible to achieve the outcome without this measure?

13.24. Evidence from the work stream projects of inadequacies in the wording and/or implementation of legislation should be followed up to determine the cause of the dissatisfaction and address it. The legal matters most frequently referred to in this context were species licensing provisions, environmental assessment of all land clearance prior to an application for planning consent and the duty on public bodies under NERC Act s 40.

Species Protection

13.25. There needs to be a review of the species protection measures (including the Schedules) in Part 1 of the Wildlife and Countryside Act to determine whether the most appropriate level of protection is afforded to the most appropriate range of species in order to contribute to the delivery of ecosystem services. This review should take forward and consider the detailed comments in the evidence and the direction of travel in England as revealed in the recently published biodiversity strategy (*Biodiversity 2020: A strategy for England's wildlife and ecosystem services*) and the links therein to the White Paper on the natural environment (*The Natural Choice*) and *Making Space for Nature* (the Lawton Review). *Our life insurance, our natural capital: an EU biodiversity strategy to 2020* is also of relevance here.

13.26. The issue of EIAs and land clearance prompts a wider comment on the status of environmental assessments in general. The number of different types of assessment has increased with time and, although there are differences in the purpose behind the assessment, it is often the case that they are informed by the same set of factual evidence. Although attempts have been made to streamline the implementation of the various assessments in order to avoid unnecessary duplication, there may be a case for a more thorough review. The assessments to be covered include environmental impact assessments stemming from the EIA Directive; Strategic Environmental Assessments made under the SEA Directive; Sustainability Appraisal; and Appropriate Assessments (Habitats Regulation Assessments) made under the Habitats Directive.

13.27. The way in which EU Directives are interpreted in the Welsh context should be examined to determine if there are ways in which the legislation could be used more effectively to deliver ecosystem benefits. It is suggested that, in the first instance, the review should cover the Birds and Habitats Directives, the Water Framework Directive, the Marine Strategy Framework Directive and the Environmental Impact Directive. The review should look at the wording of the Directives and transposing regulations, case law, and guidance and could be informed by consideration of practice in other EU Member States.

13.28. Issues relating to the Habitats Directive have been raised across the projects contributing to this workstream. It is widely acknowledged that the implementation of this legislation is not straightforward. The large body of European (and national) case law on the Directive suggests that problems with its interpretation are widespread. Comments made about the Directive are collated here to facilitate any further work that is instigated by the workstream. Table 13.2 collates comments to the workstream on the Habitats Directive. These give an indication of current concerns about this Directive. The key issue to be addressed is the degree of flexibility inherent in the Directive and whether there is any possibility of relaxing some of the perceived rigidity in its interpretation and hence implementation.

13.29. The Habitats Directive is concerned with identifying and managing risks to biodiversity and it raises a number of inter-related issues about risk, (strategic, legal and tactical) which are of wider relevance. We tend to use the term 'risk' without thinking what we mean by it and, confusingly, use it to mean different things under different circumstances. Risk can be defined as the product of the chance or probability of an impact occurring multiplied by the magnitude of the harm that will result if the impact occurs. Each component and their product is variously described as risk. Breaking it

down into its components should make it easier to address some of the concerns with the way this, and other, legislation is implemented. A measure of the hazard, for example, should be a factor in determining whether a given activity should be permitted or not. If the hazard is low, chance of it happening is of less relevance. The relationship between level of chance and magnitude of risk is not a simple one but an understanding of it should be instrumental in decisions about how much evidence is needed to support an assessment, whether it is sufficient to rely on expert opinion, whether to apply the precautionary principle or whether to take the risk and monitor outcomes.

Table 13.2. Comments on the Habitats Directive

Comment from	Comment made
Dwr Cymru	The objectives of the Directive are important and worthwhile. Having said that, Dŵr Cymru sometimes struggles to find a practical (and/or affordable) way to enable our activities to comply with the implementation of the Habitats Directive. Essentially we have to try to prove a negative in terms of our impact, but the science is often uncertain. The more flexible approach to implementation would be a welcome policy shift from our perspective, although we accept that there will continue to be activities that should not be permitted in particular Natura 2000 sites
	Another long-standing frustration of ours relates to even-handedness. For example, even though salmon are a protected species in the Welsh Natura 2000 rivers, the impact of fishing seems to escape proper assessment. What rationale can there be for permitting an obvious adverse impact on a species that is failing to achieve Favourable Conservation Status? We have long maintained that fishing permits (or fishing byelaws) constitute a 'Plan or Project', so should be subject to regular Appropriate Assessments and we would point to ECJ case-law relating to the Waddenzee
Mick Green (Ecology Matters)	I think the Habitats Regs are very important but very difficult to understand and perhaps better guidance for both the regulators and the regulated is needed explaining the actual reason and desired outcomes of the Regs and that they are not there to stop everything!
	There seems to have been a reduction in protection for EPS following the 2010 Habs Regs – as far as we can see 'reckless disturbance' introduced under CROW no longer applies to EPS
	My understanding was that Wadenzee judgment had made application of the Precautionary Principle more of a basis of the Habs Directive. I know AA only comes into play if there is likely to be a significant effect, but the process of deciding what is significant is often flawed and not precautionary. Recent work we have done on the Cardigan Bay Scallop case showed the TLSE was flawed although a more detailed analysis showed that there may not be a significant effect – an AA should always be carried out where there is any doubt but it does not mean that an effect is automatically detected (that is the whole point of the assessment) and that this will always lead to onerous conditions (and I do not agree that compensatory measures always 'tend to be onerous'!)
WEL	Recommend workstream considers the currently poorly implemented Art 10 of the Habitats Directive and Art 3 of the Birds Directive – which offer opportunities for a wider (i.e. not site focussed) approach, and to support restoration and recovery.
WG (Transport)	Is it a fair comment that conditions attached to permissions for operations on SACs tend to be onerous because of the way the Directive is implemented, if there is insufficient case law to define what is exactly required? There is of course the EC Guidance on Article 6(4) 2007 which sets out more detail what is required
EA	The European Commission has released guidelines on the implementation of the birds and habitats directives in estuaries and coastal zones with particular attention to port development and dredging.

13.30. The Law Commission's review of wildlife law will address some of the issues raised here, notably the concerns over the wildlife licensing provisions. The Law Commission's work will need to take account of the differences between England and Wales both in terms of what is and is not devolved and in terms of different specific needs.

TACTICAL LEVEL

13.31. A lot of evidence was presented on the way in which various regulatory regimes operated in practice and some of this indicated that changes to these practices were needed. If a change in the way law is implemented can reduce the regulatory burden while at the same time maintaining – or even enhancing – the condition of the natural environment, this would go some way towards meeting the objectives of NEF. Work being undertaken to consider the merits of a Single Environmental Body for Wales provides the ideal vehicle for taking these ideas forward.

13.32. The previous chapter identified a number of areas where changes to the way in which laws are interpreted and/or implemented could lead to improvements in management. Further consideration of these areas should focus on how changes could be made to meet the dual purposes of ensuring an integrated ecosystem approach to management and at the same time ensure that regulatory burdens are reduced where possible.

13.33. Further work is required to develop a position on the balance between the use of expert opinion and scientific data and on the respective merits of using a precautionary approach versus a risk based deploy and monitor approach.

13.34. The results of this work should then be taken into account in the development of guidance on determining the significance of an impact or effect at the ecosystem scale.

13.35. The licensing procedure in relation to protected species was the issue that was raised most often in evidence. I suggest that there should be a review of the implementation of the species protection measures under Part 1 of the Wildlife & Countryside Act and the Conservation of Habitats and Species Regulations to ensure that the legislation is used in the most effective and efficient way to deliver ecosystem benefits.

CHAPTER 14. RECOMMENDATIONS AND DELIVERABLES

14.1. Chapters 12 and 13 of this report set out the main conclusions from the work undertaken by the workstream and make suggestions for further work that needs to be done. This chapter proposes recommendations for how this work might be taken forward and identifies the most important deliverables. The workstream is invited to endorse these recommendations and provide further details on the deliverables.

14.2. The conclusions and recommendations from each chapter of the report are listed in tabular form in Annex 4 and readers are referred to this for details. This chapter offers a much shorter list of recommendations. The way these relate to the individual recommendations set out Annex 4 can be seen from the last column in the Annex which refers to the recommendations in this chapter by number.

14.3. In some cases a need for further investigative work – e.g. further engagement to obtain more evidence or further detailed analysis of legal provisions – has been identified. Once these detailed ‘case studies’ have been completed, it should be possible to test the conclusions through practical trials. Ideally pilot studies that enable several different threads of change will be set up; suggestions for these are identified below.

14.4. Ideally, recommendations should be addressed to a particular individual or body so that it is clear who has to take the recommendation forward. In the present case, however, there may be different ways of dealing with the recommendations. For this reason, each recommendation is followed by its deliverables which identify possible mechanisms. There are several ways in which the recommendations could be delivered including the NEF core team, WG policy team, workstream members, task and finish groups, commissioned work, work carried out outside of NEF which could be influenced by NEF, pilot studies or trials steered by the workstream, etc.

Recommendation 1: Confirm the scope and purpose of NEF, set out its underlying principles and define outcomes.

Deliverable: Scope, purpose, principles and outcomes included as key message in Green Paper

Delivery by NEF Project Team

This is the most important strategic recommendation because, without a clear understanding of the desired outcomes it will not be possible to assess and adapt legal instruments and management measures for NEF purposes.

Recommendation 2: The principles of the ecosystem approach and the delivery of ecosystem services should be embedded in all strategies and policies across Government

Deliverable: Principles included in Green Paper

Delivery by NEF Project Team

This strategic recommendation follows on directly from the previous recommendation. A clear understanding of the ecosystem approach and how it is to be applied to deliver ecosystem services is fundamental to the implementation of the NEF process.

Recommendation 3: Set out the policy framework to implement the ecosystem approach and identify necessary changes to legal framework.

Deliverable: Policy framework included in Green Paper

Delivery by NEF Project Team

This Recommendation is linked to Recommendations 1 & 2 because it is dependent on an understanding of the scope of NEF and the policy framework in which it operates. The recommendation addresses top level legal changes, such as may be required to ensure delivery of an ecosystem approach. Delivery of this recommendation is not dependent on the legislative reviews covered in Recommendations 10-12.

Recommendation 4: Embed nature conservation values and principles into NEF

Deliverable: Nature conservation values and principles included in Green Paper

Delivery by NEF Project Team

While the protection of biodiversity is a core driver for NEF, this cannot be readily achieved unless nature conservation law and practice is fully integrated into NEF. If nature conservation remains a separate sector there is a danger that it will not be able to contribute effectively to the wider NEF objectives.

Successful delivery of this recommendation should lead to, and inform, reviews of nature conservation law and practice and is of relevance to Recommendations 10, 12 and 18. There may be scope here to set up a pilot study to test ways in which a particular aspect of nature conservation (e.g. the SSSI device) can be made to deliver more.

Recommendation 5: Formulate an Engagement Strategy to ensure greater involvement with the NEF process and, in particular, to encourage participation by sectors that have not been heavily involved so far.

Deliverable: Engagement Strategy

Delivery by NEF Communications Team

The NEF process has successfully engaged the environmental sector but there is an urgent need for raising the awareness in public bodies of NEF in the planning and agriculture sectors and encouraging their engagement in the process. There should also be an improved dialogue with the marine sector. The most important sectors that need to be involved in the private sector are major industries and SMEs.

Recommendation 6: Legislate to provide for delivery of functions of public bodies to be carried out in accordance with NEF principles.

Deliverable: Commitment included in Green Paper and Government Bill

Delivery by NEF Project Team and WG

The legislation will need not specify the principles on the face of the Bill but it should include provisions for ensuring that the duty to deliver is (1) understood (e.g. by reference to current policy or ministerial statements) and (2) acted upon (e.g. by making it a duty to do so or by providing for ministerial directions). This recommendation is linked to Recommendation 11.

Recommendation 7: Take steps to ensure closer collaboration between public bodies and coordination of their regulatory and decision-making functions in order to make delivery more effective and more efficient.

Deliverable: Importance of, and mechanisms for achieving, an integrated approach through closer working relations between public bodies included in Green Paper

Delivery by NEF Project Team

The importance of achieving an integrated approach through closer working relations between public bodies will need to be emphasised at the strategic policy level by Government and the Green Paper could provide the opportunity for doing this. Once the strategic driver is in place there will be a number of options for delivery which could be used in combination. Recommendation 17 is of relevance here. The legislation embedding NEF in the work of public bodies could also include a duty to work collaboratively, for example. For some bodies the more extreme approach would be to merge the institutions. Ministerial directions could be used to require public bodies to share functions and/or work towards integrated outcomes. Where a function involves more than one body, there will need to be a mechanism for a lead agency; this could be achieved through

ministerial powers to direct, as a specific measure on the face of the relevant legislation or through formal agreements between bodies.

Recommendation 8: Develop an integrated land use policy based on spatial planning.

Deliverable: Integrated Land Use Policy

Delivery by WG, informed by NEF Project Team

An integrated land use policy should be a top level strategy for NEF. Recommendation 9 is of relevance to the delivery of this recommendation because of the progress made in marine spatial planning and reforms to the marine licensing regimes.

Recommendation 9: Analyse progress in the approach to marine environmental management under the Marine Strategy Framework Directive and the Marine & Coastal Access Act to:

- ***considering whether the principles underpinning the approach in respect of the marine environment could be usefully applied in the terrestrial environment; and***
- ***ensuring that marine and terrestrial environmental management are compatible with each other and with NEF.***

Deliverable: Discussion in Green Paper demonstrating how marine and terrestrial management can be taken forward together through NEF

Delivery by NEF Project Team

A reform of the way marine activities are managed to ensure environmental protection was initiated before the NEF process began the resulting legislation and policy statements contain top level principles relating to the ecosystem approach that are of direct relevance to NEF. The evidence from the projects in this workstream does not pay much attention to the marine environment. If the NEF process is to be a key delivery mechanism for achieving sustainable development in Wales, it is essential that it considers the marine environment as well as the terrestrial one.

Recommendation 10: Carry out a review of key legislation to assess its appropriateness for delivering NEF building on the recommendations in the Policy Map.

Deliverable: Report on key legislation

Delivery by workstream, possibly including commissioned research

The intention here is for a high level review of some key legal instruments that have the potential to be used more strategically for NEF purposes. The suite of legislation on protected area designations

provides an example. The review would look at the existing scope of the legislation and identify any synergies or potential synergies that could be taken forward by changing practices of implementation and/or making simple amendments. The scope for using SSSIs more strategically is likely to be particularly relevant here.

This recommendation is concerned with the scope and purpose of the legislation and is different from Recommendations 12 and 15 which are concerned with addressing details gaps or anomalies and with refreshing legislation to bring it up to date.

Recommendation 11: Review legal devices for embedding the duty to deliver functions in accordance with NEF with a view to determining the most appropriate way of doing this.

Deliverable: Report on legal devices

Delivery by case study set up by workstream

This recommendation provides the legal and tactical input for the high level strategic requirements of Recommendation 6. The review should consider widely used legal devices such as duties ‘to have regard to’ and to ‘take account of’ etc. as well as the use of ministerial powers to direct action.

Recommendation 12: Carry out a review of legislation on wildlife protection to

- ***address any anomalies, e.g. in species covered***
- ***consider the case for a consolidated Wales Wildlife Bill***
- ***assess adequacy of powers to facilitate enforcement and make suggestions for amendments***
- ***follow up detailed concerns raised in evidence in respect of particular provisions***

Deliverable: Report to WG and Law Commission Reform Programme with recommendations for amendments to wildlife law

Delivery by workstream

Current wildlife legislation (mainly in the Wildlife & Countryside Act and the Conservation Regulations) has been amended and modified many times and can be confusing for those unfamiliar with the legislation. Plea for a consolidated text were made several times in the evidence and it was suggested that this would provide an opportunity to tailor the legislation to the Welsh situation. The proposed study into wildlife law by the Law Commission provides a mechanism for initiating this work but it will be important for the messages coming from the evidence to this workstream to be passed on the Law Commission.

This Recommendation also goes some way to addressing the concerns raised in evidence by providing for further detailed examination of the issues raised. It needs to be read alongside Recommendation 15 which is specifically about ways of addressing these concerns.

Recommendation 13: Assessment processes should be used strategically to deliver NEF outcomes.

Deliverable: A report on assessment processes which can then inform policy development at Government level

Delivery by case study set up by workstream or by WG policy team

There is the potential for expanding the role of strategic environmental assessment into a more effective tool for NEF by using it compare across policies and strategies with a view to improved integration.

At the same time, there was evidence to suggest that the process of assessment is sometimes viewed as onerous and unnecessary or even counter-productive. Common concerns include the amount of information that has to be supplied, sometimes more than once for different assessments, and the timing of the assessments.

Before any decisions are made on the most effective way of using assessment processes for NEF, it will be necessary to carry out a detailed assessment of the workings of the different assessment processes and how they can be best used together.

Recommendation 14: Examine the way in which European Directives, in particular the Habitats Directive, are interpreted to ensure that they are being applied in as flexible a way as possible and are implemented with a focus on the desired outcome.

Deliverable: Report on interpretation of EU directives

Delivery by case study set up by workstream on the basis of the comments and recommendations in this report, possible with the advice of experts through commissioned research.

It is often argued that European law prevents the use of more pragmatic solutions tailored to the particular circumstances of a given situation. The purpose of this Recommendation is to determine whether this is true and to what extent there can be a more flexible approach to implementing directives.

Topics for consideration are discussed in chapters 12 and 13 but, in summary, should include the nature of the evidence required in assessment processes and in decision-making, how the

significance of impacts is determined, and the approach to mitigation and compensation. The approach to risk should be included.

There is already a large amount of guidance on the implementation of particular directives including the Habitats Directive. It is not intended to challenge this guidance but rather to consider how it can best be applied in the NEF context.

Recommendation 15: Follow up the detailed issues made in the evidence concerning specific legal provisions and ensure that concerns are addressed by:

- *amending the legislation;*
- *providing better information on the legislation to improve public awareness and understanding; and/or*
- *reforming regulatory practices.*

Deliverable: Report on how issues raised in evidence have been addressed

Delivery by workstream, possible through task and finish groups set up to address particular issues, such groups to include members directly involved in implementing the measure in question

It is likely that, in some cases, there may be advantages in seeking to amend legislation. Where this is the case, the implementation of Recommendation 12 should include these issues. In other cases, the 'problem' may have arisen because of a lack of understanding of what the measure was for and why it was implemented. The recommendation will identify any such communication problems so that they can be addressed by the regulators. Recommendation 7 on regulatory practices will be of relevance here.

Recommendation 16: Broaden the scope of the regulatory reform initiatives to encompass more aspects of natural resource management.

Deliverable: ****

Delivery by regulators

It has already been demonstrated that better regulation can lead to more effective environmental protection at the same time as it reduces regulatory burdens. The Policy Map identified regulatory reform as a key opportunity for achieving all round improvements. The evidence includes suggestions for different ways of achieving better regulation ranging from reducing bureaucracy (Recommendation * is relevant here) through to mechanisms for self-regulation including codes of practice and certification schemes, all of which should be considered.

Recommendation 17: Corporate strategies and business plans produced by public bodies should be based on NEF principles with the emphasis on outcomes as the deliverables, not outputs

Deliverable: Public bodies to use the NEF tool to ensure their plans are compliant with NEF principles

Delivery by Chief Executives and Boards of public bodies

The governance arrangements for public bodies will need to provide for ministerial guidance or direction to ensure that this recommendation is delivered. Recommendation 7 is of relevance here.

Recommendation 18: Improve coordination or integration of delivery of regulation and management

Deliverables: Practical demonstration or pilot projects involving more than one regulatory body

Delivery by regulators, informed by workstream and NEF Project Team on choice of topic

The Policy Map makes a clear case for conducting trials of new ways of working. While legislation can impose a duty on bodies to work in a more collaborative way, it is the way that such a duty is put into effect that is crucial. There is no easy solution or model available for doing this and it is suggested that the best way of determining how to do it in any particular situation is to try it out.

DEMONSTRATION PROJECTS AND PILOT STUDIES

Recommendations in the Policy Map clearly set out the criteria for devising trials to test new regulatory approaches but do not suggest topics suitable for trials. This is largely a matter for the workstream to decide but there the evidence does give an indication of topics and sectors that might be suitable for trialling. These are briefly described here.

Woodland Management

There was a good spread of evidence on aspects of regulation affecting woodland management under Forestry legislation. There is scope to bring together a group of interested parties to explore ways of simplifying the regulatory process and achieving better ecological outcomes. The exercise could be based on testing whether a new approach would have achieved these improvements if it had been applied to a previously decided application and/or trialling a new approach on a current issue.

Species Licensing Provision

The evidence suggests that there is some confusion and frustration over the way that species licensing provisions are implemented. If there is a problem with the way the law is drafted this should become apparent from the legal reviews but there is also scope for testing out new

approaches designed to streamline the process, especially where more than one regulator is involved. As with the previous suggestion, this could be done retrospectively and on an active case.

Large Scale Regulatory Management

Better regulatory approaches including closer coordination between regulators, clearer communication at different levels within regulatory bodies and better relationships with the public, particularly those being regulated has been one of the key messages coming out of these workstream projects. Attempts have been made in the past to forge closer working relationships, with mixed success and there is likely to be a need to trial different ways of working in order to come up with the best arrangements for the future. It is suggested that different approaches are trialled in 'live' complex situations. Dry runs on previous situations involving more than one regulatory body could be used as case studies in preparation. It will be for the regulators themselves, with the advice of the workstream, to choose appropriate situations to pursue.

ANNEX 1. BACKGROUND TO PROJECT

Natural Environment Framework – A Living Wales Regulatory and Management Approaches work stream

Background to work stream's paper

Work stream membership and engagement:

The regulatory and management approaches work stream has a large and wide ranging membership, which participates either through active engagement at work stream meetings or through correspondence. The meetings have been attended by Welsh Government departments, Countryside Council for Wales, Forestry Commission for Wales, Environment Agency Wales, local government, National Parks, Wales Environment Link, business, academics and consultants. We recognise that there are certain sectors, particularly business, which we need to more actively encourage to engage in our work. We will be working with the Engagement and Communications work stream to secure this engagement.

Our approach has been to consult and involve the wider work stream in the development and commissioning of the pieces of work to ensure that the programme, reports and recommendations reflect the discussions and views of the work stream. Such an approach inevitably takes time.

Development of the work programme:

Meeting 1 – September 2010. Work stream draft programme discussed, reviewed and revised.

Meeting 2 – December 2010. Work stream developed and agreed the questionnaire for the survey on current environmental legislation.

Meeting 3 – February 2011. Presentation of the findings from the 1:1 interviews that were commissioned for the work stream and discussion on potential pilot studies that were a recommendation from the study.

Meeting 4 – April 2011. Work stream discussed the draft final reports from the 1:1 interviews and the literature review. A facilitated work shop on management approaches.

Meeting 5 – June 2011. A presentation and discussion on the key findings from the pieces of work that the work stream has commissioned or is making use of. A discussion on the format and style of the report that will present the conclusions and recommendations, with agreement that the report will be from the work stream. Updates from various members of the work stream on related initiatives to seek participation from other members.

Scope of work to prepare the work stream interim report:

Proposal to undertake primary analysis on individual work stream projects to identify conclusions and then to prepare a report on the key themes and messages from all the regulatory and management approaches work stream projects.

Background

- The purpose of the regulatory and management approaches work stream is to analyse the effectiveness of the regulatory and management approaches currently available to deliver the NEF outcomes and, where appropriate, identify gaps in legislative provision, areas where management or financial instruments may be more appropriate than legislation, recommendations for changes to current regulation or approach or new legislation.
- The work stream will deliver a report on the effectiveness of current regulatory approaches and proposals for change to the NEF programme board in December 2011. (Interim report available in July).
- The work stream will take a three tier approach in making recommendations on both regulatory and management approaches:

Strategic i.e. At an ecosystem level

e.g. How do we ensure government policy can deliver the principles of NEF?

Legislation/Regulation

e.g. need for new or changes to specific legislation

Tactical

e.g. Improve/streamline implementation process

Proposal:

There are currently 8 projects that the work stream is either managing or has access to that will inform the final conclusions and recommendations at all three levels. This proposal is to undertake primary analysis on 4 of these and to then synthesise any conclusions from these individual projects with the 4 other projects that have already drawn conclusions to varying degrees. This synthesis should derive some key messages from the total of these projects and present them in a report for the regulatory and management approaches work stream. The report should identify these key messages and any resulting recommendations at the strategic, legislation and tactical level.

Products:

- A clear individual output for the 4 projects requiring primary analysis
- A main report to identify key messages and recommendations at the strategic, legislation and tactical level.
- Specific and cited stakeholder engagement to clarify and discuss points raised/suggested by individual named contacts

- Presentation of key messages and finding to the regulatory and management approaches work stream.

Sources of information

Project description	Scale of information available
Questionnaire: An electronic survey seeking views on effectiveness of current legislation and its implementation.	Emailed to >300 Summary of survey responses. Primary analysis required
Consultation responses: Responses to the A Living Wales consultation	Available on website CCW have undertaken a review of the responses with respect to their relevance for the regulatory & management approaches work stream. Initial review by secretariat identified 30 that had specific comments for the work stream but Primary analysis now required
Input from Wales Biodiversity Partnership groups: Information provided by WBP groups either prepared specifically for, or making available previously prepared information, relevant to regulatory and management approaches work stream	10 suggestions from LBAP representatives via Ecosystems group The information will require further analysis to identify key conclusions and recommendations. Police service view on how legislation relating to biodiversity can be improved. Primary analysis now required
Committee reports: Planning and Biodiversity Inquiries	Available on WG website Recommendations from committee inquiries into biodiversity and planning
CCW legislation critiques: Assessment of 7 pieces of legislation	Habitats Directive, Water Framework Directive, Marine Act, Marine Strategy Framework, Protected Landscapes, Species, Wildlife & Countryside, SSSI.
Literature review: Existing literature reviews and research will be condensed into a streamlined form and recommendations for reform will be drawn from this information.	Report by consultant Terry A'Hearn and 'mind-map' and reference list
1:1 interviews: A small set of targeted interviews with businesses, regulators and individuals to provide case studies of the existing regulatory systems leading to proposals for major regulatory innovation, including any ideas which could be trialled during 2011.	Report by consultant Terry A'Hearn.
Management Approaches Workshop Informed by the National Ecosystem Assessment the workshop will consider the state of the Welsh environment, pressures and the levers available within the Governance and Policy framework in Wales.	Aims to identify solutions in relation to: Shared outcomes and integration in the context of sustainable development across all sectors of Government The existing policy and management frameworks with respect to improvement in process, tools and gaps. Primary analysis of workshop outputs required

Next steps:

An overview of the key recommendations and format of the report from the work stream will be sent to the wider work stream and will be provided to the NEF programme board in advance of the meeting in July. The work stream is seeking a rapid indication of whether the programme board has any significant comments on the content or structure of the report and whether the report will need go through the NEF peer review process.

A draft final report will be sent to work stream members and the programme board with the opportunity to provide further comments and a more detailed discussion with the NEF programme board in August.

ANNEX 2. REPORT FROM REGULATORY AND MANAGEMENT APPROACHES WORK STREAM

A 1ST DRAFT report has been produced on behalf of the workstream. This report identifies some general conclusions, as well as some 'areas for further consideration'. The intention is to use the workstream members to consider the analysis in the report, with the express intention of aiming to reach consensus over some specific recommendations.

In the meantime the Programme Board is invited to note and discuss the following headline findings:

1. The report overwhelmingly confirms that even those who are engaged with the 'Living Wales' development find it difficult to consider improvements to the current legislative framework 'to deliver an ecosystems approach'. Many have suggestions for 'improving' the current biodiversity legislative framework but this is unlikely in isolation to reduce environmental risks, safeguard ecosystems let alone help to deliver 'increasingly resilient & diverse' ecosystems. When combined with the continued lack of real engagement with 'Living Wales' principles by many beyond the biodiversity sector, this means that proposals for change need to focus initially on the policy level. This general conclusion shouldn't be surprising and is borne out by the policy analysis in the report, which reflects the wider findings of the UK NEA, TEEB and RELU (amongst others). In summary, we need to address the strategic policy framework and point it in the direction of delivering an 'ecosystems approach' before we change the legislative framework to support its delivery (Annex 1).

Of course, the risk is that this all stays at a conceptual level and we never move on. Therefore the commissioning of work to 'investigate' how to take forward 'Area ecosystem plans' in Wales offers us an ideal starting point to integrate policy, places and people. There is likely to be a strong iterative loop back to the workstream in giving confidence to any specific recommendations that emerge from the workstream beyond the general policy level conclusion.

2. The report identifies 'areas for further consideration' and these are shown at Annex 2. Whether any of these become specific recommendations needs to be tested via the 'Area ecosystem plan' pilots scheduled for early 2012. Only through such an approach are we likely to have sufficient information and the basis for a consensus to enable us to recommend any significant change below the strategic level.
3. The report contains numerous 'easy fix' process recommendations from individuals. Most of these are in relation to biodiversity legislation and if through wider discussion with the workstream any, or all, stand up to further analysis, then it may be possible to make some 'process' recommendations in due course.

Chris Mills

Regulation & Management Approaches workstream Chair

ANNEX 3 COMMENTS LOG

COMMENTS FROM THE CAMPAIGN FOR NATIONAL PARKS

Comment on	Comment	Response
Questionnaire Environment Act ss 62(2) & 108	Both sections considered to be ineffective. Enforcement powers lack appropriate powers of seizure. The duty to consider impact on National Parks is not enforced because of lack of resources by NPAs and out of date WAG guidance. Recommended that the 'have regard to' duty would be stronger if worded as 'must have regard to' rather than 'shall have regard to'. I agree that the duty has been ineffective but in my view this is largely due to a failure on the part of WG and CCW to take ownership for publicising, monitoring and enforcing the duty. Yes the construction is weak, but I would have no confidence that changing the duty from shall to must would make any practical difference unless this was accompanied by the necessary resources, political commitment and systems to ensure the effective fulfilment of the duty.	Illustrates different opinions on role of law and its implementation. Comment added to in Table 3.1.
CCW Critiques Protected Area Legislation – Table *	Boundary review is a lengthy, resource intensive and legal process – the simple response here is to make it less so. Reviewing the boundary of the Clwydian Hills AONB offered some lessons in simplification (until the process got caught up in the pre- and post-election hiatus though!)	Does not offer mechanism for making it simpler – further information needed to determine whether improvements could be made without change in law. Comments added to chapter 7.
	Duty on public bodies and statutory undertakers to have regard to the purposes of protected landscapes in the conduct of their business is generally weak Yes but see above. Also the duty to have regard has nothing to do with promoting an ecosystem services approach so this comment does not relate to box opposite.	Comment added to chapter 7. There is no read across from left to right column in the box. Comment added to text to make this clear.
	Sandford Principle enacted to give primacy of conservation over public enjoyment yes but only in situations where the conflict is irreconcilable.	Comment added to chapter 7.
	Experimental powers in legislation for National Parks and AONBs.	Comment added to chapter 7.

	Indeed but these could be used!	
CCW Critiques Protected Area Legislation – Comments	The critique does not consider how other protected area designations fit with the protected landscapes designations. Yes but I assume that the ref to protected areas means nature conservation designations. The basis of these designations is different and our manifesto ask on NNRs is relevant here and would lead to a more integrated approach.	Point noted; wording in section 7.6.5 amended.
	Is 'natural beauty' still a useful term and can it be defined more precisely (and would this be beneficial)? This is a bit of a can of worms. The Meyrick judgment and CCW consultation should have helped to define this term. I suggest leaving well alone.	Point noted; text in section 7.6.5 expanded to consider Meyrick.
	How easy in practice has it been to incorporate cultural heritage within the definition of natural beauty? Is this a successful example of tweeking legislation rather than making a more fundamental change? Not sure what this is getting at but it should be recognised that the Meyrick judgment in relation to the New Forest National Park boundary has helped here?	Point noted; text in section 7.6.5 expanded to consider Meyrick.

ANNEX 3 COMMENTS LOG

COMMENTS FROM COUNTRYSIDE COUNCIL FOR WALES

Comment on	Comment	Response
General Points	Need to emphasise that current report represents an interim step towards a final workstream report in December	Text added to Introduction.
	Owing to time restraints it represents a stock take of a limited range of existing regulatory and management arrangements, limited attention has been given to enabling legislation and policy mechanisms, and non-environmental legislation has not been considered.	As I understand it, some of the 8 projects were not so constrained although it is correct that little attention was given to enabling legislation and policy. The text in the concluding chapters puts greater emphasis on these.
	It does not incorporate a future proof element	Point noted
	It has not been informed by the response options chapter of the UK National Ecosystem Assessment or other emerging evidence	It is correct that the evidence was not informed by these but they are referred to as being of relevance in chapter 11.
	It reflects the views and opinions of a particular group of stakeholders, final recommendations need to be informed by a wider group of stakeholders across economic, social and environmental sectors	The evidence comes from a number of different types of stakeholders, coming from different sectors and with different perspectives on their sector and different types and levels of involvement with their sector. The recommendations in the report will be for the workstream to take forward as it wishes but it is expected that they will be the subject of wider debate before any decisions regarding their implementation are considered.
	It should be acknowledged that specific comments reflect the views and opinions of an 'individual' as a part of a selected group of people. This does not necessarily mean that the viewpoint/opinion is not valid but does need greater analysis/evidence before changes to long established processes are considered.	The report recommends that claims about particular issues are followed up and further information sought to identify the nature of the issue and how it can best be resolved. This process should ensure that long established processes are not changed on 'a whim'. For much of the evidence, however, it is not always apparent that evidence is from an individual basis.

		I agree that individual comments can be valid and would go further and suggest that it is the summation of individual views and opinions that can be of greatest significance in determining whether a particular regulatory approach works in practice.
	As previously identified by CCW, 'integrating legislation' such as SEA of national, regional and local plans and programmes, and the interface between environmental legislation and other policies and processes have not been subject to review and consultation as part of this workstream. This area of work merits review and analysis and should be considered as further work and/or pilot proposals (this could be added to Overall Conclusions)	Point noted and additional text added in concluding chapters.
	A distinction needs to be made between devolved and non-devolved areas in terms of amending legislation e.g. recommendations made by the Police ... may be restricted because crime is not a devolved area. There may be scope to achieve these aims through a transfer of function order or other [means] but the point about devolved responsibility needs to be clarified.	Point noted and additional text added in chapter 13.
	The literature review and policy map work undertaken by WSP has not been subject to discussion by the workstream and therefore has not been subject to scrutiny, comment or agreement.	Point noted.
	There is also a need to ensure that the minutes/note of Regulatory Group meetings are included as part of the evidence base.	Point noted. Additional text added to say that the report has been informed by discussions with the Regulatory Group.
Strategic Recommendations	Need an overall recommendation to the effect that the proposed Green Paper should confirm the scope, purpose and principles underpinning the NEF	Recommendation added
	The proposed Green Paper should set out the policy framework necessary to implement the ecosystem approach together with link to any necessary change to the legislative framework – Sustainable Development Bill, Planning Bill, Environmental Bill	Recommendation added
	The Green Paper provides a strategic opportunity to engage with wider stakeholders across the economic, social and environmental sectors	Recommendation added

	Proposed pilots should take place as part of an integrated package of NEF/SEB pilots	Point noted
Strategic level	Need to highlight the importance of a strategic, integrated approach to identifying priority environmental outcomes, spatially expressed at a national, regional and local level with the aim of identifying environmental opportunities and the right development/activity in the right place/location.	Text added to chapter 13..
	Need to establish a position in relation to what an interconnected, resilient and coherent ecological network will look like in the face of drivers of change identified in the UK NEA	Text added to chapter 13.
	Undertake species review, to take forward and consider the detailed comments in relation to species legislation (with reference to EU obligations and direction of travel re recently published biodiversity strategy and link to Defra review and Lawton.	Text added to chapter 13.
	Undertake review of Government policy and guidance (devolved and non-devolved). Review of sectoral policy statements to reflect ecosystem approach (e.g. Wales Environment Strategy, Economic Renewal Programme, Low Carbon Revolution, WRDP, Planning Policy Wales and TANs, Wales Transport Strategy, Waste Strategy, Wales Fisheries Strategy, Wooldland for Wales-check-Climate Change, Climbing Higher, Communities First, etc.	Text added.
	Conclusion 1 – add reference to the NEF decision support tool	Point noted
Legislation level – additional recommendation	Make it clear that the first priority should be to define the NEF approach and strategic level changes followed by any necessary detailed proposals to plug gaps/remove inconsistency	Pointed noted. Text added to address need for strategic level changes to implemented by legislation
	Introduce legislation to integrate planning, permitting and consenting processes and mechanisms and consolidate existing legislation	Text added
	Introduce mechanisms to integrate environmental and land use planning and integrate terrestrial planning with marine planning..	Text added
Tactical/implementation level –additional recommendation	The SEB process is the most appropriate mechanism for considering and taking forward issues in relation to cooperation and collaboration between regulators and the development of a new enabling culture.	Comment added.
	Work with C3 group to develop a position on expert opinion v science and	Text added on desirability of such an approach

	the precautionary approach versus a risk based deploy and monitor approach	
	Need to develop guidance on significance of impact/effect at an ecosystem scale	Text added
Purpose of Workstream	After 'gaps in the' insert 'policy, management and '	Change made
Approach to Report	Need to add notes/minutes of workstream meetings to the evidence base	As I did not have these, I cannot add them in as something I referred to but can add as reference. The exception is the meeting I attended when I presented my preliminary conclusions and suggestion recommendations and comments on this meeting have been added.
Project 1 Questionnaire	Would be useful to know how many responses were received.	Detail added
	The number of pieces of legislation noted. However it would be useful to clarify that not all environmental and other relevant legislation was covered, and to add a list of environmental and other relevant legislation not covered in order to demonstrate where further work may be required (in the questionnaire itself and the responses). These include: all EIA regulations, SEA directive, Sustainability Appraisal, Marine Act (2009), Fisheries legislation (which will be subject to review with a view to consolidation in Wales), Commons Act, Water Framework Directive, Environmental Damage Regulations (2009), etc.	Some additional pieces of legislation have now been made available. Comments have been added on the main areas not covered but individual pieces of legislation have not been added. Cross reference to Law Commission Work and Red Tape challenge both of which give an indication of full range of legislation.
Sanctioning Powers p. 40	Note that CCW should have been granted sanctioning powers under the Regulatory Enforcement and Sanctions Act 2008 and the Environmental Civil Sanctions (Miscellaneous Amendments) (Wales) Regulations 2010 but these are pending subject to Hampton principles review.	Text added to provide this additional information.
NAFW Inquiries: Planning & Biodiversity	Need to also reflect other strategic recommendations from [the Biodiversity] inquiry (e.g. integration).	Section expanded to cover other recommendations.
	The report makes reference to the NAFW Sustainable Committee reports on the Biodiversity and Planning Inquiries, but does not cite the official responses of the Welsh Government to the recommendations.	Text on WG response to key recommendations added.
Wildlife & Countryside Act	Where is the evidence that this is 'perceived to be somewhat cumbersome	Comment quoted verbatim from CCW report

Part 1	and complicated'	
	Under Comments, delete "This is an ... weakened".	Text amended.
Wildlife & Countryside Act s 28	Comment: First bullet point – clarify that "reforms may be needed" to incorporate policy and management mechanisms to ensure that they more effectively conserve and enhance SSSI	Text added.
1:1 Interviews	Whilst there may be merit in specific conclusions CCW would caution against coming to firm or sweeping conclusions based on the opinions of 'individuals' within a selected group of 12 individuals. This is not a 'defensive position' – it is important that conclusions and recommendations are informed by robust and informed evidence. For example Box 5 illustrates poorly drafted legislation with the protection of hazel dormouse. CCW can, however, identify counter examples of where dormouse protection and development have been integrated.	Point noted. It is the nature of the work carried out by this workstream that evidence comes from various sources. I have tried to emphasise that the main point of evidence of this type is to raise issues that can then be followed up. For dormouse, for example, a piece of follow up work could look at the range of issues raised and the counter-arguments before considering what, if anything, needs to change.
	P 79 Comments: I don't believe WSP argue in favour of a reduction in the amount of legislation – the key issue is better and more integrated processes for applying legislation.	WSP's Conclusion One states that there is too much regulation.
Additional Sources of Information	Add: EU Biodiversity Strategy 2011-2020 (published May 2011): http://ec.europa.eu/environment/nature/biodiversity/comm2006/2020.htm	Information added
Conclusions	p. 86. CCW's attention has not focussed on biodiversity issues – our submission to the NEF consultation focuses on delivering the ecosystem approach within the policy and management frameworks on land and sea in Wales to deliver positive environmental, economic and social outcomes. CCW's legislation critiques were also not limited in focus to biodiversity issues.	Offending text removed.
	p. 87. Where 'criticisms' have been questioned this has not been from a 'defensive' perspective – it has been from a desire to ensure conclusions and recommendations are informed and underpinned by a robust and well informed evidence base.	Text amended.
	p. 96. Flexible outcome – CCW provided examples of where Directives can be applied to secure positive outcomes for both conservation and development and management activities at the Regulatory and	Point noted. Insufficient information available to flesh out examples.

	Management workstream meeting on 17 June – e.g. Wales Scallop Order and the Tidal Energy Ltd Ramsey Sound scheme. These should be referred to as examples of how a ‘cultural change’ within the decision making process can help ensure positive outcomes.	
	p. 97. Delete ‘it is possible to envisage circumstances where there is no need for compensatory measures to ensure overall coherence’. It is legally incorrect.	Point noted. This is a matter of interpretation and I would argue that it is not legally incorrect. I have attempted to clarify the text.
	p. 97. Over interpretation and over reliance on science. Delete ‘There seems to be a ... guide not direct’	This is a matter of opinion and I have not deleted it.

ANNEX 3 COMMENTS LOG

COMMENTS FROM DWR CYMRU

Comment on	Comment	Response
1:1 Interviews	Dŵr Cymru took part in the 1:1 interviews so you may want to amend Table 7 to include an entry in column 7 against the water sector.	Interviews were anonymous; Table 2.1 has been amended and a note added to chapter 9 to the effect that I have not been able to identify other sectors that might have been involved
Questionnaire	Dŵr Cymru also submitted a completed questionnaire about the Bathing Water Regulations 2008, but that isn't included in your summary of the questionnaire responses. Perhaps that's because our comments were very specific to our sector rather than having a wider application?	One of a number of questionnaires omitted from draft report; see revised chapter 3.
CCW Critiques	In terms of the workstream's outputs, the project with which we probably have most difficulties is the 'legislation critiques' produced by CCW. Even though we are an active member of the workstream, we have only seen drafts following a specific request we made: perhaps you might note in your report that the critiques were not widely distributed amongst the workstream. Hopefully you have seen finalised versions (appendix 4 was not included with your draft report). We also wonder whether the authors are too close to the topics they were asked to assess.	Comment added to section 7.1 noting that the critiques have not been circulated to the workstream in advance and that the views presented are those of the individual authors. As far as I am aware, I have seen the final version of these reports.
	The two 'critiques' in which we have the greatest interest are probably those on the European Water Framework (WFD) and Habitats Directives. We would not have 'signed off' the versions of the critiques that we have seen if we had been asked to. For example, the Habitats critique is incomplete: the section on the EA's 'review of consents' (RoC) is missing which is particularly unfortunate since (as the critique acknowledges) the RoC "is not an explicit requirement of the Directive".	Comment added to section 7.1

	The Habitats related RoC continues to have a considerable impact on our company, so we would have been very interested in an (impartial) review of its pros and cons.	
	On page 53 you refer to the linkages between the WFD and Habitats Directives. Sites that are designated under Habitats legislation enjoy protected area status under the WFD. There is a clear obligation under WFD to deliver Favourable Conservation Status by 2015 and so it should, in our view, have been given a much higher priority in the first cycle of WFD delivery. The WFD critique seems silent on this issue. We would also argue that whilst the WFD is inherently complicated, its application in (England and) Wales has unnecessarily exacerbated this complexity.	These comments have been added to section 7.3.
Report in general	Throughout your report there are conclusions reached in individual sections (e.g. section 3 which includes recommendations made by specialist police officers on how to improve the practicality of conservation legislation). To avoid these being overlooked, you may want to cross refer to them in the conclusions section.	I have attempted to ensure that all conclusions have been taken forward into chapter 12.
	You have provided a very balanced overview of the outputs of the workstream. The new perspective and fresh insight you have brought to the (often nebulous) outputs of the eight projects should enable the workstream to make a positive contribution to the NEF agenda being taken forward. More generally, I detect a wider appetite to improve environmental regulation, which the NEF is trying to tap into. The UK water industry has, for example, commissioned its own research into sustainable regulation. ... we think that your report will make a very positive contribution to the current debate, hence we have resisted suggesting amendments to your draft (e.g. on the critiques). We hope that everyone will be prepared to compromise and agree that your report should go forward without major amendment. If, though, the editorial line was to change significantly, we would want another opportunity to comment.	Positive response noted.

Points for discussion	We agree that the objectives of the [Habitats] Directive – in common with most conservation/environmental legislation - are important and worthwhile. Having said that, Dŵr Cymru sometimes struggles to find a practical (and/or affordable) way to enable our activities to comply with the implementation of the Habitats Directive. Essentially we have to try to prove a negative in terms of our impact, but the science is often uncertain. The more flexible approach to implementation that you seem to advocate would be a welcome policy shift from our perspective, although we accept that there will continue to be activities that should not be permitted in particular Natura 2000 sites.	Points to need for further work on Habitats Directive and its implementation. These sentiments have been noted in chapter 12.
	Another long-standing frustration of ours relates to even-handedness. For example, even though salmon are a protected species in the Welsh Natura 2000 rivers, the impact of fishing seems to escape proper assessment. What rationale can there be for permitting an obvious adverse impact on a species that is failing to achieve Favourable Conservation Status? We have long maintained that fishing permits (or fishing byelaws) constitute a 'Plan or Project', so should be subject to regular Appropriate Assessments and we would point to ECJ case-law relating to the Waddenzee - see http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002J0127:EN:PDF .	Points to need for further work on Habitats Directive and its implementation. These sentiments have been noted in chapter 12..
	You say (on page 98) that "It is also very important to look at nature conservation law and policy in the round rather than just focus on the details of the regulation. Much of the law is about incentives and agreement; this contrasts with pollution control where the emphasis is on control. There are fundamental differences between industrial processes with an inherent potential for harm that needs to be regulated and rural processes where there is a need to ensure that the most appropriate management is applied." There is much in this sentiment with which we would agree, although it does raise the issue of even-handedness.	Point noted; no changes made.
	The first cycle of the WFD (2009-2015) should be used to try voluntary	Comments added to chapter 12..

	or elective measures to achieve good status in the aquatic environment. Should these fail, the second and third cycles provide the opportunity to apply regulatory measures to drive compliance with the Directive. The question arising from your position is whether “appropriate management” will be sufficient to achieve the desired outcome for (mostly) 'diffuse' pollution or whether more prescriptive measures need to be applied at a later date. This also raises the danger of an inappropriate burden being placed upon the (already) regulated point source discharges as they may have a greater certainty of delivering a particular environmental outcome. Dŵr Cymru continues to believe that some diffuse pollution is sufficiently damaging that it may require much more direct regulation than has been the case hitherto.	
	Looking ahead, the proposed amalgamation of the EA Wales and CCW may help to overcome some of the discrepancies in environmental regulation. For example, we hope that greater emphasis will be placed on practicality in the implementation of the Habitats Directive in future. We also anticipate that CCW may want to take a more direct role in the implementation of the WFD. Although town and country planning legislation will continue to be handled by separate agencies (local planning authorities), the amalgamation of EAW and CCW should go some way to delivering the “lead competent authority” concept you refer to on page 17.	Point noted. The report does not cover the proposals for a new environmental body so these comments are not taken forward in the text.
	The plans announced by the Welsh Government’s First Minister on 12 July to “embed sustainable development as the central organising principle in all of our actions across Government and all public bodies, by bringing forward a sustainable development Bill” may also help to ensure that the three aspects of sustainable development – environmental, social, and economic factors – are properly weighed in the decision making processes of all relevant bodies in Wales.	Agreed. The First Minister’s statement is covered in chapter 11.

ANNEX 3 COMMENTS LOG

COMMENTS FROM ECOLOGY MATTERS (MICK GREEN)

Comment on	Comment	Response
Conclusions – the need for regulatory change	I'd agree that the main problem is in the implementation of the law (or even non-implementation) in some cases. A review of laws applicable to cetaceans I have been involved with for WDCCS came to much the same conclusion – I hope to be able to send you a copy once it's been through internal review at WDCCS)	Noted
	I think the Habitats Regs are very important but very difficult to understand and perhaps better guidance for both the regulators and the regulated is needed explaining the actual reason and desired outcomes of the Regs and that they are not there to stop everything!	Noted. Comment incorporated into discussion in chapter 12..
	NERC duty – I agree with your points. The Marine Ecosystem Group sat down last year to look at main impediments to protecting s 42 species and habitats and nearly all actions were to inform other areas of WAG of their duties. I have seen no examples of where NERC has led to a real change in approach. Getting real change embedded is very difficult – we had that experience with DTI / DECC and oil and gas drilling. I'll attach an article on this with these notes (M Green & M Simmonds, 2008, 'Riding the waves – lessons from campaigning on oil and gas' ECOS 29(3/4) 72-79.)	Comment included and article referenced in chapter 12.
Conclusions Flexible outcome.	I agree with most of these pages, and that we need to look at outcomes not strict application of a regulation with a broad intent. I do have worries about the Morge case and that it has left 'disturbance' about as clear as mud. There has to be some better guidance on disturbance and it should be species based as it is going to vary. At the moment I need a licence if I visit a hen harrier nest, but not if I trawl through an area with young dolphins. There also seems to have been a reduction in protection for EPS following the 2010 Habs Regs – as far as we can see 'reckless disturbance' introduced under CRow no longer applies to EPS.	Comments on Morge added to chapters 5 and 12. Comment on Habs Reg added to chapter 12.
	My understanding was that Wadenzee judgment had made application of the Precautionary Principle more of a basis of the Habs Directive. I know AA only comes into play if there is likely to be a significant effect, but the process of deciding what is significant	Comments added to chapter 12..

	is often flawed and not precautionary. Recent work we have done on the Cardigan Bay Scallop case showed the TLSE was flawed although a more detailed analysis showed that there may not be a significant effect – an AA should always be carried out where there is any doubt but it does not mean that an effect is automatically detected (that is the whole point of the assessment) and that this will always lead to onerous conditions (and I do not agree that compensatory measures always ‘tend to be onerous’!)	
Conclusions over reliance on science	I do not agree that there is an over reliance on science. The level of proof must depend on the level of possible impact. For large projects with large impacts we need to know possible long term effects – in such projects the applicant usually has significantly large resources than the regulator. This is especially the case for marine projects where projects are often large and knowledge and resource base of the regulators often lower than in terrestrial situations. Even in terrestrial situations I have carried out several very useful research projects paid for by windfarm companies to inform regulators (or even NGO) concerns – these have led to useful knowledge for a range of situations and in terms of the overall cost of the development been small fry. There should also be encouragement to fund necessary research at an industry rather than project level – small levies across an industry can lead to big research – the COWRIE approach is a possible model to build on. Much of the scientific information can also come at the strategic level – the SEA process should address this. I have been critical of the series of oil and gas offshore SEAs – they have consistently identified data gaps for cetaceans but made no effort to fill these. However, in other areas, such as bird distribution and some benthic work, Government has commissioned work to fill data gaps to inform the SEA that can then be used by others at the project level. We need a lot more information to help make informed decisions and need to be creative in how this is funded. It is right that a householder shouldn’t be expected to fund research to get permission for an extension, but a developer on a multi - million pound project has greater impact and greater responsibilities.	Text amended slightly in chapter 12 and further section added on assessments in general.
Conclusions spatial planning.	Spatial planning, and its associated SEA process, must be central to delivering NEF objectives, but those objectives need to be much more clearly defined. Spatial planning needs to be improved – as somebody who works on windfarm sites I have come to see TAN 8 as a very good example of how not to do it – the long term	Suggestion of case study noted in chapter 12.

	consequences and knock on effects of this policy were never clearly thought out. Perhaps TAN 8 should be one of your case studies?	
Conclusions - strategic changes	I agree that we need to show why we are conserving, though I'm not sure we need to re-assess conservation law as such but its application and our approaches to management. Perhaps we need to revisit Also Leopold's land ethic - "The land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land." "This sounds simple: do we not already sing our love for and obligation to the land of the free and the home of the brave? Yes, but just what and whom do we love? Certainly not the soil, which we are sending helter-skelter down river. Certainly not the waters, which we assume have no function except to turn turbines, float barges, and carry off sewage. Certainly not the plants, of which we exterminate whole communities without batting an eye. Certainly not the animals, of which we have already extirpated many of the largest and most beautiful species. A land ethic of course cannot prevent the alteration, management, and use of these 'resources,' but it does affirm their right to continued existence, and, at least in spots, their continued existence in a natural state. In short, a land ethic changes the role of Homo sapiens from conqueror of the land-community to plain member and citizen of it. It implies respect for his fellow-members, and also respect for the community as such."	Comment noted. No change made to text.
	SSSI approaches certainly need to be re-thought – we should be looking at bigger more robust areas and not think quite so much about micro managing small sites. I do not like the common standards monitoring approach where if you have too much of this or too little of that your site is automatically 'unfavourable' – we should be looking at greater ecosystem health and long term survival of habitats.	Noted.
Conclusions – headline conclusions	I agree with most of your headline conclusions. Under 3 – I am not sure what lessons can be yet learnt from the marine sector as I am not happy with it at the moment! and under 5, this should be undertaken carefully as I am not sure it is a widely perceived need and we need to differentiate between legislation and application of legislation.	Comment noted.

ANNEX 3 COMMENTS LOG

COMMENTS FROM ENVIRONMENT AGENCY (KATHRYN MONK)

Comment on	Comment	Response
Report in general - focus	The report starts by pointing out that respondents to surveys did not seem to understand the purpose of the NEF, focusing mainly on biodiversity. But the long 'Conclusions' section of the report continues to highlight ramifications for biodiversity and wider targets of environmental legislation (pollution, etc.) without ever addressing what ecosystem services are, and how the fragmented legislative base is contributing to tackling them on an integrated and systemic basis - just repeating early interpretation. Surely this overall review should be providing another level of interpretation of the current analysis looking at adequacies and shortfalls of the legislative base relative to the systemic whole represented by the ecosystem approach and ecosystem services assessments? To emphasis this concern, a quote from page 78: <i>The idea of setting some guiding principles (WSP's Recommendation 1) is worth pursuing but these principles would need to be very high level. The suggestion that regulations should be positive for both environmental and economic outcomes is entirely dependent on how society values the environment and its services. In principle fine; in practice it could require a major culture change. This is the whole point of NEF – as this report has not taken that focus when looking at results so far and gaps to fill, then I suspect its overall analysis may not be really helpful in planning next steps for NEF A.</i>	The report is intended to be a synthesis of comments received and not an additional workstream. As ecosystems services and tackling them did not rank highly in the evidence it does not feature much in the draft report. Following discussions with the workstream team, further text has been added which addresses this lack of emphasis but no attempt has been made to provide a detailed analysis of the current legislative base as suggested because this would go beyond the scope of the work undertaken. However, the suggestion that this sort of analysis needs to be done as a next step is made.
	There are of course several good general guides to legislative and management approaches for the ecosystem approach/ecosystem services assessments - the main mantra from the global community of integrate policy (policy integration tools and management styles), integrate places (GIS, planning), and integrate people (participation especially in valuations and	Information added to chapter 12.

	interventions); • the TEEB guide was used by WSP (international project); • UK NEA Response Options chapter is still in draft but was influenced by us to be a bit more strategic and structured - for info I've added below the summary on policy etc. from this draft chapter. • and the RELU guide (which has now been included in the UK NEA chapter). • Any of these could be used to give NEF a framework in which to place its specific Welsh patchwork of evidence and highlight the gaps and next steps logically.	
Report in general - structure	The report has taken a chronological/randomly placed list and description/criticism of the work done within the workstreams. If you use the policy map and literature review's recommended strategic, legislation, and tactical levels (attached) from the start, the overall report will have more structure and be easier to identify gaps logically - this will work whether the report simply summarises the subprojects from a biodiversity focus (which doesn't add much value) or undertakes the more systematic analysis from an ecosystem approach perspective. The original policy map emphasised the well-known appreciation that "the sustainable management of ecosystems and their services involves a mix of approaches mix of approaches including regulations, policies, attitudes, incentives, technologies and voluntarism" - this draft review of NEF to date needs to repeat this. You can then display and work through the individual sub-projects as a hierarchy or network to show structured levels of examination -- from general policy map and literature reviews to specific area reviews, through to consultation responses, surveys of stakeholders, to 1:1 interviews. Given the emphasis on some much specific and individual comment, presenting the structured framework first enables the rest to be handled more tightly. The strategic, legislation, tactical categorisation as suggested by WSP and the hierarchical relationship of the projects provide structure to first para of <i>purpose of this review</i>. Table 1 then needs rearranging in same sequence of projects.	The terms of reference for the report were to review and comment on each of the workstream projects, which I have attempted to do. The idea of 3 levels of action – strategic, legislation and tactical – was discussed with the workstream team. It has a number of attractions and has been used in the comments section of the report. However, this is not a hierarchy because there is no clear line of authority between levels. I do not think that structuring the detailed evidence in this way would have added a great deal to the report and would certainly not have made it easier to move forward. In any event, given the nature of the evidence it would not have been possible to structure the report in the way suggested in the time available. As the policy map noted, it is the mix of approaches that matters and this mix is unlikely to be hierarchical nor is it likely to be simple to categorise. Insufficient time for re-organisation and would not be straight forward; remit required separate analysis of projects and I wanted to maintain clear trail back to evidence

p.5	Why not use [strategic, legislation and tactical levels] as a structural approach throughout the report to give it more clarity? I don't think this report needs to be a chronological list and description of the work done within the workstream. This structure was recommended by the policy map and literature review so strange to keep it as a tool until the end of this new report.	Text amended to explain why this has not been done.
	The report seems to frequently contradict generalised points and recommendations made by the various sub-groups. This may or may not be justified but certainly tends to exacerbate the cycle of one consultant refuting/refining another report and not providing that unifying approach needed.	I agree that this is frustrating but it is what the evidence was! I do not have the authority to judge between conflicting pieces of evidence and, in most cases, could not even follow differences up because there is insufficient information available. What I hope I have done, however, is highlight the fact that the interpretation of what is required by the law, how effective it is, and how well it has been implemented, is not straightforward but is subject to many different perceptions both general and specific. Addressing these different perceptions may well be the single most important next step.
Report in general - gaps	My understanding of the purpose of this overview of the projects to date is to draw together the main points/threads arising, and highlight gaps and next steps. I have noticed throughout the draft the frequent reference to limitations/failures etc. used as a criticism of the work as if this was a self-contained programme that was supposed to have now delivered a new legislative framework. This is I am sure going to irritate all those folk who worked on small budgets or very tight timelines on very limited bits of the project. Could we focus on the gaps and next steps rather than suggest that the work so far is not just the first steps? I changed a few bits to illustrate this on p 84-85.	Point noted; this is not the meaning I intended to convey. The evidence is what it is and I have not sought to criticise it. But I do think it is important to point out its limitations so that anyone who thought the outcome would be a new legal framework can understand why this cannot be the case. Comments on p 84-85 have been noted and text revised in places in an attempt to address concerns raised. I strongly believe that the report should stimulate further thinking and thereby go some way towards developing new regulatory and management approaches and I do not accept that the output from this workstream is a failure because it has not solved the problem.
Table 1	why not lay this out in more hierarchical way to allow some patterns to be	Insufficient time for re-organisation and would not be

	seen, from general literature reviews to specific area reviews, through to consultation responses, surveys of stakeholders, to 1:1 interviews.	straight forward; remit required separate analysis of projects and I wanted to maintain clear trail back to evidence
Specific comments p. 7	There is a comprehensive separate and long established programme focused on better regulation by the Environment Agency and Defra. Links and summaries were made to that in the policy landscape and the summary conclusions. The main point was that the work on better regulation for the wider environmental management issues (including pollution control in general) could probably be easily mapped across to the biodiversity regulations. At the same time, it was noted that the ecosystem approach and ecosystem services assessment are already being considered if not applied in these areas – e.g. persistent bioaccumulative toxic (PBT) chemicals.	Point noted but no changes made. There is no point in repeating what is said in the policy landscape work and I could not add anything more from the evidence available at the time. Further evidence on regulatory reform has been added in the revised text but it does not suggest that perceptions on how this has been progressing are any clearer than the perceptions of legislation in general. Beyond stating the principles behind regulatory reform – and the Hampton Principles are now included– I am not sure what more could be added.
Specific comments on Tables	Table 2 -- how has this has been classified for a literature review that used both scientific publications and grey literature? Also, same issue of random sequence of information as Table 1. doesn't make sense to do this for a literature review that used scientific publications and grey literature – eg several scientific reviews were based on policy makers work, others from conservation bodies, NGOs etc so what does this mean. Why not structure it left to right as per general review from general literature reviews to specific area reviews, through to consultation responses, surveys of stakeholders, to 1:1 interviews. Otherwise difficult for reader to draw any pattern or inferences From a colleague, but endorsed by me - specific points for clarification include wondering what Tables 4 and 5 were really trying to tell the reader	Tables have been re-arranged and amended.

Specific comments Individual projects	Same comment on presentation of individual project work - same issue of random sequence of information as Table 1/2. Lead the reader through structured levels of examination -- from general literature reviews to specific area reviews, through to consultation responses, surveys of stakeholders, to 1:1 interviews	I did not receive the bibliography until after the report was submitted in draft form and I have not read all of the items referred to in it. From the limited knowledge that I do have, it would not be possible to lead the reader in the way suggested because the literature does not follow the hierarchical logical structure implied here.
1:1 Interviews – 1 st paragraph of comments	This is a really longwinded and confusing way of describing the results!!!	The intention was to do more than simply describe the results; no change made.
1:1 Interviews – Final paragraph of comments	[A major cultural change] is the whole point of NEF – if this report has not taken that focus then I suspect this overall analysis will not be helpful to the development of NEF at all!	The focus in the report has been on the evidence presented.
Management approaches workshop	The two most fundamental messages that come across to me are the identification of spatial planning at a range of scales as a tool for achieving multi-functional use and the recognition of the need for integrative approaches from a range of perspectives - these are two prime objectives identified by the ecosystem services community years ago – so what value overview in this report?	I can only report what is in the evidence. I think it is also noteworthy that the relevance of spatial planning has not come across clearly on other strands of evidence.
Consultation – overall conclusions	Are these discussions not just continuing the first interpretation of NEF as a biodiversity conservation tool rather than explore the results in light of its present form which is as a tool for multiple services? The following conclusions seem to continue the biodiversity focus rather than how the fragmented legislative base is contributing to tackling ecosystem services on a more integrated and systemic basis?	Text amended to record comment. This chapter is primarily concerned with specific examples and wider discussion is deferred to later in the report.
	Any more scope for real added value of comments on subprojects - e.g. on p. 80 repeats widely held prime objectives identified by the ecosystem services community years ago and repeated in every workshop held within this NEF workstream.	I am not sure what is being asked for here and I have no further information for doing this.
Conclusions Table 32	Comment that headings incompatible with table 2	Table removed
Conclusions Purpose	it is important to distinguish between the outcomes that the legislation is being employed to deliver and the purpose of the legislation, two things that are often confused highlighted specifically in the	The questionnaire distinguished between the effectiveness of the legislation and whether it achieves what it was designed to achieve. This is not quite the same point as is being made

	questionnaire I thought.	in this section. As the box attempts to illustrate, legislation tends to provide a purpose but is silent on the reason behind it. The reason for using the legislation may change with time – giving flexibility.
Conclusions	KM has made track changes to the text of this chapter	All of the track changes have been acted upon; in most cases the revised wording has been retained or slightly modified for style.
Additional information	From UK National Ecosystem Assessment: Technical Report Response Options: Ch 27:- In the context of legislation, the most significant opportunities for integration discussed in previous sections emerge from discussions around reforms to the CAP (see Section 27.4) and the CFP (see Section 27.6). In both cases, embedding ecosystem-based thinking in proposals for reform will allow for a more cross-sectoral approach to be adopted, which will deliver multifunctional and resilient habitats, and recognise the importance of these activities in broader ecosystem management. There are a number of areas of policy-, institutional- and governance-based responses discussed in a sectoral context that are beginning to reflect a more integrated approach. Adopting principles of Integrated Water Resource Management and strategic flood risk management allow for a more coordinated approach to manage water and land resources to secure ecosystem health and human well-being, and to minimise vulnerability (Section 27.3). The impact of forested land uses on water quality and quantity is an important consideration in both the Water and Forestry sectors. The recognition of a holistic approach to land use may require collaboration between farmers to achieve landscape-scale benefits that secure habitats for certain mobile species such as butterflies and birds (Section 27.4); this complements more integrated land use planning such as Scotland's Land Use Strategy. Multifunctional forested landscapes have scope to deliver potentially synergistic recreational, conservation and climate change mitigation outcomes, and are being promoted (Section 27.5). Within the Marine context, marine spatial planning and Integrated Coastal Zone Management can reflect integrated ecosystem-based thinking and deliver substantial benefits (Section 27.7). Spatial planning in an Urban context and the promotion of GI also	Points noted. No changes made to text.

	provides potential benefits for ecosystem functioning and human well-being (Section 27.9).	
--	--	--

ANNEX 3 COMMENTS LOG

COMMENTS FROM WALES ENVIRONMENT LINK (ANNIE SMITH)

Comment on	Comment	Response
Work Strands	We particularly welcome the fact that, in drawing together the information from these strands, you have reflected their various strengths and weaknesses – as reflected throughout these comments, we do feel it is crucial to recognise the limitations of the important work done so far and ensure sufficient time and consideration is given to how to take it forward.	Noted
Questionnaire	It would be helpful to know how many individual respondents there were to the questionnaire, if that is possible, to complement information elsewhere in the report about the number and ‘type’ of respondents to the other strands of work. From Table 3 it looks like around 40 individual responses were received altogether (adding up the number of respondents on each piece of legislation), but these responses could have come from a smaller number of individuals. I think from memory that the questionnaire gathered contact details so it may be possible to work this out (although I realise you might not have the information to do this).	I do not know how many individuals were involved only the number of respondent bodies – sometimes this would presumably be one person for each body but there are indications that sometimes more than one is involved.
	I responded to the questionnaire as a consultee (on the Habitats Regulations), which could be reflected in Table 2 (which currently reports that there were no responses to workstream/project 1 from environmental NGOs).	As responses were anonymous I have only been able to change table to add consultee to list.
CCW critiques	WEL provided some comments on these, and although I haven’t got the appendices to your report, from reading your commentary I don’t believe they have been taken into account; they were provided relatively late, so perhaps there simply wasn’t time for the critique authors to consider them. However, while we were broadly very	I did not see any comments on the CCW critiques. The additional information supplied is now referenced

	supportive of the critiques our comments were additional, and were distinctive also from your own views as set out in the report. I am attaching them along with these comments, with some additional thoughts received this week from the Council for National Parks on the Protected Landscape legislation (this was the one critique we did not manage to comment on initially).	
	I realise, of course, that you will not be able to address these views in the report, but I hope the case will be accepted that further discussion of the legislation in question is needed in order to draw out conclusions from the workstream. I would therefore strongly urge that recommendations relating to these pieces of legislation are for further discussion, rather than any specific actions.	Useful information to inform further discussion.
1:1 Interviews	The limitations of this strand of work were discussed by the workstream, in terms of the small number of interviewees and what they were commenting on in their interviews – with much focus on regulatory process rather than outcomes, for example. I am attaching the short response I sent to Jennifer in relation to the WSP report for information.	Further information noted.
	The key point, I think, is that the conclusions appeared to be based on the perceptions of a fairly small number of respondents; before other specific actions are identified based on this piece of work, these perceptions need to be tested.	Agreed. It is clear from across the evidence that perceptions differ considerably and the reasons for these differences needed to be explored.
Suggested recommendations WEL have drawn out and numbered recommendations from the text. This perhaps gives them too much status. I must emphasise that these are no more than my suggestions	THE REGULATORY CULTURE 1. Recommendations for improving the regulatory culture should be agreed by the workstream. My suggestion would be for a recommendation to test out ways of working better together through trials or pilot studies. We are happy with this suggestion, and keen that the specific trials are	Noted.

for possible recommendations that the workstream might like to proposed	agreed upon through input and discussion by the workstream.	
	THE NEF PROCESS 2. Considerable effort will need to be put into obtaining the views of, and extracting specific examples from, a wider range of interest sectors including, in particular, the business community and the general public. We accept the broad point that engagement with a broader range of sectors is necessary for further development of this work, and would also stress that better engagement of the environmental NGOs is necessary. As you point out elsewhere, the questions included in the A Living Wales consultation were very broad and rather difficult to respond to, and the pace of work under this workstream has also made detailed engagement challenging. It is vital that as more detail develops, sufficient time and space is allowed for people to understand the issues being discussed and express their views in a meaningful way. The National Principles for Public Engagement in Wales (Participation Cymru) have been recommended by WEL colleagues.	Noted. Reference to the National Principles for Public Engagement in Wales (Participation Cymru) has been added.
	THE NEED FOR REGULATORY CHANGE Although there is some discussion under this section of views that have been gathered on different pieces of legislation, I have only been able to pull out two suggested recommendations; I hope I haven't missed others. I would urge that further discussion is needed prior to identifying any specific regulatory changes to pursue, due to the limitations of the work strands pulled together in this report.	Agreed that further discussion is needed on this. The draft report did not develop this discussion because this was something for the workstream itself to pursue.
	3. The Sustainability [Committee] has made a strong recommendation for change [to address the legislative gap whereby EIA Regulations do not apply to land that is cleared prior to development] which this workstream should endorse. We support your suggestion that the workstream should endorse this	Noted.

	recommendation. However, I seem to recall that it was one of the few Committee recommendations rejected by the last government, so further consideration would have to start with an examination of the reasons for rejection.	
	4. An analysis of existing laws to see if they meet requirements such as compliance with the principles of good legislation or can contribute to the wider goals of NEF is the only realistic option. A more detailed review of key legislation is needed once there are clear outcomes to meet. SWOT analysis would be one way of doing this. 5. Any review of the effectiveness of a piece of legislation should not only look at the wording on the face of the law but also at the way the words are interpreted in order to see if there is sufficient inherent flexibility to render the legislation more effective at delivering NEF objectives. We do not object to these suggestions, but would add two caveats (which I know you are familiar with): firstly, the desired outcomes of NEF (when they are made clear) do not render obsolete the outcomes of existing legislation or other approaches. Nature conservation remains a valid objective in the context of a broader approach that focuses also on ecosystem services and wider socio-economic benefits; a piece of legislation should not be considered outdated or irrelevant because it delivers primarily for nature conservation. Secondly, this recommendation is preceded by discussion of the Habitats Directive, of which there is a considerable amount throughout the report. As noted above, WEL supplied some comments in response to the CCW critiques on the Directive and other legislation, and it does not appear there has been time to incorporate or address these – but it is important to note that there are additional and different views among	Points noted..

	workstream members to those expressed in the report. Therefore I would request that no specific recommendation related to the Directive or other legislation dealt with by the work strands is made. We hope that a large part of the focus in going forward will be on how the nature conservation framework needs to be augmented, to deliver nature conservation better as well as contributing to the other, broader objectives of the NEF, rather than simply on seeking amendments to the existing laws.	
	CASE STUDIES 6. Two issues that could usefully be developed further using case studies, to illustrate contrasting aspects of the legislation: i) detailed description of the process [through] which a law is implemented – e.g. proposals for obtaining a licence to disturb a protected species; ii) look at the limitations of a legal measures – e.g. the issue of approvals for replanting under the Forestry Act. 7. Also useful to prepare a case study of a more complex and complicated issue to gain a clearer understanding of how the different regulatory and managerial strands come together – e.g. the regulatory approach to a major planning application. No objection to these suggestions for further examination of issues. WEL would welcome the opportunity to contribute to the design and implementation of such case studies.	Noted.
	8. Evidence shows there is also a need for changes to individual regulations and/or the way they are implemented. Recognising the limitations of the evidence gathered thus far (as the report does very clearly) we would suggest there is a need for further detailed consideration of this point, along with specific issues raised in the report, as this workstream enters its next phase of work.	Noted.

	SUGGESTIONS FOR CHANGE 9. Further work [is needed] to address the relationship between protection of biodiversity and the process of planning for and controlling development. One objective should be to investigate the potential value, in terms of NEF objectives, of a detailed system of spatial planning. We support this suggestion, and would add that work on spatial planning should go beyond considering protection of existing biodiversity. It should also look at opportunities to plan for and enable (e.g. through safeguarding land from certain uses) restoration, improving habitat connectivity, and so on, to deliver multiple benefits including biodiversity gain and ecosystem services.	Point noted. Useful comments for further discussion.
	10. There is also a need to re-assess nature conservation law and management from a NEF perspective. At the moment there is no clearly expressed common understanding of why we are conserving what we are conserving. Conservation should only exceptionally be about the preservation of individual animals or plants or the artificial retention of a habitat that would naturally change. In far too many cases, decisions are made on the basis of the circumstances of a particular project proposal alone and the bigger picture is lost. This is made possible because we never consider the bigger “why”. We request that this is not represented as a view or recommendation of the workstream. There is much to explore in this paragraph and not enough time to do it justice here. It questions the breadth and depth of environmental management and conservation approaches – and calls to mind the fact that one absolutely key element that has been excluded from this workstream so far is that of agricultural management and agri-environment schemes. We don’t disagree with the need for better broad approaches addressing the bigger picture, but contend strongly that regulation of specific activities, in the interest of specific objectives,	It was not my intention to suggest that the regulation of specific activities in the interests of specific objectives did not remain valid. Wording has been changed to explain that my intention was to suggest that greater clarity was needed as to why we regulate – in the hopes that this would produce better outcomes. The need to consider agriculture and agri-environment schemes is referred to in the section on further work.

	remains valid and important.	
	11. There is a need to explore ways in which measures can be interpreted and implemented in a flexible way so as to achieve a larger purpose – SSSI legislation and MCZ legislation are noted as possible useful starting points. Again, we would welcome some more detailed consideration of this point before a firm recommendation for further work (particularly the specific topics to examine) is agreed. It would help if it could be made clear that the “larger purpose” could be inclusive of but go beyond the existing use of the legislation, rather than necessarily reinventing it.	Text amended to reflect this concern
	12. It is also necessary to re-examine species protection measures and, in particular, the listings of species...There is not a good balance of protected species across the phyla...The desire to preserve vulnerable and threatened species has obvious appeal but given the likely impact of climate change there may be a need for a different approach which acknowledges that species will be lost. We request that this is not presented as a view or recommendation of the workstream. I would suggest the issue is over-simplified in this short paragraph, and that any consideration of listed species must draw on a broad base of expertise including that of WEL members. While climate change is very likely to impact upon designated sites and may lead to the loss of some listed or priority species, we do not know which ones or over what length of time. A fundamental point is that, if we are to support species in adapting to climate change, then addressing other pressures and building resilience in populations is key. Climate change will require adaptive management over the coming decades, but this does not point to the need to weaken current protection. Rather we	Comments noted. These do not necessarily contradict what is proposed in the suggested recommendation. Additional text added to make it clear that the suggestion is controversial..

	would suggest it needs to be implemented better and bolstered with measures to address the long term fragmentation of habitats.	
	13. It is also very important to look at nature conservation law and policy in the round rather than just focus on the details of the regulation. We would support this – as noted above, the workstream has not addressed some key aspects of agricultural management, for example.	Noted.
	14. Comments on self regulation and use of codes of practice. We would be content for these to form elements of future workstream discussions, which should include consideration of the resources required to make them effective and could draw on recent experience of the Pembrokeshire Marine Code.	Comment added to text in chapter 12.
Headline Conclusions	We are broadly content with the headline conclusions, and welcome the fact that in general they point to the need for further consideration of issues, rather than highlighting specific areas. However, we would challenge parts of the third strategic level conclusion – that lessons could be learned from the marine sector and efforts will be needed to ensure that NEF is compatible with current marine policy. We agree that lessons could be learned from the marine approach, and also with comments made elsewhere in the report on the need to better integrate consideration of marine management into this work. However, we are not confident that all of current marine policy will in fact deliver an ecosystem approach; in particular we are concerned about the Welsh Government’s approach to Marine Conservation Zones. We would suggest it cannot simply be a case of ensuring the NEF	Point noted. The headline conclusions section is not in the revised draft.

	fits with marine policy – elements of marine policy itself may need to adapt to be compatible with NEF (when the outcomes are clear) and other legitimate outcomes.	
Further comments and recommendations	As noted above, we agree with the suggestion that spatial planning, and the land-use and marine planning systems, will be key to the NEF. Development of thinking around this should focus not only on protection of existing resources, but also on opportunities for restoration, improving connectivity, etc.	Point noted.
	We note that agricultural management has generally not been considered as part of this review, but that agri-environment schemes in particular will be absolutely key to NEF and should be integrated better into future thinking about the regulatory/management framework.	Point noted and incorporated into text of further work.
	In line with this, we would recommend that this workstream considers the currently poorly implemented Article 10 of the Habitats Directive and Article 3 of the Birds Directive – which offer opportunities for a wider (i.e. not site focussed) approach, and to support restoration and recovery. The recommendations of the Lawton Review should also be considered in further work.	Point noted and incorporated into text of further work.
	We would also suggest that another issue that comes out of the report – that of the need to resource effective implementation of the legislation – will need further consideration.	Point noted and incorporated into text of further work.
Additional Information –	I am also attaching, for extra detail, comments that I provided in relation to two of the work strands – the report based on 1:1 interviews, and the CCW critiques of different pieces of legislation. The critiques have been reviewed by colleagues within the RSPB, whose comments provide the bulk of those below. Some additional comments from the Wildlife Trusts Wales and Butterfly Conservation have also been incorporated. These represent additional information that we feel would be usefully incorporated to strengthen the critiques.	There email entitled “Comments on WSP Regulation Report”, which I presume is what is being referred to in respect of the 1:1 interviews, has no content. 6 pages of notes on the CCW critiques were supplied. These have not been considered further here but comments are referred to in the Report

ANNEX 3 COMMENTS LOG

COMMENTS FROM WELSH GOVERNMENT (TRANSPORT) (LEN WYATT)

Comment on	Comment	Response
Report in General	Do we need to include Hampton Principles in an annex - for completeness. So that future readers will not need to chase them from another source?	Hampton Principles included in chapter 3.
	Is there a need for paragraph numbers to help people navigate around the report?	Paragraph numbers have been added.
	Does the report need to be updated in line with declared WG legislative programme – e.g.: add environment bill to Headline conclusions Legislation Level 4?	Covered in chapter 11.
Introduction p 3/4 Table 1	Can the presentation/consistency of this be improved, by ensuring the contents of Project Description and Comments are consistent – e.g.: Management Approaches Workshop - project description isn't about information provided as in other projects, but aims. Should aims be in comments - and state what happened/who was involved in Project Description?	Attempt made to improve consistency; information on what happened and who was involved is not available in all cases however. I have opted for anonymity for people but have identified organisations where this information is available. This could be changed if so desired.
The Evidence p 7	- First sentence - add to end "....refreshing the approach to regulation through NEF"? - Para 2 - line 14 - clarify what/where the issues addressed are. e.g.: "The issues addressed by xxxxx are also limited." - End of Table 2 - do you need to explain why not engaged other sectors/communities?	Points noted and text amended to address first point.
Specific examples	- Page 26 - 2nd Para - last sentence - what kind of an example is BREEAM building standards? Suggest finish sentence? - Page 27 Mick Green Para 2 - first sentence - Wales?	Footnote to BREEAM Typo corrected
Scale of impacts	Page 32 - Para 2 - reference to risk based approach - any example of what that approach could be?	No!
Individual Responses	Page 33 Table 11 Issue column - Disturbance of species - code of practice. Clarify for what the code of practice required is for?	Text added
Committee Reports	P44 - Para 5 - last line. Was enhancement mentioned, alongside mitigation and	Yes; text amended.

	compensation? I don't know the source, but just thought there was a gap here. If of course it didn't mention it, ignore my comment.	
WCA Pt I	Page 62 Comments - Para 2 - line 2. I didn't understand the bracketed phrase "present in 5.8% grid squared to 58.8%"	Text corrected
1:1 Interviews	• 7 1 to I interviews - is this title correct? • Page 74 - Box 6. • Recommendation 1 - should this have included social outcomes as well? I dont know if the original report did. • Recommendation 3.3 - point 6 - RTI or RIT?	Text corrected. Recommendations quoted verbatim RIT corrected.
Additional sources of Information	Page 81 - Table 31 - there may be value in adding dates to items in Information column, so that they can be found again.	References to web sites and/or dates added.
Conclusions	Page 84 - Para 6. Is it worth quickly listing a few more ecosystem services topics than pollution control, would suggest landscape, cultural heritage as well. Flexible outcome Page 94 - first para - is the issue about SACs or all Natura 2000 sites/ Ramsar sites? See other references to SACs. Understanding the law • Para 1 - line 8 - are you sure that the precautionary principle only applies to the "potential adverse effects at an early stage" I know that our approach is slightly different, e.g.: it is applied when there is uncertainty and used as defined with EC Communication on the Principle. If your evidence is different than mine, can you state which stages of HRA/App Ass(screening and app appropriate assessment)? • Page 95 - Para 1 - bullet points - I wasn't sure whether Article 1(1) is the aim/objective of the Directive, with (2) and (3) being about the aims/objectives of the measures? • Para 2 - line 9 onwards - is this a fair comment about conditions tend to be onerous because of the way the Directive is implemented, if there is insufficient case law to define what is exactly required? There is of course the EC Guidance on Article 6(4) 2007 which sets out more detail what is required. • Page 96 - Para 2 - first sentence - does this relate to a project (e.g.: planning application) or a management regime. If the former - is this legal - see Waddensee	Text added. The issue relates to SACs. No, I'm not sure – this is a matter for interpretation. I have amended the text to make this a bit clearer. The bullets are the full text of article 2, verbatim. Your interpretation may well be correct. Point added to section on Habitats Directive

	Judgement 2004 - and links to no reasonable scientific doubt that there will be an adverse effect on the integrity of the site?	The comment is not directly related to habitats Directive.
Other thoughts for the wider team - not related to report per se	Comments - Page 19 Para 4 - is there a need to go back out to people to find more detailed information if a gap has been identified? I am not saying you should, but is it an option worth considering if it can provide better information? - Page 28 - Overall conclusions - Planners and Developers. Embedding biodiversity duties is noted as best achieved, if there is a clear enforceable duty. Agree - but is it also about positive attitudes towards the duty? Use of scientific evidence - Page 31, para 2 refers to Habitats Directive and the role of scientific evidence and professional judgement. We tend to separate the two out, in as far as - there can be scientific evidence on which professional judgements can be made; but also situations where there is no scientific evidence, but professional judgements have to be made. - Does Monitoring - mean Monitoring and Evaluation? Often I would suggest that provision of information – doesn't necessarily lead to interpretation/contextualisation of that information. - P41 Biodiversity duty. I have often wondered whether we could have one Welsh list of habitat/species of importance, rather than WCA, S42 and UKBAP lists.	Points noted. Not recorded in report.

ANNEX 3 COMMENTS LOG

OTHER COMMENTS

Comment from	Comment on	Comment	Response
Welsh Gov SEED (Rachel Hudson)	p. 40 Licences.	House sparrow and starling were removed from the WCA General Licence in Wales from Jan 2011	Text amended.
	p. 71 Badgers.	We do not always issue a licence for work near badger setts to carry out forestry operations. I think this is just a forestry company / FC trying to save themselves the bother of applying. We would not for instance issue a licence to work over a main sett between Dec 1st and June 30th. Often we carry out a site visit and discuss options etc. including timing / machinery to be used etc. We do this in the same way we would for a farmer who wants to carry out agricultural operations within 20m of a badger sett.	Pointed note. Comment added to the effect that there is not a clear understanding of the processes involved in licensing of this type.
Welsh Gov Planning (Neil Hemington)	Report in general	You have expressed our main concerns about the evidence gathered so far. In particular, we are concerned that the evidence base is partial and tends to be anecdotal based on opinion rather than verifiable information. From a planning perspective we are particularly concerned that the views of business and local authorities have not been established. Obviously this is worrying from a planning perspective where we are required to consider social and economic as well as environmental perspectives before changing policy and / regulations or making planning decisions.	Point noted. No changes made.
		As far as planning is concerned the conclusions drawn and recommendations made are not fully justified. It would be difficult to validate action against these recommendations.	Point noted but no changes made as it is not clear which conclusions and recommendations are being referred to.
WBP Non-	Additional	EA/CCW/FC staff do not have powers to access land (without the owner/occupier's permission) to control invasive non native species	Reference to Wildlife and Natural Environment (Scotland) Act

Native Species Working Group via CCW	information	(INNS). This means that it is often impossible to stop the spread of an INNS, for example <i>Crassula helmsii</i> (New Zealand Pigmy weed) through a river catchment. In Scotland they have just passed the WANE Act which gives relevant bodies (as directed by the minister) the right of access to private land to control INNS. The INNS group thought this was a significant gap in our current powers and that it would be good to have these powers in any new SEB.	2011
Workstream team (Jennifer Dack)	Additional information	EC Guidelines on the implementation of the birds and habitats directives in estuaries and coastal zones The European Commission has released guidelines on the implementation of the birds and habitats directives in estuaries and coastal zones with particular attention to port development and dredging. Recommendations from the guidelines include: • The design of plans or projects should always be based on mutually beneficial strategies with a view to achieving dual goals of both Natura 2000 conservation objectives and socio-economic objectives • Damage prevention or avoidance measures should always be preferred to compensation measures. • Pre-assessments to evaluate the potential for impact of a plan or project on Natura 2000 sites should always be foreseen. • Thorough and timely stakeholder consultation is always recommended. • Maintenance of ports and navigational access should be dealt with in the context of integrated management plans for the entire waterway or the affected Natura 2000 site. • Capital dredging operations should be designed as a part of sustainable dredging and sediment management schemes.	Information added to chapters 11 and 12.

ANNEX 4. RECOMMENDATIONS COLLATED BY REFERENCE IN REPORT

Report Section	Recommendation or Conclusion	S, L, T*	Relevant Recommendation in Ch 14
2.7	Need to address under-representation of some sectors in evidence	All	5
Table 3.1	Recommendation for risk based enforcement of duties under Conservation Regulations	T	15, 16, 18
Table 3.1	Comment that implementation of Environmental Permitting Regulations would be improved if the regulatory role was not split between authorities	L, T	7, 11, 18
Table 3.1	Need to revise Forestry Act to take account of changing objectives, remove complexities and address lack of joined up management	L, T	10, 15
Table 3.1	Need to close loophole where permitted development rights allowed damaging activities in order to maintain land drainage	L	15
Table 3.1	Recommendation for natural capital tool to enable LPAs to understand value of assets, e.g. greenfield sites	T	16,
Table 3.1	Need for consolidation of Wildlife & Countryside Act for Wales	L	12
Table 3.4	Recommendation for amendments to Plant Health Act to redress lack of provision to replace woodland destroyed under the Act.	L	15
Table 3.4	Recommendations for amendments to Reservoirs Act to clarify what takes precedence – public safety or ecosystem protection	L	15
Table 3.4	With respect to the Water Resources Act, links between flood defence consenting and biodiversity need to be clarified and overriding principles better understood	L, T	10
3.11	Need to address anomaly of permitted discharges being classified as pollution incidents	L, T	15
3.14	Recommendation that appoint lead competent authority or improve coordination permissions for complex schemes under Conservation Regulations	L	6, 7, 11, 17,18
3.14	Recommendation for simple guidance for competent authorities to implement Conservation Regulations	T	16
3.14	Statutory consultees should be included from start of decision making process under Conservation Regulations	L, T	12, 18
3.14	More comprehensive definition of ‘plan or project’ needed for Conservation Regulations	L, T	14, 16

3.14	Need for culture of early consultation, pre-application, in respect of Conservation Regulations permissions	T	7, 16, 18
3.22	Recommendation to consider changing T&CP law to require parallel tracking of planning and permits for certain types of development	S, L	10
3.22	Developers should be required to submit all necessary information with application for planning permission	L, T	15, 16, 18
3.22	The need to plan for water should be joined up through requirement for a water cycle study	T	18
3.22	Flooding needs to be taken account of in a strategic way	All	2
3.25.	The message that comes across is that there is a need for a stronger focus on the desired outcome and a more integrated approach between public bodies charged with ensuring the outcome is delivered.	T	1, 2, 3, 4, 7, 18
3.26	Need to understand wider benefits of legislation – positive unintended consequences	L	5, 10, 12, 15
3.27	Need to raise awareness of related legislation and roles of other bodies	T	5
3.28	Recommendation for consideration of wording of powers and duties	L	11
3.28	Recommendation to consider legal mechanisms to tie procedures together (eg. Planning and permitting).	L	6
3.28	Recommendation to consider potential models of ‘good’ legislation, e.g. HSE Regulations which tend to be risk based	L	10
3.28	Need for greater recognition of the limits of hard scientific evidence and inevitability of scientific uncertainty and finding a way to deal with this that does not involve invoking the precautionary principle or adopting a risk based approach	L, T	13, 14, 16
4.12	Need for more standards of environmental management to be applied	T	16
4.16	More common sense approach to implementation required based on expert knowledge	T	16
4.25	Need for legal duty to consider biodiversity	L	4, 12
4.27	Need detailed legislative review to identify levers, challenges and opportunities	L	10
4.28	Review of existing legal regimes should check for redundancy	L	12
4.29	Need for greater synergies between the way laws are applied in different sectors	T	6, 7, 18
4.33	If there is an expectation that measures will be enforced, this needs to be backed by legal mechanism such as duty to enforce or requirement to monitor	L	6, 10
4.36	There is too much focus on detail at the expense of strategic opportunities	T	16
4.38	Recommendation for ecologically driven approach based on expert opinion in assessing favourable	T	2, 3, 4, 13, 14, 16, 17, 18

	conservation status		
4.40	Different scales of activity should have different levels of regulation reflecting risk involved and based on common sense	L, T	13, 14, 16
5.4. Table 5.1	Access to land to check for presence of biodiversity and monitor is needed	L	12, 15
5.7. Table 5.1	Need to allow sufficient time for biodiversity surveys required for grant applications	T	15, 18
5.8. & 5.11. Table 5.1	Recommendation for improved guidance on best time to clear land and/or translocate species for development purposes to take account of different types of biodiversity	T	16
5.9. Table 5.1	The definition of disturbance and its practical interpretation need to be species specific	T	12, 16
5.10 & 5.11. Table 5.1	Need to clarify extent to which habitat destruction amounts to disturbance	T	12, 16
5.12. Table 5.1	Recommendation that reckless as well as intentional disturbance should be covered by the legislation	L	12
5.13. Table 5.1	Need to consider why different species are afforded different levels of protection – specifically bats and house-nest birds	L	4, 12
5.14. Table 5.1	Recommendation for greater use of codes of practice in general and, in particular, for wildlife watching	L, T	16
5.15. Table 5.1	Where replacement planting is required under TPO legislation it should ensure that planting is appropriate.	L, T	15
5.16. & 5.17. Table 5.1	Need for consolidation of wildlife legislation including recommendation to address claim that Wildlife & Countryside Act and Conservation of Habitats and Species Regulations are not always compatible	L	12
5.18. Table 5.1	Recommend introducing statutory definition of ‘in the wild’ in relation to control of invasive non-native species	L	12
5.3. & 5.19. Table 5.1	Recommendation for power of access to land to determine if a wildlife offence has been committed and to control invasive non-native species	L	12
Table 5.1	Recommendations for use of standard protocols and/or simple check lists for assessment purposes to simplify the process	T	13, 16
5.21. Table 5.1	Recommendation for stop notices to be re-introduced in relation to protected species	L	12
5.22. Table 5.1	Recommendation to make it an offence to breach licence conditions	L	12
5.23. Table 5.1	Need for restoration orders to reinstate or replace protected places	L	12
5.24. Table 5.1	Recommendation to include wildlife offences under definition of serious crime	L	12
5.25. Table 5.1	Recommendation to add offence of vicarious liability for wildlife crime	L	12
5.26. Table 5.1	Recommendation that legislation should incentivise compliance	L	12

5.27. Table 5.1	Recommendation that the species covered by General Licences should be regularly reviewed and the list amended to reflect their conservation status	L	12
5.29. Table 5.1	Need to strengthen NERC s 40 duty	L	12
5.29. Table 5.1	Need to amend NERC s 42 duty	L	12
5.30. Table 5.1	Recommend making it an offence for a statutory authority to fail to pay regard to biodiversity	L	12
5.31. Table 5.1	Recommend introduction of a duty to consider biodiversity in planning consents and to incentivise this by a requirement for developers to design their proposals to minimise habitat loss by	L, T	12, 16, 18
5.32. Table 5.1	The use of EDR 2009 should be strengthened so that they cover the safeguard and, where appropriate, restoration of habitats for biodiversity	L, T	12
5.33. Table 5.1	Recommendation that BREEAM should prioritise ecosystem protection over non-native planting	T	16
5.34. Table 5.1	Recommend prohibiting third party operation likely to cause damage to an SSSI	L	12
5.35. Table 5.1	Recommend powers to apply SSSI notification to buffer zones	L	12
5.36. Table 5.1	Need to address legislative gap in Hedgerow Regulations to protect against deterioration through neglect or mismanagement	L	12, 15
5.36. Table 5.1	Need to amend Hedgerow Regulations to cover hedgebanks	L	12 15
5.38. Table 5.1	Planning law and guidance needs to be amended to take account of TAN 5 etc.	L, T	16
5.38. Table 5.1	Recommend making it an offence to carry out excluded activities on access land, regardless of whether damage actually occurs	L	12
5.39. Table 5.1	Recommendation to amend public rights of way legislation to allow for a diversion or closure in the interests of nature conservation	L	12
5.40	All conclusions and recommendations in this chapter should be followed up	L, T	
6.2	The Welsh Government should adopt a strategic ecosystems approach to the management of biodiversity in the wider countryside through the [NEF]. This ecosystems approach should be central to the Government's efforts to achieve the 2020 targets, and its effectiveness should be reviewed in 2015	S	2, 3
6.6.	The Welsh Government should legislate ... to place a duty to support and promote biodiversity on relevant organisations, building on the duty to have regard to biodiversity established by the Natural Environment and Rural Communities Act	L	3, 4, 6, 11
6.8.	The Welsh Government should ensure that local authorities have access to sufficient resources and expertise to be able to ensure the proper implementation of biodiversity legislation through the planning system ...	T	5, 6, 17

6.10 & 6.11	[T]he Welsh Government [should] work with the European Commission to ensure the current loophole in the EIA regulations allowing development sites to be cleared prior to the submission of a planning application is closed. To prevent an further biodiversity loss in this way, this should be done as a matter of urgency ...	L	14, 15
6.12.	The Welsh Government should take the opportunity provided by the development of the Natural Environment Framework to further develop the Networked Environment Regions concept under the Wales Spatial Plan. Ministers should ensure that NEF priorities are incorporated into the WSP and WSP Regional strategies so that biodiversity is given greater priority within them	S	8
6.15.	We recommend that the Welsh Government should carefully review any further proposals to deliver strategic objectives through the mechanism of the land-use planning system to ensure that it is the most appropriate vehicle for delivering those objectives and that it has clear delivery mechanisms related to them	S	1, 3, 8
6.17.	the Welsh Government should encourage the sharing and development of expertise on planning policy and proposals for development	T	7, 8, 18
6.19.	the Welsh Government should amend chapter 1 of Planning Policy Wales to provide a clearer statement of its strategic priorities and to clarify how conflicting objectives should be resolved where they occur in the planning system	L	1, 3, 8
6.21.	the Welsh Government should revise the chapters in Planning Policy Wales to ensure that the national development control policies are expressed in full as policies that can be clearly cross-referenced in Local Development Plans and Supplementary Planning Guidance	T	1, 3
7.9., 7.11.	Recommendations on Habitats Directive	L, T	14
7.13.	Recommendations on Water Framework Directive	T	14
7.18.	Recommendations on Marine & Coastal Access Act	T	9, 12
7.22.	Recommendations on Marine Strategy Framework Directive	S, L	9
7.26-7.28.	Recommendations on review of protected landscape legislation including use of term 'natural beauty'	L	10, 12
7.35.	Recommendations on Wildlife & Countryside Act Part 1	L	12
7.39	Recommendations on Wildlife & Countryside Act s 28	L, T	12
8.6.	Recommendation to use the Policy Map template for further work on legislation, possible accompanied by SWOT analysis	All	3, 5
Table 9.1.	Need for streamlined single decision-making process between WG and local government in relation to bat licences.	L, T	15, 18

Table 9.1.	Recommendation for company general badger licences for tree felling near setts	L	12, 15
Table 9.1.	Need to update Tree Felling Regulations to change focus to protection of trees	L	15,
Table 9.1.	Recommend establishing codes of practice between industry and CCW to eliminate need for Forestry Commission Wales approvals for new planting	T	16
Table 9.1.	Recommend more use of certification based on international forestry standards	T	16
9.6..	Recommend careful review and redrafting of some regulations to realise significant opportunities for improved environmental outcomes at reduced cost	L	12, 15
9.6.	Recommend pursuing scope to deliver better environmental outcomes at lower cost to regulated businesses through changing the culture of the interaction between regulatory agencies and regulated businesses. Need to recognise that opportunities need to be carefully identified where genuine trust can be harnessed and developed.	T	16
Box 9.3.	Recommendation 1: Guiding Principles 1. Regulations should drive both positive environmental and positive economic outcomes 2. Process should be rationalised and outcomes should be bolstered 3. Most businesses and citizens should find regulatory compliance to be cheaper, easier and quicker.	All	16
Box 9.3.	Recommendation 2: Quick Wins • small set of trials to generate significant gains from outputs to WSP work.	T	18
Box 9.3.	Recommendation 3.1: Regulatory Innovation Trials (RITs) • Using a mix of different ‘innovation access points’: ○ A specific regulation ○ A specific policy process ○ A specific location or region ○ A specific regulated business ○ A specific development project ○ A specific activity • “Design exercises” (working up a project proposal) or “live exercises” (trialled in practice)	T	18
Box 9.3.	Recommendation 3.2: Suggested Regulatory Innovation Trials • Engage with non-environmental agencies to get much stronger uptake of sustainability and environmental issues in a particular economic policy, plan or strategy • Estimate the cost of a regulatory system and explore two or three alternative management	T	5, 18

	approaches to achieve the policy aims of the regulations • Explore ways to reduce the cost and increase the value of the existing regulatory requirements for a single regulated company • Explore options for reform of the regulation of species protection and, specifically, the way in which bats are protected in Wales • Combine the environmental monitoring programmes of key agencies		
Box 9.3.	Recommendation 3.3:Suggested Factors to be considered in designing Regulatory Innovation Trials • Using the Policy Integration Tool where it will add value • Ensuring that synergies with and implications for planning systems are assessed • Making sure that the contribution of environmental regulations to non-environmental objectives is captured • Adopting a clear and practical Sustainable Development decision-making framework is critical • Cross-border issues should be considered and effort should be made to identify any potential quick wins • Any RITs need to be led by an identified representative of the workstream so that responsibility is clearly assigned	S, T	18
Table 10.1	Multifunctional use of land and sea can be optimised through spatial planning at a range of scales, supported by robust evidence and stakeholder involvement	S, T	1, 2, 3, 4, 5, 8, 9
Table 10.1	Need to explore range of tools available nationally, regionally and locally including the sustainability tool, public registers of permits, cost benefit analysis tools, subsidies and grants	T	3,
Table 10.1	Need for engagement with people beyond the “usual suspects”	T	5
Table 10.1	Need for policy cohesion between NEF, ERP and education strategy	S	3
12.6	Need to obtain further evidence on marine environmental management	All	9
12.10	Need to engage with wider range of sectors including local government and agriculture	All	5
12.11	Follow up evidence of problems with specific legislation	L, T	15
12.13	Note that involvement of local authorities is extremely important	S, T	7, 18
12.21	Need for lead competent authority where more than one involved	L	6, 7, 16, 17, 18
12.22	No acknowledgement in Habitats Directive that some impacts may be more harmful than others	L, T	14
12.24	Recommendation to foster closer working relationships between regulators	T	1, 7, 17, 18
12.24	Recommendation to foster better relationships between regulators and the regulated	T	16
12.24	Recommendation for clear and timely guidance on regulations	T	16

12.26	Need to review legislation with view to amendment	L	12, 15
12.51	Need for more flexible approach to implementation	T	16
12.53	Recommendation that any review of legislation should consider interpretation as well as drafting	L, T	6, 10, 11, 12
12.57	Recommendation to consider balance application of science and expert opinion	T	13, 14, 15, 16, 18
12???	Recommendation to consider role of precautionary principle versus risk management based on deployment and monitoring	T	2, 13, 14, 15
12.58	Need for strategic level thinking on role of planning system in delivery of NEF	S	1, 2, 3, 4, 5, 8
12.59	Applications for planning permission should not be accepted unless and until all necessary supporting information was supplied.	T	16, 18
12.59	Wales Spatial Plan should fully adopt NEF	T	3
13.4	Need for changes to individual laws and/or their implementation	L, T	12, 15
13.4	Priority is to address strategic policy framework	S	1, 2, 3, 4
13.5	Need for wider engagement	S, T	5
13.7	Recommendation for review of Government policy and guidance	All	3
13.8	Need for closer collaboration between public bodies	T	7, 16, 18
13.9	Conclusion on advantages of wider engagement	S, T	5
13.10	Recommendation to build on existing work on integration frameworks for ecosystem approach	S	2, 3
13.11	Better use of assessment processes to achieve integration	T	13
13.12	Need for further work on relationship between biodiversity protection and planning system and value of spatial planning	S	1, 2, 3, 4, 10
13.13	Recommendation that integrated land use policy based on spatial planning could be top level strategy for NEF	S	3, 8
13.14	Need to re-assess role of nature conservation in context of NEF	S, L	4
13.15	Recommendation to explore ways of interpreting and implementing measures more flexibly	T	14, 16
13.16	Recommendation to review species protection measures against NEF requirements	L	4, 12
13.17	Need to take account of cultural differences in implementing measures	T	16
13.19	Need for staff training and allocation of resources to deliver NEF	T	17
13.20	Recommendation to consider scope for self-regulation based on codes of practice and guidance	L, T	16
13.21	Need for legislation to embed NEF principles	S, L	1, 2, 3, 4
13.23	Recommendation for review of key legal instruments against NEF objectives	L	1, 10
13.24	Recommendation to follow up alleged inadequacies in wording and/or interpretation of legislation	L, T	15

13.25	Recommendation for review of species protection measures against need to contribute to delivery of ecosystem services	L	4, 12, 15
13.26	Recommendation to review suite of assessment processes to see if they can be rationalised further	L, T	13
13.27	Recommendation to review interpretation of key Directives	L, T	14
13.29	Recommendation to develop thinking on risk and how to assess it.	All	13, 14, 15, 16
13.33	Further work needed to develop position on balance between use of expert opinion and scientific evidence	T	14, 16
13.33	Further work needed to develop position on precautionary approach versus a risk based deploy and monitor approach	T	13, 14

*S, L and T refer to the main level of action for the recommendation – strategic, legislation, or tactical.