1. **Ensuring compliance with a site protection notice and recovery of costs incurred**

***In our evidence we were asked;***

***(i) Why we felt the current provisions were not currently sufficient to prevent certainty of non-compliance with a particular site protection notice and needed to be more robust. And;***

***(ii) Why it would be more effective and represent less of a financial risk for the Welsh Government compared with the current provisions***

The key issue is the extent to which the legislation creates an effective deterrent for the person who is not complying with a site protection notice. We believe the draft bill is not sufficient for a number of reasons as follows:

1.1 The legislation already acknowledges, by the inclusion of s5D, that there needs to be a sanction for breach of the site protection notice beyond simply varying or revoking the order under s5E.

1.2 The sanction chosen in s5D, i.e. to allow the Welsh Ministers to take action and to recoup the costs, is ineffective as a deterrent:

1.2.1 First operators know that such provisions (seen elsewhere in legislation) are largely ineffective as no public body wants to take the risk of incurring costs and then not being able to recoup them from the operator (e.g. due to simple refusal to pay or bankruptcy). The wording of s5D is clear that the Welsh Ministers must themselves incur the expenses first; and only then may they recoup the costs, so there is no opportunity for the Welsh Ministers to obtain "payment on account" from the person who has breached i.e. before the Minsters carry out the works.

1.2.2 Secondly, a monetary debt to the Welsh Ministers is much less of a concern to most people than the risk of a criminal record. Criminal records have far reaching effects, for example under the Company Directors Disqualification Act 1986. Furthermore penalties can include a custodial sentence as well as a fine. A monetary debt by contrast amounts to a civil debt for which the remedy (for the Welsh Ministers) is legal action in the civil court.

1.3 We do not feel that reliance on s5E is an adequate as a basis for not including a criminal offence in s5D, as the s5E process will take time. First s5E cannot be triggered until any appeal against a site protection notice is finished and even then the Ministers must first complete a consultation process. Only once the consultation is complete can the order then be varied or revoked. As such there could be significant delays between a problem being identified and any enforcement action against the relevant person then being taken.

1.4 Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on "The protection of the environment through criminal law" *requires* a criminal offence to be created.

1.4.1 Article 3 states: *Member States shall ensure that the following conduct constitutes a criminal offence, when unlawful and committed intentionally or with at least serious negligence: (a)...; (b)...; (c)...; (d)...; (e)...; (f)...; (g)...; (h) any*

*conduct which causes the significant deterioration of a habitat within a protected site; (i).....*

1.4.2 Article 5 states: *Member States shall take the necessary measures to ensure that the offences referred to in Articles 3 .....are punishable by effective, proportionate and dissuasive criminal penalties.*

1.4.3 The definitions in Article 1 state: *For the purpose of this Directive:*

*(a) 'unlawful' means infringing:*

*(i) the legislation adopted pursuant to the EC Treaty and listed in Annex A* [this Annex A list includes the Habitats Directive and Birds Directive]*; or*

*(ii) .....; or*

*(iii) a law, an administrative regulation of a Member State or a decision taken by a competent authority of a Member State that gives effect to the Community legislation referred to in (i).....*

*.....*

*(c) 'habitat within a protected site' means any habitat of species for which an area is classified as a special protection area pursuant to Article 4(1) or (2) of Directive 79/409/EEC, or any natural habitat or a habitat of species for which a site is designated as a special area of conservation pursuant to Article 4(4) of Directive 92/43/EEC.*

1.5 In any event, inclusion of a criminal offence is standard in similar legislation in this scenario:

1.5.1 Take for example the SSSI protection provisions of the Wildlife and Countryside Act 1981 which applies in Wales. In certain circumstances NRW may serve a Management Notice on an owner / occupier of a SSSI (s28K). Where that person fails to comply with the Management Notice then he or she commits a criminal offence (s28P(8)). In addition the person may appeal against the Management Notice. NRW is however also given the option of entering the relevant land, carrying out the prescribed works and recovering the costs as a debt (though of course NRW risks possible non-recovery in doing so) (S28K(7)). This regime therefore recognises that NRW's power to carry out works and recover costs is not a sufficient deterrent and that it is appropriate to combine, with it, a criminal offence.

1.5.2 Take for example also the "Works Notice" provisions of the s161 Water Resources Act 1991 which apply in Wales (as well as England) to deal with water pollution issues. Under this regime, as long as NRW can identify the "responsible person", it may serve a Works Notice on that person requiring that person to take the specified steps set out in the Notice to address the pollution. It is then a criminal offence to fail to comply with the Works Notice. In addition a person may appeal against the Works Notice. However, NRW is also given the option to take

action itself and recover the costs of so doing from the responsible person (please note this only applies in the case of an emergency or where service of a Works Notice is not practical because the responsible person cannot reasonably be found). This regime therefore again recognises that NRW's power to carry out works and recover costs is not a sufficient deterrent and that it is appropriate to combine, with it, a criminal offence. This regime also demonstrates the common sense position (following the "polluters pay" principle) that priority should be given to pursuing the responsible person via a criminal sanction; and only if the responsible cannot be found should the works be carried out by NRW (who in so doing will be taking the risk of possible non-recovery).

1.6 The key issue is the extent to which the legislation creates an effective deterrent for the person who is not complying with a site protection notice. As noted at paragraph 1.2.1 above, in general people are much more concerned about the risk of criminal offences / a criminal record than having a bill / debt to pay. The key point is the deterrent effect of making "breach of a site protection notice" a criminal offence. A site protection notice is far more likely to elicit compliance where it is served on the person with the threat of a criminal offence if not complied with.

1.7 As noted above, a criminal offence is required under Directive 2008/99/EC.

**2. In our evidence we argued strongly that the provisions within the bill were not sufficient to deliver the requirements of Regulation 63 of the Conservation of Habitats and Species Regulations 2010.**

Below is further information on this matter, we hope that this provides clarity as to why the bill as drafted is not adequate for a regulation 63 review.

2.1 In a situation where an Order under s1 of the Sea Fisheries (Shellfish) Act 1967 exists, and a new European Marine Site is then designated / classified, there will need to be a review of the Order under regulation 63 Conservation of Habitats and Species Regulations 2010. Effectively regulation 63 requires the Welsh Ministers to conduct a Habitats Regulations Assessment (**"HRA"**) of the Order and for the Order to be affirmed, modified or revoked as a result.

2.2 Regulation 63(3) states that "*any review required by this regulation must be carried out under existing statutory procedures where such procedures exist* ...".

2.3 If new s5B-5F are adopted then the Welsh Ministers, when required to apply regulation 63, may consider using these procedures as "existing statutory procedures". However this would in fact not be possible or appropriate. The is because

2.3.1 (i) s5B-5F are triggered only "*if it appears to the Welsh Ministers that harm to a European marine site has occurred, or is likely to occur, as a result of any activity*" (see s5B(1));

2.3.2 and (ii) this trigger is not consistent with the HRA screening test as set out in regulation 61(1) (i.e. "*a plan or project which is likely to have a significant effect on a European site ....(either alone or in combination with other plans or projects); and is not directly connected to the management of that site*"). Therefore one cannot rely on s5B-5F to give proper and full effect to the HRA requirement under regulation 63.

2.4 Therefore one is left without any “existing statutory procedures” by which the Welsh Ministers may carry out its regulation 63 review of the Order.

2.5 Regulation 63 provides that where there are no “existing statutory procedures” then the appropriate authority may give directions as to the procedure to be followed. However, an alternative, so as to avoid the inevitable difficulties for the Welsh Ministers when this problem arises, is for the Environment Bill now to deal directly with the point and to provide an appropriate “statutory procedure”.

2.6 This would be straightforward to do. S5E would provide an appropriate basis for this if, for the purpose of regulation 63, it could apply as a stand-alone provision, without any reference to the need for a site protection notice to first be in existence under s5C. If this could be drafted into the wording of s5E, then this issue would be addressed.