



House of Commons
Regulatory Reform Committee

**Proposal for the
Regulatory Reform
(Deer) (England and
Wales) Order 2007**

Fourth Report of Session 2006–07



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*Report, together with formal minutes and
written evidence*

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The Regulatory Reform Committee

The Regulatory Reform Committee is appointed under Standing Order No. 141 to consider and report to the House of Commons on proposals for regulatory reform orders under the Regulatory Reform Act 2001 and, subsequently, any ensuing draft regulatory reform order. It will also consider any "subordinate provisions order" made under the same Act.

Current membership

Andrew Miller (*Labour, Ellesmere Port & Neston*) (Chairman)
Gordon Banks (*Labour, Ochil and South Perthshire*)
Lorely Burt (*Liberal Democrat, Solihull*)
Mr James Gray (*Conservative, North Wiltshire*)
Stephen Hammond (*Conservative, Wimbledon*)
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Mr Andrew Slaughter (*Labour, Ealing, Acton & Shepherd's Bush*)
Ms Angela C Smith (*Labour, Sheffield, Hillsborough*)
Mr Anthony Steen (*Conservative, Totnes*)

Criteria against which the Committee considers each proposal

Paragraph (6) of Standing Order No.141 requires us to consider any proposal for a regulatory reform order against the following criteria:

... whether the proposal—

- (a) appears to make an inappropriate use of delegated legislation;
- (b) removes or reduces a burden or the authorisation or requirement of a burden;
- (c) continues any necessary protection;
- (d) has been the subject of, and takes appropriate account of, adequate consultation;
- (e) imposes a charge on the public revenues or contains provisions requiring payments to be made to the Exchequer or any government department or to any local or public authority in consideration of any licence or consent or of any services to be rendered, or prescribes the amount of any such charge or payment;
- (f) purports to have retrospective effect;
- (g) gives rise to doubts whether it is *intra vires*;
- (h) requires elucidation, is not written in plain English or appears to be defectively drafted;
- (i) appears to be incompatible with any obligation resulting from membership of the European Union;
- (j) prevents any person from continuing to exercise any right or freedom which he might reasonably expect to continue to exercise;
- (k) satisfies the conditions of proportionality between burdens and benefits set out in sections 1 and 3 of the Regulatory Reform Act 2001;
- (l) satisfies the test of desirability set out in section 3(2)(b) of the 2001 Act;
- (m) has been the subject of, and takes appropriate account of, estimates of increases or reductions in costs or other benefits which may result from its implementation; or
- (n) includes provisions to be designated in the draft order as subordinate provisions.

Publications

The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the Internet at www.parliament.uk/regrefcom. A list of Reports of the Committee in the present Session of Parliament is at the back of this volume.

Committee staff

The current staff of the Committee are Mick Hillyard (Clerk), Stuart Deacon (Committee Specialist) and Liz Booth (Secretary/Committee Assistant).

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Summary

Overall recommendation

We have examined the proposal for the Regulatory Reform (Deer) (England and Wales) Order 2007 in accordance with Standing Order No. 141. We recommend unanimously that the proposal should be amended before a draft Order is laid before the House.

Outline of the proposed Order

The proposed Order would make a series of amendments to the Deer Act 1991 with the aim of making it easier for individuals to take action to control the deer population in England and Wales. It would also introduce various new provisions to that Act which aim at the enhancement of deer welfare, including the establishment of close seasons for deer species which are currently not protected against killing at any time of year.

The proposal for the Regulatory Reform Order was laid before the House by the Department for Environment, Food and Rural Affairs on 18 December 2006. We have considered the proposal against the criteria set out in paragraph (6) of Standing Order No. 141 and report the following conclusions to the House:

Criterion (a): appropriate for delegated legislation

In our view the proposal appears to be appropriate for delegated legislation.

Criterion (b): removal or reduction of burdens

The proposal would remove or reduce a number of burdens.

Criterion (c): maintenance of necessary protection

We are concerned that necessary protection could be lost and recommend that parts of the proposal should be excluded for that reason.

Criterion (d): adequate consultation

We consider the proposal has been the subject of, and appropriate account has been taken of, an adequate degree of consultation.

Criterion (e): charges on public revenues, payments to the Exchequer or any public authority

The proposal would authorise the charging of fees in consideration of applications for licences.

Criterion (f): retrospective effect

The proposal would not have retrospective effect.

Criterion (g): vires of the proposal

The proposal gives rise to no doubts as to whether it is *intra vires*.

Criterion (h): requires elucidation, is not written in plain English or appears to be defectively drafted

We consider that some elements of the proposal have been defectively drafted and that these should be amended.

Criterion (i): compatibility with membership of the European Union

We have seen no reason to consider that the proposal is incompatible with obligations arising from membership of the European Union.

Criterion (j): prevention of the exercise of rights and freedoms it would be reasonable to expect to continue

We consider that the proposal would not prevent the exercise of any right or freedom that any person could reasonably expect to continue to enjoy.

Criterion (k): new burdens are proportionate to the benefit which arises from them

We consider the burdens imposed by the proposal would be proportionate to the beneficial effects which would arise from them.

Criterion (l): extent to which the Order removes burdens or has other beneficial effects makes it desirable for it to be made

We consider the proposal meets the test of desirability in its removal and reduction of burdens.

Criterion (m): estimates of increases or reductions in costs or other benefits and the account taken of them

We consider the Department has made reasonable efforts to foresee the costs, savings and other benefits that could arise from the proposal.

Criterion (n): subordinate provisions

The proposal contains provisions which are designated as subordinate provisions. We make recommendations for amendment of the proposal concerning the circumstances in which it would be appropriate for the proposed subordinate legislative powers to be exercisable.

Explanatory report

Introduction

1. The proposal for the Regulatory Reform (Deer) (England and Wales) Order 2007 was laid before the House on 18 December 2006 by the Department for Environment, Food and Rural Affairs (“the Department”).

2. Management of the deer population of England and Wales is regulated by legislation, and principally by the Deer Act 1991 (“the 1991 Act”). The 1991 Act, which consolidated a number of earlier enactments in a largely unaltered form, has been little amended. This Act regulates when, how and by whom deer may be killed, prescribes the close seasons wherein the killing of the various deer species is unlawful, determines by what methods the killing of deer can be carried out and imposes controls on the sale of venison.

3. Since the time the 1991 Act was passed, the deer population in England and Wales has increased substantially, as has the number of reports of damage and nuisance caused by deer. As a result of this evidence that deer were becoming an increasing problem in some areas, the Department and the Forestry Commissioners for England undertook a joint consultation in 2002 entitled. “Achieving the sustainable management of deer in England”. According to the Department, responses to this exercise indicated support for legislative change and have informed the development of the current RRO proposal.¹

Current provisions of the 1991 Act

Poaching

4. Section 1 of the 1991 Act provides that it shall be an offence for any person to enter any land without the consent of the owner or occupier or other lawful authority in search or pursuit of any deer with the intention of taking, killing or injuring it/them. There are no plans to change this.

Taking or killing deer during close season

5. Section 2 of the 1991 Act provides that it shall be an offence to take or intentionally to kill any deer of a species and description specified in Schedule 1 to that Act during the close season which is established in that Schedule. These close seasons are currently set in Schedule 1 at the following:

Red Deer

Stags	1 May to 31 July inclusive
Hinds	1 March to 31 October inclusive

¹ Explanatory Statement, paragraph 4

Fallow Deer

Buck	1 May to 31 July inclusive
Doe	1 March to 31 October inclusive

Roe Deer

Buck	1 November to 31 March inclusive
Doe	1 March to 31 October inclusive

Sika Deer

Stags	1 May to 31 July inclusive
Hinds	1 March to 31 October inclusive

6. The Department notes that these periods prevent the taking and killing of female deer during times when they may be pregnant or nursing young, and male deer during the period of the re-growth of their antlers.²

7. There are provisions which establish exceptions to the prohibition on taking or killing of deer during the close seasons. Section 6(1) of the 1991 Act disapplies the prohibition when the act is carried out in pursuance of a requirement of the Secretary of State under section 98 of the Agriculture Act 1947. The Secretary of State may issue a notice under section 98 of that Act in order to prevent damage to crops, pasture, animal or human foodstuffs, livestock, trees, hedges, banks or any works on specified land. Such a notice may require the person on whom it is served (who would be the owner or occupier of land on which pest animals are present and causing damage) to take defined action to rectify the problem or specify a particular result to be achieved.

8. A right of exemption to the prohibition on taking or killing of deer during close seasons is also given under section 7 of the 1991 Act to the occupier of land, a person of his household or in his service with his written authority or any person with legal right to kill or take deer or acting on behalf of a person with such rights on the specified land, where that land is cultivated, pasture or enclosed woodland and where he has reasonable grounds for believing deer of the same species are causing damage to crops, vegetables, fruit, growing timber or any other property. This is sometimes referred to as the “farmers’ exemption”.

9. Section 6(2) of the 1991 Act creates an exemption for any act done for the purpose of preventing the suffering of an injured or diseased deer.

10. Section 8 of the 1991 Act contains provisions which enable the issuing of licences which exempt persons from the prohibitions otherwise imposed by that Act regarding the use of nets, traps, stupefying drugs and muscle relaxing agents and the missiles used to

carry or contain them in cases where the persons are acting for the purpose of moving deer between areas, or in order to take them alive for scientific or educational purposes.

11. It is also important to note that a further exemption from the prohibition on killing deer in the 1991 Act applies to deer which are being kept for their meat, skins or other by-products or as breeding stock. In this case section 2(3) of the Act creates a further exemption where the person keeping them has the deer enclosed and they are conspicuously marked in such a way as to identify that they are kept by that person. In this case, the killing of those deer by that person, or by someone authorised by him to kill them, is likewise not an offence against the Act. This means that those who farm deer are not prevented from culling them by the general provisions which control the management of wild deer.

Taking or killing deer at night

12. Section 3 of the 1991 Act provides that it shall be an offence to take or intentionally kill any deer between the expiry of the first hour after sunset and the start of the last hour before sunrise. The permitted exceptions to this prohibition are where the act is done to prevent the suffering of an injured or diseased deer, or where a notice issued under section 98 of the Agriculture Act 1947 compels night-time action, or when the act occurs during the use of devices specified in section 8 for the purpose of moving deer or taking deer alive for scientific or educational purposes.

Use of prohibited weapons and other articles

13. Section 4(2) of the 1991 Act introduces Schedule 2 to that Act, in which are listed firearms and ammunition which are proscribed for the taking, killing or injuring of deer. Schedule 2 makes it illegal to use for these purposes, in respect of firearms, any smooth-bore gun, any rifle having a calibre of less than .240 inches or a muzzle energy less than 2,305 joules (1,700 foot pounds) or any air gun, air rifle or air pistol; in respect of ammunition it is illegal to use any cartridge for use in a smooth-bore gun or any bullet for use in a rifle other than a soft-nosed or hollow-nosed bullet.

14. Section 4(2) of the 1991 Act also makes it unlawful to use any arrow, spear or similar missile or any missile, whether discharged from a firearm or otherwise, which carries or contains any poison, stupefying drug or muscle-relaxing agent for the same purposes.

15. Section 4(4) of the 1991 Act further makes it unlawful to discharge any firearm or project any missile at any deer from a mechanically propelled vehicle, or to use a vehicle of this kind for the purpose of driving deer (except for where, as section 4(5) provides, this is done by or with written authority of the occupier of enclosed land where deer are usually kept, and in relation to deer on that land).

16. A number of exemptions are established by sections 6 to 8 of the 1991 Act which permit: the use of traps and nets to prevent suffering to injured or diseased deer; permitting the use of smooth-bore guns for killing deer as an act of mercy provided that the person using a gun of this kind to kill deer has not himself injured the animal by his own unlawful act; permitting the use of smooth bore guns with barrel less than 24 inches in length provided they be of a gauge not less than 12 bore and use shot size of at least AAA; and

where an owner or occupier of land uses a shotgun of a gauge not less than 12 bore loaded with cartridges of a certain type to prevent serious damage to crops or other property; and in relation to the use of various devices used for the purpose of moving deer or capturing them alive for scientific or educational purposes.

The aims and effects of the proposed order

17. The Department has listed the intended legal effects of the proposed Order at paragraph 18 of the Explanatory Statement. The Order would make amendments to sections 2, 4, 6, 8 and Schedule 1 of the 1991 Act. The effects of the Order are given as:

- a) Allow .22 centre-fire rifles to be used for shooting smaller species of deer;
- b) Allow any reasonable means of humanely despatching deer that are suffering due to injuries or disease;
- c) Allow dependent deer to be taken or killed if they have been deprived of, or are about to be deprived of, their mother, at any time of year;
- d) Enable licensed taking or killing during the close season to prevent deterioration of the natural heritage;
- e) Enable licensed taking or killing during the close season to preserve public health and safety;
- f) Enable licensed taking or killing at night to prevent deterioration of the natural heritage;
- g) Enable licensed taking or killing at night to preserve public health and safety;
- h) Enable licensed taking or killing at night to prevent serious damage to property;
- i) Shorten the close season for all female deer to help allow better control of population numbers where necessary, without increasing the welfare risks for dependent young;
- j) Introduce a close season for Chinese water deer from 15 March to 31 October inclusive;
- k) Ensure the close season applies to hybrids of a species as well as the parent species;
- l) Amend the meaning of mechanically propelled vehicle in the 1991 Act to permit discharging firearms or projecting missiles from a mechanically propelled vehicle that is stationary.

18. In addition to giving effect to these purposes, the proposed Order also contains provision to give effect to a number of incidental amendments, and these have been described by the Department at paragraph 68 of the Explanatory Statement. These amendments are:

- Removal of the provision in section 2(4) and (5) of the 1991 Act by which the Secretary of State can revise Schedule 1 to the Act by means of an Order subject to a consultation requirement;

- Removal of the reference in section 15 to the extant power for making such Orders;
- Applying the provision in section 8(5) which makes it an offence to breach licence conditions to breaches of the licences made under the proposed new provision;
- Creating power to charge for the proposed licences
- Creating powers to revoke the proposed licences
- Providing that no proposed licence can last for more than 2 years.

The Committee's remit

19. The House has instructed us to examine the proposal against the criteria specified in Standing Order No. 141(6) and then, in the light of that examination, to report whether the Government should proceed, whether amendments should be made, or whether the Order should not be made.

20. Our discussion of matters arising from our examination is set out below. Where a criterion specified in Standing Order No. 141(6) is not discussed in the report, this indicates that we have had no concerns to raise about that criterion. In the course of our examination, we requested further information from the Department about a number of issues relating to the proposal and the text of our questions to the Department is reproduced in Appendix A to this report. The Department's response and associated supporting documents are reproduced as Appendix B. A supplementary exchange between our staff and the Department is reproduced as Appendices C and D. An exchange of emails between our staff and the RSPCA is reproduced as Appendices E and F.

Extent of the proposal's application

21. The draft Order would apply only to England and Wales.

22. Any Order which amends a function of the National Assembly for Wales may only be made with the agreement of the Assembly. In this case, the proposed Order would give to the Assembly a power to make changes to Schedule 1 insofar as it applies in Wales. The Department has therefore confirmed that the consent of the Assembly would be sought prior to the making of the Order as would be required under section 1(5) of the Regulatory Reform Act 2001.

Assessment of the proposal against the Standing Order No. 141(6) criteria

Inappropriate use of delegated legislation

23. **The proposal appears to be appropriate for delegated legislation.**

Drafting of the Order: (i) Text of the Order

24. Section 3 of the 1991 Act makes it an offence to take or intentionally kill deer at night, subject to further qualifying provision under sections 6 and 8. It is proposed that article 4 of the Order should insert new provision into section 8 amending existing machinery for the granting of licences to take and kill deer at night. It was therefore unclear to us why the proposed new section 8(3F)(d) provides that, before granting a licence, the relevant authority must be satisfied that “to achieve the purpose in question there is no satisfactory alternative to taking and killing the deer of the species and description to which the application relates *during the close season prescribed by Schedule 1 to this Act*” (our italics). It appeared to us that this was likely to be an error, unless further explanation could make clear why this reference to the taking and killing of deer during close seasons had been intended. We asked the Department to explain.

25. In its reply, the Department accepted that the wording it proposed for new section 8(3F)(d) was inappropriate and agreed that it should have referred to the taking and killing of deer at night rather than during the close season.³ It now proposed therefore to amend the originally proposed article 4 to substitute the following new section 8(3F)(d) into the 1991 Act:

“(d) to achieve the purpose in question there is no satisfactory alternative to taking and killing the deer of the species and description to which the application relates between the expiry of the first hour after sunset and the beginning of the last hour before sunrise;”

26. We agree that this would correct the previous textual defect and we recommend that the proposed Order be so amended before a draft Order is laid before the House.

Drafting of the Order: (ii) Text of the Explanatory Note

27. We noted that the explanatory note attached to the proposed Order has been drafted in such a way as to give very little information about the Order it purports to describe. The references to the 1991 Act are fairly loose and for the most part go no farther than to identify the general purpose of the provisions being amended – no effort has been made to give a description of the changes which the Order would introduce. In particular, there is no reference to the two new burdens being created by article 5 (the new close season for Chinese water deer and red/sika deer hybrids). In this context, we were mindful of the relevant section of *Statutory Instrument Practice (SIP)* which states “The explanatory note should give a concise and clear statement of the substance and purport of the instrument. It should be informative, and should say what the instrument does”. We therefore asked the Department if it agreed that it would be helpful to expand the explanatory note so as to give a better and more explicit account of the Order it purports to describe.

28. In response, the Department stated that it “agrees that the current explanatory note could be expanded to reinstate the previous explicit reference to the effect of the Order in respect of new close seasons for Chinese water deer and hybrid deer”.⁴ It did not state

3 Appendix B, answer to question 10

4 Appendix B, answer to question 11

explicitly that it intended so to expand the note to achieve this purpose. **While we assume that is the Department's intention, we also formally recommend that the explanatory note be amended to describe the Order more fully.**

Removal and reduction of burdens

29. The Department considers that the proposed Order will remove or reduce ten burdens from the existing 1991 Act. We discuss these burdens below.

Restriction on controlling deer during the close seasons and at night

30. It is currently unlawful to take or kill a deer during close seasons or at night, except in the circumstances subject to exemption from the prohibition as described above. The Department states that the existing close seasons are considered “too long for effective deer management and the scope of the existing exemptions to control deer [are] too narrow and [do not] address damage caused by deer outside the agricultural sector”.⁵ The Department considers that there is a need to reduce the existing burden on those who have a need to control deer numbers by extending the period over which female deer can lawfully be killed, and it therefore proposes to shorten the respective close seasons by putting back the start date for taking and killing female deer by two weeks.

31. The Department also considers that it would be helpful for persons needing to control deer to be able to kill them during the close seasons or at night. Section 8 of the 1991 Act makes provision for the issuing of licences which exempt persons from restrictions otherwise imposed by the Act regarding the use of nets, traps, stupefying drugs or muscle relaxing agents and the missiles used to carry or contain them in cases where those persons are so acting for the purpose of moving deer between areas or in order to take them alive for scientific or educational purposes.⁶ Article 4 of the proposed Order would supplement this by inserting extensive new provision into section 8 of the 1991 Act to allow licences to be granted to any person to take or kill deer during the close season for the purpose of (i) preserving public health or safety or (ii) conserving the natural heritage. It is also proposed that new provision be inserted in a new section 8(3D) of the 1991 Act so that licences could be issued permitting the taking or killing of deer at night for these same purposes and also for the purpose of preventing serious damage to property. **We agree that effect of these proposed changes would be to reduce the weight of existing burdens.**

The taking or killing of dependent deer

32. The Department considers that it would be beneficial to amend the 1991 Act to allow the taking or killing at any time of a deer in circumstances where it is believed it has been legally deprived of its mother, or is about to be deprived of its mother.⁷ Article 3 of the proposed Order would amend section 6 of the 1991 Act to permit a person with reasonable

5 Explanatory Statement, paragraph 29

6 The respective licensing bodies being Natural England (in respect of England) and the Countryside Council for Wales (in respect of Wales). Natural England is a statutory body set up by the Natural Environment and Rural Communities Act 2006 with the general purpose “to ensure that the natural environment is conserved, enhanced and managed for the benefit of present and future generations, thereby contributing to sustainable development”.

7 Explanatory Statement, paragraph 33

belief in the dependence of a deer which has been or is about to be deprived of the female on which it depends to take or kill it, regardless of the season or time of day. **We agree that this would relax the restrictive effect of the relevant part of the 1991 Act and so would constitute the reduction of a burden.**

Prohibition of weapons and other articles

33. The existing section 4 of the 1991 Act provides that only firearms of a certain size and power can be used to take, kill or injure deer. Previous research and consultation carried out by the Department indicated that the existing restrictions were unnecessarily narrow and it would be possible for a wider range of weapons to be used to kill the smaller species of deer humanely.⁸ It is therefore proposed that article 3 of the Order should amend section 6 of the 1991 Act so that it is no longer an offence to take kill or injure Chinese water deer, muntjac deer or roe deer using a rifle with not less than .220 inch calibre and a muzzle energy of not less than 1,356 joules (1,000 foot pounds) and a soft nosed or hollow nosed bullet not less than 3.24 grammes (50 grains) in weight. **By widening the range of weapons which may lawfully be used to take, kill or injure deer, the proposed Order would reduce the existing burden.**

Discharging firearms or projecting missiles from a stationary vehicle

34. The effect of the existing section 4(4) of the 1991 Act is to make it illegal in any circumstance to discharge a firearm or project any missile from a mechanically propelled vehicle at any deer. The Department considers this has the unhelpful effect of stopping the use of stationary vehicles as shooting platforms, as a stationary vehicle provides an effective vantage for shooting, were it legal to shoot from it.⁹ It is therefore proposed to reduce the existing burden by means of new provision to be inserted by article 2 into section 4(4)(a) of the 1991 Act to apply the restriction in future only to shooting from a vehicle which is moving, or which has its engine running, and to permit shooting from vehicles which are stationary and the engines of which are inactive. **We agree that this would reduce a burden.**

New burdens and the proportionality test

35. Article 5 of the proposed Order would insert new provision into the 1991 Act having the effect of establishing for the first time a close season for (a) Chinese water deer and (b) hybrid individuals of red/sika deer parentage. Section 2 of the 1991 Act already makes it an offence to take or intentionally to kill deer of the kinds specified in Schedule 1 to the Act. However, the Schedule contains no restrictions on steps to manage the population of these kinds of deer at present, and it is proposed that provision be added to establish close seasons for them to prohibit killing of Chinese water deer (except under licence or in accordance with other exemptions which currently apply in the case of other species of deer) during their breeding season, from 15 March to 31 October and for hybrid animals for periods identical with their two progenitor species, 1 May to 31 July (for stags) and 15

8 Explanatory Statement, paragraph 34

9 Explanatory Statement, paragraph 35

March to 31 October (for hinds). **Establishment of these close seasons amounts in each case to the creation of a new burden.**

36. The Explanatory Statement was not fully clear as to why it should be necessary now to introduce these close seasons when it had not been considered necessary at the time the 1991 Act was passed. It states that, with respect to the proposed close season for Chinese water deer, it is often difficult to distinguish the bucks from the does and so the close season, which is intended principally to prevent the killing of does with dependent young, must be the same for deer of both sexes. The proposed close season for hybrids of red and sika deer is said to be needed in order to prevent the killing of red and sika deer mistaken for the hybrid animals and to prevent the killing of hybrid hinds with dependent young.¹⁰ While we did not doubt that it was quite reasonable to protect Chinese water deer and hybrid deer on the same basis as other deer, we wanted to understand why it was considered necessary to introduce a new close season now, and so we asked the Department to explain.

37. The Department stated that Chinese water deer were first introduced into England late in the Nineteenth Century and for most of the time since then the population of these animals was small.¹¹ The population is now thought to be around 1,000 and the increase in numbers is thought now to make it more likely that they will be stalked both as sport and in order to control their numbers. The Department regards it as possible that the protection of these deer with a close season would have been beyond the acceptable scope of the 1991 Act, which was a consolidation measure and therefore perhaps unsuitable for introducing protections for novel species.

38. The Department considers that the proposed new burden is proportionate to the benefit in animal welfare which arises when animals are protected during the breeding season and when they may have dependent young. The proposed close seasons for Chinese water deer and hybrids are analogous with the identical protections afforded by the existing law to other very similar animals. **We agree that the new burdens are proportionate to the benefits which would arise from their creation.**

Fair balance and desirability

39. The Department has addressed these tests at paragraphs 69–71 of the Explanatory Statement. It reasons that the proposed new burdens would affect persons who might otherwise wish to hunt the relevant kinds of deer throughout the year but that the imposition of the burdens is outweighed by the public interest, which they do not explicitly define but presumably consists in “[maintaining] welfare protection of wild deer by limiting, where possible and practicable, control during the period when female deer have dependent young”.¹² The various ways in which ten burdens of the existing 1991 Act are reduced or removed, without in their opinion prejudicing ‘environmental or economic stability’, is seen by the Department as making it desirable that the proposed Order should be made. **We agree.**

¹⁰ Explanatory Statement, paragraphs 36–40

¹¹ Appendix B, answer to question 12

¹² Explanatory Statement, paragraph 69

Necessary protection

40. The Department has addressed the effect it believes the proposed Order would have on the continuance of necessary protections at paragraphs 41 to 55 of the Explanatory Statement.

Shortening of close season (proposal 1, article 5 and Schedule 1)

41. The Department considered that delaying the commencement of the close season by two weeks will enable more effective population control it believes is necessary, and this is quite obviously by allowing more killing of deer to take place and with greater ease/fewer restrictions. The proposal is to take time from the start of the close season, as this is not expected to be a time when there will be mothers nursing young. The lower levels of vegetation are also expected to make it easier to shoot deer accurately. At the time the proposal was laid, it had been proposed to delay the commencement of the close season until 15 March. Following further discussions with interested parties, the Department now proposes to start the close seasons for female deer on 1 April. We discuss the underlying factors further at paragraphs 83-86 below under the issue of the adequacy of the response to consultation. **In the meantime, we record here that we consider that no necessary protection would be lost.**

Allowing any reasonable means of humanely despatching deer which are injured (proposal b, article 3(3))

42. It is currently prohibited to use any weapon not specified in Schedule 2 to the 1991 Act to kill a deer. Further provision at section 6 of the 1991 Act creates an exception to allow the use of smooth bore guns to kill an injured deer where it would be an act of mercy to do so. It is proposed to replace the existing section 6(3) and (4) of the 1991 Act to permit a person who finds an injured deer to use “any reasonable means” to kill it. The Department considers reform of the current provision is necessary to allow the killing of deer by persons who currently might be unequipped to do it – as they have put it, when such a person now finds an injured deer “leaving the deer would be cruel, but killing it an offence” and on this basis, the method of killing must be a secondary issue to allowing the animal to be quickly relieved from its suffering. The proposed new provision defines any reasonable means as “any method of killing a deer that can reasonably be expected to result in rapid loss of consciousness and death and which is appropriate in all the circumstances (including in particular what the deer is doing, its size, its distance from the closest position safely attainable by the person attempting to kill the deer and its position in relation to vegetative cover)”. Any particular instance of killing could be challenged where it was felt not to fall clearly within the proposed exemption, and the use of any method not explicitly permitted under the 1991 Act for the purpose of killing deer otherwise than as an act of mercy would otherwise continue to be an offence.

43. The policy intention for the proposed reform is quite clear. However, we noted that the wording used in the proposed new provision differs subtly from that used in existing section 6(3) and (4). Firstly, the existing section 6(3) created an exemption on the prohibition on taking and killing deer for those setting traps or nets for the purpose of preventing the suffering of an injured or diseased deer. The proposed replacement provision refers instead to “the use of any reasonable means for the purpose of killing any

deer ...”. This supposes that it will always be intended to kill the deer – it seems not to be envisaged that an injured deer might be captured for any purpose other than to kill it.

44. Secondly, the existing section 6(4) creates an exemption for persons using smooth bore guns for killing deer “in such a condition” that to kill them is an act of mercy. This compares with the proposed new section 6(3) which permits the use of any reasonable means to kill a deer provided “it is so seriously diseased” that to kill it would be an act of mercy. On the face of it, the proposed provision permits a greater freedom in methods of killing but actually narrows the range of circumstances in which that freedom may be exercised, as it may be thought the state of being “diseased” might not include, for example, having been poisoned or cases where an animal’s distress arises from starvation. We asked the Department to comment.

45. In response, the Department agreed that the proposed new provision might have the effect of narrowing the scope of the existing protection, which was not the intention.¹³ The Department therefore suggested that the existing section 6(3) be retained and the proposed new sections 6(3) and 6(4) be renumbered as (4) and (5); and that in renumbered section 6(4) the phrase “is so seriously diseased” originally proposed be replaced with “was in such condition”.¹⁴ **We welcome these suggested amendments to the proposed Order and formally recommend that they be made before a draft Order is laid before the House.**

Establishment of new close seasons for deer not currently so protected (Proposals j and k, article 5, Schedule 1)

46. Currently the 1991 Act makes no provision for close seasons for Chinese water deer and hybrid red/sika deer and the Department considers new provision is necessary on grounds of the welfare of those deer and of protected deer which might otherwise be killed on the supposition that they were of the unprotected kinds. **We consider that no necessary protection would be lost.**

Permitting dependent deer to be taken or killed if they have been deprived of their mother, or are about to be deprived of her at any time of the year or day (proposal c, article 3(2))

47. It is proposed to continue to protect all deer which are not the dependent young of an injured mother during close season and at night, but to allow taking or killing of deer not so protected in the interest of avoiding suffering on the basis that the alternative is permitting their abandonment and probable death from starvation. **We consider no necessary protection would be lost.**

13 Appendix B, answer to question 13

14 The Department also proposed the necessary consequential renumbering. See Appendix B, answer to question 13.

Permit the use of .22 centre fire rifles with muzzle energy of at least 1,356 joules and specified ammunition for killing Chinese water deer, muntjac deer or roe deer (Proposal a, article 3(4))

48. Since the time the relevant provisions of the 1991 Act have been in force, smaller species of deer have become well-established in England and Wales. The Department considers that evidence is available to show that a firearm smaller than that currently permitted is effective for killing these smaller species. In particular, the Explanatory Statement argues that the law in Scotland permits roe deer to be killed with the proposed smaller weaponry with no evidence of cruelty or ineffectiveness and both Chinese water deer and muntjac deer are smaller than roe deer and should therefore also be effectively killed by such means.

49. We took note of the expert opinion supplied on this question during the consultation on the proposals. The Department recorded that the Deer Commission for Scotland has no concern with the use of the suggested calibre of gun in Scotland for killing deer of the kinds at issue. However, Natural England were not prepared to provide a view on the safety of the proposal in respect of roe deer due to lack of available evidence, although they were content with the proposal in respect of the other two species. Furthermore, the RSPCA was concerned about the proposal in respect of roe deer because of a lack of evidence that animal welfare would not be compromised and “believed that it is still open to question as to whether the necessary protection for roe deer will be maintained”. We asked the Department specifically to comment on the views of Natural England and the RSPCA.

50. In response the Department referred to the long practice of shooting smaller species of deer, including roe deer as the largest of these smaller species in Scotland, with the calibre of guns which are the subject of the proposal.¹⁵ Scottish Natural Heritage and the SSPCA were said to have made no formal representations to the Deer Commission for Scotland about the practice.

51. The Department noted, correctly, that neither Natural England or the RSPCA expressed their concern in the form of an objection to this element of the proposal. Both these key bodies had been unable to say, on the basis of the evidence, that animal welfare would not be prejudiced. The majority of opinion as tested in the consultation was in favour of the proposal. However, the foundation of the Department’s reason for proceeding with the proposal despite the concern expressed by the RSPCA and Natural England was stated to be “the long standing situation in Scotland with respect to roe deer”.¹⁶

52. We consider this to be a difficult issue, although it constitutes a relatively minor part of the proposal. We note carefully that the effect of the proposal would be to align the law in England and Wales with the law in Scotland and we understand that there would be merits in this. Conversely, we must also note that evidence has not been presented to demonstrate conclusively and to the satisfaction of informed opinion that shooting of roe deer as proposed would not constitute a risk to animal welfare. The test we are required to

¹⁵ Appendix B, answer to question 15

¹⁶ Appendix B, answer to question 15

measure the proposal against is whether a necessary protection would be lost. Sources of expert opinion canvassed during the consultation were unwilling to say that necessary protection would not be lost in respect of the shooting of roe deer, although there was not the same level of concern about Chinese water deer and muntjac deer.¹⁷ In the absence of clear evidence about roe deer we do not feel able to offer the House the certainty on this issue which Natural England and the RSPCA have felt themselves unable to give in their comments on the matter.

53. We recommend that the reference to roe deer be excluded from article 3(4) of the proposed Order before it is laid in draft before the House.

Permitting the licensed taking and killing of deer at night for the purpose of i) preventing deterioration of the natural heritage ii) preserving public health and safety and iii) preventing serious damage to property (proposals f-h, article 4(3))

54. The 1991 Act presently prevents the taking and killing of deer during the night, with very limited exceptions for the purpose of preventing the suffering of injured or diseased deer. It is also presently possible for the Secretary of State to issue a notice under section 98 of the Agriculture Act 1947 which authorises killing of deer at night, where he feels there is a reason to do so. Notices are however primarily for the purpose of compelling a person to take steps to control pests within a specified period which they would otherwise be unlikely to take, rather than of enabling persons wishing to control deer on their land or land to which they have lawful access to do so by means of action at night. The Department proposes that the licensing authorities should have power to issue licences to take or kill deer at night for three specific purposes, all of which are on their own terms beneficial to the public interest. Despite that, we wished clearly to establish that no loss of protection would occur. In particular, we were concerned to note that there is no mention of any risk to the public from shooting at night at paragraph 44 of the Explanatory Statement, where the Department comments on the effect of these elements of the proposal on necessary protection. Paragraph 44 does state that the licensing authorities will examine each application carefully on its merits and consider all alternatives before issuing a licence, which will also prescribe how taking or killing may be carried out.

55. It is also the case that the response to the consultation exercise shows a considerable weight of concern about the risks to animal welfare from night shooting, which is seen as inherently less likely to result in a clean kill. While many of those who expressed concern about the likelihood of animals being hurt but not killed and thus escaping injured to die later or survive disabled, most were prepared to accept there were sometimes circumstances justifying night shooting, but these would be exceptional circumstances. Among those expressing concern, the RSPCA suggested that it would be helpful to understand the factors which the licensing authorities might consider when deciding whether or not such a licence should be issued and what conditions might be applied to a licence for such shooting. The National Gamekeepers Association was of the opinion that

¹⁷ We refer here specifically to RSPCA and Natural England. However, we further note that the British Deer Society was also concerned about the shooting of roe deer as proposed, although its objection equally covered the shooting of all the smaller species of deer with weapons of the kinds envisaged by the Department.

only “Professionals and others with real experience and knowledge” should be allowed to shoot at night and those who receive licences should receive clear guidance.

56. We asked a number of questions of the Department in relation to this element of the proposal.¹⁸ In response, the Department considered that night shooting would always be an unusual practice for which there would be a very limited number of applications each year (Natural England was stated to have estimated 30 applications per year with, the Department thought, a proportionately smaller number likely in Wales).¹⁹ It was stated that “the licensing authorities will subject applicants to rigorous assessment, and in all cases will conduct at least one site visit to assess the case before an application is approved”. It stated that licences issued “will contain conditions, such as restricting the species and number of animals that can be killed”.²⁰ When subsequently asked to explain the basis on which it could claim sure knowledge that such visits would always occur, given that the proposed Order does not require them, the Department told us this was based “on information provided by ... Natural England ... and it is a position to which the Welsh Assembly Government also subscribes”.²¹ However, in the context of this supplementary reply the Department considered that the effect of the various requirements imposed on the licensing authorities by the proposed Order prior to the issuing of any night shooting licence would mean that “it is very unlikely that the licensing authorities would issue licences to shoot deer at night without a site visit”, which is clearly less categorical than their previous assertions. The Department considered that it would be inappropriate actually to include provision in the Order requiring a site visit before a licence could be issued because it would restrict the ability of the authorities to react to situations in which deer needed to be shot at night as a matter of urgency.

57. The Department also informed us that a Code of Practice for night shooting was in preparation in association with the Deer Initiative,²² Natural England and Welsh Assembly Government and a draft of that Code was annexed to their letter of response to us. We note that the draft Code makes sensible and careful provision to guide the activity of night shooters, including specifying that notices should be displayed to warn the public that shooting is taking place where there may be a right of way and advising that “If there is any doubt about the safety or humaneness of a particular shot it must not be attempted”.²³

58. Shooting is clearly a potentially dangerous activity, and it is important for the House to know that sensible and reliable measures will be in place to mitigate the risks. Having pursued the matter at some length we are content with what has been proposed and consider that it would be appropriate to rely on the judgment and expertise of the licensing authorities. We are content that a necessary degree of protection would be

18 Appendix A, questions 16-18

19 Appendix B, answer to questions 16-18

20 When subsequently asked to explain the basis for the claim about licences specifying the numbers of deer which may be shot the Department admitted that the proposed Order did not actually require this and said that its earlier reference to numbers should be understood not as a statement that this would be a condition in all cases but merely as an attempt to illustrate *the types of conditions that might be imposed*.

21 Appendix D

22 The Deer Initiative is a charitable body established to promote “a sustainable and balanced population of wild deer”. Defra, Natural England and Countryside Commission for Wales are Partner members and most of the funding for the bodies activities is provided by the Forestry Commission and Natural England.

23 See Annex to Appendix B

maintained by these means. We also discuss the question of the effects of this element of the proposal on freedom of access to the countryside further below.

Continuation of rights and freedoms

59. The Department has described the effect it believes the proposed Order would have on the exercise of existing rights and freedoms at paragraphs 56 to 67 of the Explanatory Statement. The conclusion it has reached is that wherever these rights or freedoms are curtailed it is reasonable that they should be so.

60. Article 5 of the proposed Order introduces revisions to the existing table of close seasons in Schedule 1 of the 1991 Act and would for the first time apply close seasons for the killing of (i) Chinese water deer and (ii) hybrids of red and sika deer. These are those elements of the proposed Order designated proposals j and k by the Department and because they prevent persons from carrying out actions which they could lawfully do at present, they do remove existing rights and freedoms.

61. The Department has argued that the limitation of the existing freedom to kill deer of these kinds at any time of year is justified to protect the welfare of the animals at times when they may be nursing dependent young.²⁴ Where there may be a sufficient reason to kill such animals even during close seasons it would be possible for the licensing authorities to issue a licence permitting the applicant for the licence or someone acting for him to do so. The impact of the narrowing of the existing freedom in practice is therefore (i) the necessity to seek and be granted a licence for any killing of the relevant deer during close season and (ii) the new power of the licensing authorities to refuse a licence and so prevent killing at times when they do not believe the need outweighs considerations of animal welfare. The Department reasons that, in any circumstance where the licensing authorities do not believe there is a substantial enough reason to issue a licence then it would be unreasonable to expect to continue to exercise the present right and freedom to kill the deer. **We agree with this.**

62. The Department has reasoned that the policy objectives of the proposed Order that it has designated proposals a- i and l would have no effect on the exercise of existing rights and freedoms, and would actually permit those affected by them an enhanced range of discretionary freedom than they enjoy now. These proposals are listed below:

- a) Allow .22 centre-fire rifles to be used for shooting smaller species of deer;
- b) Allow any reasonable means of humanely despatching deer that are suffering due to injuries or disease;
- c) Allow dependent deer to be taken or killed if they have been deprived of, or are about to be deprived of, their mother, at any time of year;
- d) Enable licensed taking or killing during the close season to prevent deterioration of the natural heritage;

24 Appendix D, paragraphs 66-67

- e) Enable licensed taking or killing during the close season to preserve public health and safety;
- f) Enable licensed taking or killing at night to prevent deterioration of the natural heritage;
- g) Enable licensed taking or killing at night to preserve public health and safety;
- h) Enable licensed taking or killing at night to prevent serious damage to property;
- i) Shorten the close season for all female deer to help allow better control of population numbers where necessary, without increasing the welfare risks for dependent young;
- j) Amend the meaning of mechanically propelled vehicle in the 1991 Act to permit discharging firearms or projecting missiles from a mechanically propelled vehicle that is stationary.

63. Article 4(3) of the proposed Order would permit a licence to be issued to permit the taking or killing of deer at night for the three purposes of protecting the public health and safety, conserving natural heritage or preventing serious damage to property. We asked whether the licensed shooting of deer at night under licence as proposed might increase the risk of accidental shooting to the public. We were also concerned, where shooting of deer might be carried out at night, whether the public would avoid such areas during the hours of darkness.²⁵ In addition to the question of the safety of anyone who might, whether by chance or design, be in such an area we were also concerned that the knowledge and fear of a risk so caused might have a negative effect on the freedom of the public to access some parts of the countryside at night. For example, if a public right of way runs through a place which deer frequent and it is known that efforts have been made to kill deer in that place during night hours it could affect the usability of that right of way. We therefore asked the Department to comment.

64. In response, the Department noted that powers exist under the Countryside and Rights of Way Act 2000 to allow landowners and tenants (in the case of certain types of tenancy) to restrict public access to open access land and that these powers are used by those who currently need to arrange for deer shooting to take place, in the interest of public safety. The power to restrict access may be invoked for up to 28 days per year, although there are limits to the number of Saturdays or Sundays which can be used and the power is not available to prevent access on bank holidays or at certain other specified times. **We consider that the use of these powers is a sensible means of ensuring the public are not exposed to unnecessary risk at times of night shooting.**

65. The Department further advised us that the proposed Order would only marginally affect the ability of the public to access the countryside because its effect would be to increase the number of days available for shooting by only 7% and the number of applications expected for licences to shoot deer at night is expected to be very small.

66. We consider that the legal and practical machinery for mitigating such risks, if correctly used and enforced by the relevant authorities, is adequate to protect public

²⁵ Appendix B, answer to question 20

safety and that the proposal does not unreasonably deprive the public of rights of access to areas where the shooting of deer may take place. We further note that those using the countryside will need to have times and places of night shooting brought to their attention. This can be done in a variety of ways. We consider that it would be appropriate for the licensing authorities to require licencees to post the necessary information at facilities used by walkers (such as, for instance, visitors centres, youth hostels, local tourist offices).

Subordinate provisions

67. The Department has proposed that Article 6 of the proposed Order should designate articles 4(3) (licensing) and the tables of close seasons set out in article 5(1) as subordinate provisions and that any future Subordinate Provisions Orders should be subject to negative resolution procedure in both Houses. The power to make such a subordinate provisions Order in respect of Wales is proposed to be exercisable by the National Assembly for Wales. The purpose of these proposed designations is simple – to permit amendments to be made with relative ease to the proposed provisions establishing revised close seasons and the conditions and machinery for the issuing of licences to take and kill deer in exception to the limitations otherwise applied by the 1991 Act.

68. The Department considered that the proposed designation is appropriate because the Secretary of State and the National Assembly “have adequate expertise to review the operation of the new close seasons and the licensing conditions”.²⁶ While the Secretary of State and the Assembly might be expected potentially to be well informed about the matters addressed by these possible subordinate provisions, we were mindful that a proper degree of scrutiny would be expected of any future reforms to those provisions, controlling as they do the extent and even existence of close seasons and the power of various bodies to issue licences giving powers to persons to act in ways which would otherwise be illegal under the terms of the 1991 Act.

69. It appeared to us that there were a number of issues to consider in relation to the proposed subordinate provisions powers. Sections 2(4) and (5) of the 1991 Act currently give power to the Secretary of State and the National Assembly to amend the close seasons set out in Schedule 1 to the Act by order subject to negative resolution parliamentary procedure and prior consultation with interested organisations. The nature of the power here conferred is a power to amend Schedule 1 to the 1991 Act by the addition of new close season(s) for any species not so protected in the Act and the power to vary or delete any such additions. The Department proposes the repeal of these provisions, replacing them with a power for the Secretary of State / National Assembly for Wales to amend the revised close seasons (set out in the tables in article 5(1)) by subordinate provisions order subject to negative resolution procedure, but without any requirement for prior consultation with interested organisations. The Department also stated in paragraph 68 of the Explanatory Statement that “maintenance of [the section 2(4)] power on the statute book would be anomalous since when a schedule is substituted, a power relating to the original provision can no longer be exercised”. That statement appeared to us to be simply incorrect - just because the tables of close seasons in Schedule 1 to the Act would be replaced by the draft

26 Appendix B, answer to question 28

Order, this would *not* mean that the power in section 2(4) could no longer be exercised. Removal of the existing provisions in section 2(4) and (5) appeared to us to be a policy choice, rather than a supplemental or incidental amendment. However, because the Department characterised the removal as such an amendment, no justification for it was offered. We sought further comments from the Department.

70. In response, the Department referred to the fact that the existing power to amend under section 2(4) of the 1991 Act merely allows for the supplementation of the existing close seasons with close seasons for other species of deer, and the subsequent amendment or revocation of those additions. The proposed new subordinate provisions power would allow for these kinds of amendments to be made, and additionally allow amendment of the terms of the currently existing close seasons. The Department's view was that the degree of Parliamentary scrutiny should not depend on the species of deer in question. The Department also considered that a power to vary existing close seasons should properly be seen as a lesser power than the power to create a new close season altogether, and because the creation of new close seasons under the 1991 Act as it now stands is subject to negative resolution procedure, reasoned that the proposed extended power involving power to amend the duration of the close seasons should similarly be exercisable subject to negative resolution procedure.

71. The Department further argued that amendments to the proposed machinery for the issuing of licences to shoot deer which would be established by article 4 of the Order should be amendable by negative resolution procedure on the basis that the conditions under which licences could be granted had been "set out in detail" and "the precise details may change from time to time as new evidence or information on the populations of deer, or damage they can cause comes to light".

72. We do not find the Department's arguments persuasive. No real reasoning was offered to justify the licensing arrangements being amendable under the negative resolution procedure other than the possible need, which no one has disputed, for changes to be made in future in the light of changing circumstances. The issue is not whether there is a need for legislation to be amendable, but how amendment should be scrutinised and effected. It appears to us that the details of the licensing system contain important protections for animals and the public and that it would be expected that amendments to these arrangements would only be made after a vote in the House.

73. With respect to the justification for the procedural treatment of the enhanced power to amend close seasons, we understand that the proposed new power overlaps with that which it is proposed should now be superseded, in that the new power would enable amendments to be made to existing provisions, as well as to provisions now proposed to be made in the Order. However, the scope of the power is also greater than that which currently exists insofar as it could be used to vary (or even abolish) the extant close seasons for native species of deer – something which it would presently require primary legislation to do. The precedent of the 1991 Act therefore appears to us to suggest that power to vary the duration of the close seasons should be exercised with a higher degree of Parliamentary scrutiny than is provided under the negative resolution procedure.

74. The Department argued that it wished to remove section 2(4) and 2(5) because "they are more limited in scope than the replacement provisions". Given that variation of the

extant close seasons in Schedule 1 cannot currently be made by subordinate legislation, the Department wished, understandably, to avoid a situation in which more than one process was needed to make amendment to the tables of close seasons. The Department also considered it arguable that the wording of section 2(4) meant that once the 1991 Act Schedule is replaced under the proposed Order, it would be questionable whether the section 2(4) power could be exercised at all. This seems to us a perverse and unpersuasive reading of the text of the 1991 Act – we take “that Schedule” to refer quite clearly to the Schedule as it stands from time to time.

75. The Department accepted that the repeal of section 2(5) would mean that the Secretary of State and the National Assembly would be under no statutory obligation to consult interested parties before making subordinate provisions orders.²⁷ Instead, the Department refers to the Cabinet Office policy on consultation as part of the process of assessing proposed legislative change and stated in the light of this policy “It is anticipated that any future changes to the close seasons would require similar consultation with stakeholders”.

76. We have considered the Department’s proposals to create subordinate legislative powers as described very carefully. We consider that the power it is proposed to create is unambiguously greater, not less, than that which would be repealed. Given that the duration of the close season has proved to be a matter of intense interest and some controversy it appears to us entirely reasonable that future variations to them should be subject to statutory consultation requirement, as the present statutory regime requires. We also consider that the provisions relating to the proposed licensing arrangements ought similarly to be the subject of a consultation requirement before amendment.

77. We therefore recommend that article 6 of the proposed Order be amended (i) to require that before making a subordinate provisions order in relation to any of the provisions mentioned in article 6(1), the Secretary of State and the National Assembly for Wales must consult those organisations who appear to them to represent persons likely to be interested in or who would be affected by the order and that (ii) article 6(2) of the proposed Order should be omitted so that subordinate provisions orders will be subject to the affirmative resolution procedure (by virtue of the default provision in section 4(2) of the Regulatory Reform Act 2001).

Compatibility with membership of the European Union

78. The Explanatory Statement records that there are no European Union provisions which relate to deer management and reasons that the proposed Order must therefore be compatible with obligations arising from membership of the European Union. We asked the Department to specify the steps taken to establish that this is so. In response, the Department stated that the only EU Directives with possible relevance have already been implemented through the Wildlife and Countryside Act 1981 and the Conservation (Natural Habitats etc) Regulations 1994. The proposed provisions which the Order would create would not affect any EU obligations.

²⁷ Appendix B, answer to question 29

79. We are content that the proposed Order gives rise to no issues of compatibility with UK obligations as a member of the European Union.

Adequate consultation

80. The Department supplies comments on the consultation at paragraphs 17, 18 and 74 to 92 of the Explanatory Statement and Annex A to the statement. It is recorded that the Secretary of State carried out a consultation in relation to his intention to legislate by Regulatory Reform Order between 29 August and 24 October 2006, a period of 8 weeks. The consultation document proposed 12 amendments to the 1991 Act and these are listed at paragraph 5 of Appendix A. The document was sent to 130 “stakeholder organisations” and private individuals. The document was also made available on the Department’s website and two other central government websites and hard copies were also available to enquirers on request. 68 responses were received, of which 40 were supplied by stakeholders and 28 from private citizens. An analysis of the responses received to each of the eight individual legislative proposals form the bulk of the commentary in Appendix A.

81. The Cabinet Office Code of Practice requires that consultations should normally be carried out over a period of not less than 12 weeks. However, the Code does permit that consultations can be shorter in some conditions, including where earlier consultation has covered the same ground. In this instance, the Department states that “the majority of measures proposed in the draft Order were subject to consultation and public scrutiny before the consultation on the draft Order”.²⁸ It refers to the document “Current and Future Deer Management Options” issued in December 2003, which it is said contained various of the proposals which are now contained in the current RRO proposal. It further states that following the generally favourable reaction to the contents of this earlier document the Department worked with stakeholders to develop “The Sustainable Management of Wild Deer Populations in England: an action plan” and conducted informal consultation with relevant (unidentified) stakeholders. On the basis that various consultation exercises had already taken place covering some of the elements of the eventual RRO proposal, “Defra took the view that an 8 week consultation still met with the requirements of ... the Code of Practice ...”.²⁹ We asked the Department to indicate which elements of the proposal were not included in the early consultation, and their response indicated that, where material was not included in the early consultation, it was instead included in the Deer Management Action Plan jointly issued by the Department, the Countryside Agency, English Nature and the Forestry Commission which was jointly developed as a result of response to the 2004 consultation. On this basis, we agree that the proposals enshrined in the current proposal have been subject to wide and extensive consultation.

82. It is stated that no respondent to the consultation carried out in relation to the formal preparation of the RRO proposal made any criticism of the way in which it was carried out. It is stated that support for the individual elements of the proposed Order varied between 61% (for proposal H, on the enabling of licensed shooting at night for the protection of

²⁸ Explanatory Statement, paragraph 79

²⁹ Explanatory Statement, paragraph 83

property) and 97% (for proposal B, on allowing any reasonable means to kill injured deer). No change was made to the proposal was made as a result of the consultation exercise.

Extent of the close season

83. A significant number of those described as stakeholders responding to the consultation argued that it would be appropriate for the close seasons for the females of deer species to commence on 1 April, rather than 15 March, as proposed. While it was often acknowledged that a small risk of killing nursing mothers would thereby be introduced, it was thought this would be very rare, and justifiable in view of the need to control the increasing deer population.

84. Subsequent to the laying of the proposal a number of those consulted who expressed a view that the close season should be reduced by a full month have written to the Committee to argue that the Department has not taken proper account of their arguments. We received letters on behalf of The British Deer Society (BDS) and the Deer Initiative. The British Deer Society stated that those bodies which argued in favour of a close season starting on 1 April represented the majority of the deer management industry, although no weighting had been applied to their views in the production of statistics for the Explanatory Statement on the proposal. We make no criticism of the Department for this, as to introduce proportional weighting into digests of consultation responses will always run the risk of creating new distortions while ironing out others and can lead some to conclude that their views have been unfairly marginalised. Nevertheless, the point with the BDS makes about the consultation is wellmade and we have taken careful account of it.

85. We also note that the Deer Initiative has taken the view that scientific evidence available from Scotland, properly interpreted, suggests that there would be no undue risk to the welfare of deer if the close season for female animals began on 1 April. In their letter, the Deer Initiative stated that the RSPCA would have no objection to a close season beginning on 1 April (which the Society had previously been concerned about during the Department's own consultation on the proposal). When we contacted the RSPCA directly on this point, it confirmed this was its position.³⁰ The RSPCA also noted that an extension to the open season might have the effect of minimising the need for night shooting during the close season and in that respect the proposed greater extension might actually promote animal welfare.

86. In its own response to us on this question, the Department indicated that it would be willing to amend the proposal to provide that the close season for female deer should commence on 1 April.³¹ **In the light of the submissions made to us we recommend that the proposal be so amended.**

87. We are satisfied that the proposal has been the subject of, and taken appropriate account of, adequate consultation.

30 Appendix F

31 Appendix B, answer to question 4

Costs, savings and other benefits

88. The Department has addressed the costs savings and other benefits it expects to arise from its proposal at paragraphs 93 to 95 of the Explanatory Statement and in the Regulatory Impact Assessment reproduced as Annex B to the statement. It considers that the proposal would have a beneficial effect in respect of the increased effectiveness in the management of the deer population and in the welfare of deer species.

Economic factors

89. The Regulatory Impact Assessment (RIA) indicates that the deer population of England and Wales is unknown, although informed opinion considers that the population has been increasing, has probably doubled in the last 30 years and is likely to amount to approximately 1.25 million in Great Britain, of which 375,000 are in England.³² Projections indicate that the population of various deer species is likely to increase further in all areas in which deer live. Figure 1 in the RIA under paragraph 30 gives a population projection graph for deer in England over the next 10 years, which suggests that population may reach in excess of 500,000 within 10 years.³³ Deer have no natural predators in Britain. Given the damage which deer do to agriculture, conservation and in terms of accidents involving road traffic, this population increase is considered a problem in need of action.

90. The Department has produced an estimate of the possible costs in terms of injury and death caused by deer-related traffic accidents in England, with ranges between £41.35 million and £187.25 million per annum. It is estimated that the cost to agriculture in England caused by deer is £5.3 million at 2006 values. There are also costs to conservation interests and forestry and increasingly to gardens where woodlands abut residential areas. These costs have not been quantified for the whole of England.

91. The proposed Order would in various ways relax the law controlling the culling of deer and make it possible for a larger number of deer to be culled annually. Based on various assumptions, the Department has estimated that up an additional 28,000 deer might be culled annually as a result of the proposed Order, in addition to an estimated yearly cull at present of 242,361.³⁴ Although the relaxing of culling arrangements for economic reasons is the primary cause of the proposal, no estimate is given of the economic benefit anticipated from this increased cull.

92. Costs associated with the establishment of a licensing system by Natural England are estimated at £1,233 with annual running costs thereafter of between £27,000 and £67,000 depending on the number of licences issued. It is thought the proportionate costs will be lower in Wales, where the deer population is less dense.³⁵ The Department considers that the power to charge for the issuing of licences is unlikely to be used. Based on an assumption of 60 applications each year, aggregate costs to applicants are estimated at £5,000.

32 Explanatory Statement, Annex B, paragraph 28

33 Explanatory Statement, Annex B, figure 1

34 Figure from table at Explanatory Statement, Annex B, paragraph 33

35 Explanatory Statement, Annex B, paragraph 42

Animal welfare issues

93. The Department considers that animal welfare will benefit from the proposal in a number of ways. It is stated that because the 1991 Act is unduly restrictive in respect of the methods that may be used to kill an injured deer, a person finding such an animal and not equipped or otherwise able to kill it within the law may have to leave it until someone in a position to kill it can be found, leading to further suffering. Similarly, the Department believes it will be more humane and on that basis beneficial overall, to allow the killing of dependent animals deprived of their mothers without the existing restrictions. The establishment of new close seasons for Chinese water deer and hybrids of sika and red deer would protect these animals from being killed during their breeding seasons and there would also be an effect on the protection of red deer now killed when mistaken for hybrid animals. The Department does not believe that the extension of close seasons to hybrids will have any negative impact on the numbers of the native red deer species.

94. It does not appear that there is any intention of organising a cull programme to limit or reduce numbers of deer but it is expected that economic benefits will rise, or costs be avoided, because of the increased freedom of individuals to act in their own interests with respect to the killing of deer.

95. We consider that the proposals have been the subject of, and taken appropriate account of, estimates of increases or reductions in costs or other benefits which may result from their implementation.

Other matters

Implementation, enforcement, monitoring and review

96. The Department indicates in the Explanatory Statement that it will work with the National Assembly for Wales and with various stakeholders, including the Deer Initiative, to publicise changes to the law that the proposed Order would give effect. It is also recorded that there will by September 2007 be an “overarching policy for the issue of licences to control deer outside the close season and after daylight hours” although it is not made clear who will agree this policy and what matters it will cover. It is further stated that the Deer Initiative will produce guidance to cover some of the matters addressed by the proposed Order, but the statement does not say when these will become available and what areas they will cover. There are no plans to review the legislation subsequent to its implementation on a formal basis, although the Department and the National Assembly would be able to monitor how the changes affect issues concerning deer conservation and deer management through contact with such bodies as the Deer Initiative, Natural England, the Countryside Council for Wales and other interested parties. As currently, the police would have responsibility for enforcing the 1991 Act as it would be amended by the proposed RRO. The Department states that it has the intention of seeking regular advice from the Police and the Deer Initiative about the effectiveness of the proposals if implemented.

97. It was therefore not clear to us by what process it would be decided to amend the close seasons or matters relating to the issue of licences for exceptional shooting of deer, and we were mindful that a number of consultation respondents have suggested that only after

review and real consultation should such matters be further amended. We asked the Department to explain (i) what guidance would be made available to licence holders, (ii) how the Department intended to take forward the process of informally reviewing the revised legislation and (iii) who would develop the future policy on the issuing of licences.

98. The Department stated that guidance relating to the taking and killing of deer would be provided by The Deer Initiative, who were said to be preparing around 80 best practice guides.³⁶ The particular titles which would be specifically relevant to the holders of the licences were said to be: Night Shooting; Use of High Seats for Controlling Deer; Shot Placement; Reaction and Follow Up of Shot Deer; Dealing with Injured Deer and Use of Dogs. It was stated that these guides would become available on the Deer Initiative Website subsequent to the Order coming into force. It has therefore been made clear to us that guidance on a wide range of subjects is in preparation, although as the Department stated that the guidance was not yet available we have been unable to form a view as to the actual usefulness of the guidance. It is however being prepared under the auspices of a body which has access to the most expert opinion.

99. Regarding the formation of policy on the future issuing of licences to shoot deer, the Department stated that this would be developed by the two licensing bodies in association with the Deer Initiative. Natural England was also said to be drafting its own best practice guidelines, again with assistance from the Deer Initiative.

100. The Department informed us that both it and the National Assembly intended to take the advice of the Deer Initiative on the effect of the proposed Order if enacted. Natural England will monitor the licences it issues. In their response the Department noted that additional funding has been provided jointly by the Department and by Forest Research “to establish improvements to deer data management” and we assume that this funding has been given to the Deer Initiative.

101. We welcome the Department’s additional comments about mechanisms being put in place to monitor the effectiveness of the proposed Order, if it is enacted. We note and draw the attention of the House to the key role in guiding public policy on deer management in England and Wales in the future that appears to belong to the Deer Initiative.

Conclusion

102. We recommend that the proposal should be amended in the manner described in paragraphs 26, 28, 45, 53, 77 and 86 before a draft Order is laid before the House.

Formal minutes

Tuesday 20 March 2007

Members present:

Andrew Miller, in the Chair

Gordon Banks

Dr Doug Naysmith

Alison Seabeck

Mr Andrew Slaughter

Ms Angela C Smith

The Committee deliberated.

Draft Report [Proposal for the Regulatory Reform (Deer) (England and Wales) Order 2007], proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 102 read and agreed to.

Resolved, That the Report be the Fourth Report of the Committee to the House.

Ordered, That the Chairman do make the Report to the House.

Several papers were ordered to be appended to the Report.

Ordered, That the Appendices to the Report be reported to the House.

[Adjourned till a day and time to be fixed by the Chairman.]

List of written evidence

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Appendix A

Extract from letter from the Committee Specialist to Department for Environment, Food and Rural Affairs: Proposal for the Regulatory Reform (Deer) (England and Wales) Order 2007: request for information

Thank you for the presentations which you made yesterday with your colleagues on the subject of Defra's two current RRO proposals.

The Committee considered both proposals and decided to seek further information on them from you. The issues which concern the Committee are set out below, under the indicated category for consideration in the Regulatory Reform Act and the Committee's Standing Order.

Proposal for the Regulatory Reform (Deer)(England and Wales) Order 2007

Whether the proposal requires elucidation, is not written in plain English or appears to be defectively drafted; (S.O. 141 (6)(h))

8. The Committee notes that section 3 of the Deer Act 1991 makes it an offence to take or intentionally kill deer at night, subject to further qualifying provisions under sections 6 and 8 of that Act. It is proposed that article 4 of the Order should insert new provision into section 8 amending arrangements for the granting of licences to take and kill deer at night. It is unclear why the proposed new section 8(3F)(d) should provide that before granting a licence the relevant authority must be satisfied that "to achieve the purpose in question there is no satisfactory alternative to taking and killing the deer of the species and description to which the application relates during the close season prescribed by Schedule 1 to this Act".

Q10. Please explain why the indicated term has been included in article 4 given that the provision being amended relates to the taking and killing of deer during the night at any time of year.

9. The Committee notes that the Explanatory Note to the Order contains a minimal description of the effect of the proposed provisions and does not mention at all that the effect of proposed article 5 would be to establish new burdens in the form of close seasons for Chinese water deer and hybrid red/sika deer. In this context, the Committee further notes that *Statutory Instrument Practice* states that: "the explanatory note should give a concise and clear statement of the substance and purport of the instrument. It should be informative, and should say what the instrument does".

Q11. Please indicate whether the Department considers it would be helpful to expand the form of the explanatory note as drafted so as to give a fuller account of the substance and purport of the proposed Order.

Whether the proposal satisfies the conditions of proportionality between burdens and benefits set out in sections 1 and 3 of the Regulatory Reform Act 2001; (S.O. 141 (6)(k))

10. The Committee notes that no close season was established for Chinese water deer in the Deer Act 1991 and that it is proposed to create such a close season for the first time in the proposed provision at article 5 of the Order.

Q12. Please explain why the Department wishes to establish a close season for Chinese water deer at this time when no such restriction was imposed at the time of the Deer Act 1991 and how the burden of the new close season satisfies the proportionality test.

Whether the proposal continues any necessary protection; (S.O. 141 (6)(c))

11. The Committee notes that the existing section 6(3) of the Deer Act 1991 created an exemption from the effect of provisions elsewhere in that Act which would otherwise render it illegal to set traps or use nets for the purpose of preventing the suffering of an injured or diseased deer. The proposed replacement provision at article 3(3) refers instead to “the use of any reasonable means for the purpose of killing any deer”. This appears to suppose that it will always be intended to kill the deer and that it is not intended to continue the existing exemption in respect of the capture of deer for any purpose other than to kill them.

12. Section 6(4) of the Deer Act 1991 provides a related exemption for persons using smooth bore guns for killing deer “in such a condition” that to kill them is an act of mercy. The proposed new section 6(3) would permit the use of any reasonable method to kill a deer provided “it is so seriously diseased” that to kill it would be an act of mercy. This appears to permit a greater freedom in respect of methods of killing but to narrow the range of circumstances in which that freedom may be exercised. It is not clear, for example, that the state of being “diseased” would apply where deer had been poisoned or whose distress arose from starvation.

Q13. Please indicate whether the Department considers the scope of the proposed new section 6 (3) and (4) is narrower than the extant section 6(3) and (4) which would be replaced, if so why it is proposed that the exemption should apply in a reduced range of circumstances and how necessary protection would be maintained for injured deer and those who might find them.

13. The Committee notes that article 2 of the proposed Order would amend section 4 of the Deer Act 1991 to permit the shooting of deer from a stationary mechanically propelled vehicle which does not have its engine running. In the course of the consultations on this point the National Gamekeepers Association argued that it would be better not to require that engines must be switched off as this may itself alarm otherwise quiet deer. Additionally, a number of consultees argued that the use of stationary vehicles as shooting platforms might cause deer in future to fear motorized vehicles more, thus making them more difficult to manage.

Q14. Please comment on these concerns and explain why the Department did not consider they were sufficient cause to amend the proposals in the way in which respondents recommended.

14. Article 3(4) of the proposed Order would amend section 6 of the Deer Act 1991 to permit the shooting of Chinese water deer, muntjac deer and roe deer with .22 centre fire rifles. The Committee notes that Natural England were not prepared to give their assent to this element of the proposal in respect of the shooting of roe deer due to a lack of available evidence to show that animal welfare would not be prejudiced, and that the RSPCA were unpersuaded the same aspect of the proposal would continue necessary protection on similar grounds.

Q15. Please indicate what evidence the Department has in addition to that received during consultations on the proposed Order to show that there is not an appreciable risk of non-fatal injury and unnecessary suffering to roe deer from the use of the guns and ammunition of the kinds here proposed and why the Department has not excluded the shooting of roe deer from this element of the proposed Order in the light of the concerns of Natural England and the RSPCA.

15. Article 4(3) of the proposed order would insert new provision into the Deer Act 1991 to permit the shooting of deer at night under licence for the three purposes of i) preventing deterioration of the natural heritage ii) preserving public health and safety and iii) preventing serious damage to property.

16. Paragraph 44 of the Explanatory Statement addressing the continuance of necessary protection under this element of the proposal does not discuss whether there could be any increased risk to the public from shooting of deer at night. It is stated in that paragraph that the licensing authorities will examine each application for night shooting carefully on its merits and consider all alternatives before issuing a licence, which may also prescribe how killing may be carried out.

17. The Committee notes that the consultation indicates a considerable weight of concern about the risks of night shooting to animal welfare on the basis that it is inherently less likely to result in a clean kill.

Q16. Please indicate in what circumstances the Department considers the licensing authorities would be prepared to issue a licence for the shooting of deer at night and the basis for that belief.

Q17. Please indicate whether the Department considers that risk to the public of accidental shooting will be increased by this element of the proposal and if not, why not.

Q18. Please indicate what requirements the Department considers could be inserted into licences to mitigate risks to the public and to deer (for example such as that shooting can only be carried out by someone with a formally recognised degree of competence and that sniffer dogs might be required to be on hand to locate injured animals when the shooting sessions ends).

Q19. Please explain why the proposed Order does not itself contain provision to require that licences must specify minimum standards or conditions to ensure protection of the public and animal welfare during night shooting.

Whether the proposal prevents any person from continuing to exercise any right or freedom which he might reasonably expect to continue to exercise; (S.O. 141 (6)(j))

18. The Committee is mindful of the possible impact of the shooting of deer at night under licence as provided for by article 4(3) of the proposed Order on the continuation of rights of access to areas where deer may be shot. In addition to issues of public safety, the consultation responses suggest concern about the effect of this element of the proposal on practical rights of access to the countryside and specifically public rights of way in areas where it is understood deer may be shot at night.

Q20. Please indicate whether the Department considers that the relevant provisions of the proposed Order will have any effect in practice on freedom of access to the countryside at night and if not why not.

Whether the proposal appears to be incompatible with any obligation resulting from membership of the European Union; (S.O. 141 (6)(j))

19. The Committee notes that the Department considers that the proposed Order is compatible with obligations arising from membership of the European Union because there are no EU provisions which relate to deer management.

Q21. Please explain the steps the Department has taken to satisfy itself that there are no such obligations arising either from provisions with direct or indirect relevance to activities which would be affected by the proposed Order.

Whether the proposal has been the subject of, and takes appropriate account of, adequate consultation; (S.O. 141 (6)(d))

20. The Committee notes that the Department held consultations on the proposed Order in accordance with section 5 of the Regulatory Reform Act for 8 weeks rather than the usual 12 weeks as specified in the Cabinet Office Code of Practice on Consultations for the reason that many of the proposed provisions had already been the subject of other consultation processes prior to development and statutory exposure of the RRO proposal.

Q22. In the light of the comment in paragraph 79 of the Explanatory Statement that “the majority of measures proposed in the draft Order were subject to consultation...before the consultation on the draft Order” please indicate which provisions of the draft Order were not included in the earlier consultations here referred to and why it was felt that, in the light of the incompleteness of the earlier consultation in respect of the RRO proposal it was felt appropriate to reduce the standard consultation period by 4 weeks.

21. The Committee notes that the Explanatory Statement records that no criticisms were made of the manner of the consultation on the proposals. However, the responses from the National Game Dealers Association and Hampshire Game both state that they did not receive copies of the consultation document.

Q23. Please indicate whether the National Game Dealers Association and Hampshire Game were sent copies of the consultation document and explain on what basis the Department compiled the targeted consultation list for this proposal.

22. The Committee notes that a significant number of those consulted believed that it would be appropriate for the future RRO on deer management to provide that the close season for female deer of all species should not begin until 1 April. The actual proposed Order makes provision for the close season to begin on 15 March.

Q24. Please explain what consideration was given to the views of those who argued that the close season for does/hinds should commence on 1 April in the interests of better managing deer numbers and the reasons why the Department has not accepted these arguments.

Other matters arising from the Committee's consideration of the proposals (S.O. 141(5))

23. The Department has indicated that it will work with the National Assembly for Wales and with various stakeholders, including the Deer Initiative, to publicise changes to the law to which the proposed Order would give effect. The Explanatory Statement records that there will by September 2007 be an “overarching policy for the issue of licences to control deer outside the close season and after daylight hours” although it is not specified who will agree this policy and what matters it will cover. It is further stated that the Deer Initiative will produce guidance to cover some of the matters addressed by the proposed Order, but the statement does not say when this guidance will become available and what matters will be addressed by the guidance.

24. The Committee notes that there are no plans to review the legislation subsequent to its implementation on a formal basis, although the Department considers that, together with the National Assembly for Wales, it would be able to monitor how the changes affect issues concerning deer conservation and deer management through contact with such bodies as the Deer Initiative, Natural England, the Countryside Council for Wales and other interested parties.

25. As currently, the police would have responsibility for enforcing the 1991 Act as it would be amended by the proposed RRO. The Department states that it has the intention of seeking regular advice from the Police and the Deer Initiative about the effectiveness of the proposals if implemented.

Q25. Please indicate who will be responsible for developing and agreeing the future policy on licences to shoot deer and explain in as much detail as possible the form and substance it is intended that this policy will take.

Q26. Please explain what guidance will be made available to licence holders in respect of the taking and killing of deer and who will be responsible for providing such guidance.

Q27. Please explain how the Department intends to take forward the suggested process of informal monitoring of the effects of the proposed Order, if implemented.

Whether the proposal includes provisions to be designated in the draft order as subordinate provisions; (S.O. 141 (6)(n))

26. The Committee notes that it is proposed that article 6 should designate articles 4(3) (licensing) and the tables of close seasons in article 5(1) as subordinate provisions which could be amended by the Secretary of State (in respect of England) and National Assembly for Wales (in respect of Wales) by means of an order subject to annulment in pursuance of a resolution of either House of Parliament.

27. Under existing section 2(4) of the Deer Act 1991 provides that the Secretary of State (in respect of England) or the National Assembly (in respect of Wales) may amend Schedule 1 to that Act (containing the

close seasons) “by the addition of any species not mentioned in that Schedule and of a close season for any description of deer of that species, or by varying or deleting any such addition.” It appears to the Committee that the existing provision provides a narrower power to amend than that which would be created by article 6 of the proposed Order, which is an unrestricted power of amendment.

28. Section 2(5) of the same Act requires that before making any such amendment by order the Secretary of State and the Assembly shall consult any organisations that appear to them to represent persons likely to be interested in or affected by the order. The Committee notes that article 5 does not make any provision requiring consultation before the exercise of the proposed subordinate legislative power.

29. The Department states in paragraph 68 of the Explanatory Document that “maintenance of the [section 2(4)] power on the statute book would be anomalous since when a schedule is substituted, a power relating to the original provision can no longer be exercised”. It is not clear to the Committee why this is so - just because the tables of close seasons in Schedule 1 to the Act would be substituted by the draft Order, this does not mean that the power in section 2(4) can no longer be exercised. Removal of the existing provisions in section 2(4) and (5) seems to be a policy choice, rather than a supplemental or incidental amendment.

Q28. Please explain why, in the light of the increased scope of the power to amend the terms of the close seasons and the nature of the proposed licensing system when compared with current subordinate legislative power established in section 2(4) of the Deer Act 1991, the Department considers it would be appropriate for the proposed subordinate legislative powers which would be created by article 5 to be exercisable subject to the negative resolution procedure.

Q29. Please explain why the Department proposes that the close seasons need be amendable by means of a subordinate provisions order at all given that the existing procedure for altering them under the 1991 Act, including the benefit of a consultation requirement, continues in being in the absence of provision being made to the contrary in the proposed RRO.

I would be grateful to receive your response to these questions, together with any additional information which the Department believes would be helpful to the Committee not later than 9 February 2007.

1 February 2007

Appendix B

Extract from letter from Department for Environment, Food and Rural Affairs to the Committee Specialist and extract from annexed paper: Proposal for the Regulatory Reform (Deer) (England and Wales) Order 2007: response to request for information

Thank you for your letter of 1 February that raised a number of questions on the two RRO proposals on game and deer following the presentation to the regulatory Reform Committee on 31 January.

The attached paper, plus 3 annexes, provides the Department’s response to [all] the questions raised by the Committee. Unfortunately we are unable to provide complete responses to questions 28 and 29 pending further legal consideration. I will forward the department’s response to the se questions by 16 February. I hope this does not inconvenience your work too much.

I hope the Committee finds these responses useful and informative. If, however, anything in the response is unclear, or any issue requires further clarification, please do not hesitate to contact me.

9 February 2007

Reply to Questions Raised by the Regulatory Reform Committee

Q10. Please explain why the indicated term has been included in article 4 given that the provision being amended relates to the taking and killing of deer during the night at any time of year.

The term “to achieve the purpose in question there is no satisfactory alternative to taking and killing the deer of the species and description to which the application relates during the close season prescribed by Schedule 1 to this Act” was included to ensure that licences to kill deer at night were only issued if the alternative of killing deer outside the close season was not a satisfactory alternative. However, the killing of deer at night is prohibited at all times, not just during the close season. The Department accepts that the safeguard outlined in Article 4 of the Order, creating a new section 8(3F)(d) which relates to section 3, should have referred to the taking and killing at night rather than the closed season. For that reason the Department has redrafted that provision as set out below. This wording will ensure that that the licensing authority must be satisfied that there are no alternatives to shooting at night, including licensed daytime shooting during the close season under licence.

Proposed new section 8(3F)(d)

(d) to achieve the purpose in question there is no satisfactory alternative to taking and killing the deer of the species and description to which the application relates between the expiry of the first hour after sunset and the beginning of the last hour before sunrise;

Q11. Please indicate whether the Department considers it would be helpful to expand the form of the explanatory note as drafted so as to give a fuller account of the substance and purport of the proposed Order.

Earlier drafts of the Order did have fuller explanatory notes which were amended in the interests of being more concise. The Department agrees that the current explanatory note could be expanded to reinstate the previous explicit reference to the effect of the Order in respect of new close seasons for Chinese water deer and hybrid deer.

Q12. Please explain why the Department wishes to establish a close season for Chinese water deer at this time when no such restriction was imposed at the time of the Deer Act 1991 and how the burden of the new close season satisfies the proportionality test.

Chinese water deer were only introduced in England in the late 1800’s, wild populations only began to become established through escapes and deliberate releases in the 1920/30’s. In the mid 1990’s, the wild population was estimated at around 650 animals. When the Deer Act 1963 came in to force and at the time of the 1980 and 1987 amendments the wild population of Chinese water deer was so small very few were hunted, therefore it was not deemed necessary to include them in the legislation.

The population has subsequently increased to around 1,000. This increases the chance that the species will be stalked for sport and/or population management reasons.

The Deer Act 1991 was a consolidation of the previous deer legislation rather than being reform legislation. As such the scope for any amendments to the existing law would have been very limited and giving added protection to a particular type of non –native deer (even if it was thought necessary) may have been beyond its scope.

Any control of wild deer should be carried out with due regard to the welfare of the species concerned by limiting where possible and practical, control during the period where female deer have dependent young. As with other UK species of deer (with the exception of Muntjac) Chinese water deer have an identifiable breeding and rearing season. Killing of female deer during this period would result in welfare concerns for dependent offspring.

The Department confirms that the imposition of the new burden would satisfy the condition of proportionality required by section 1(1)(c)(ii) of the Regulatory Reform Act. Although the introduction of a

close season is will limit the opportunities to shot and manage this species, the Department considers this reduction is proportionate when balanced against the improved welfare of Chinese water deer bringing it in line with other seasonally breeding deer species. Where this species requires control during the close season, deer managers will be able to apply for licences under the provisions set out in the draft Order.

Q13. Please indicate whether the Department considers the scope of the proposed new section 6 (3) and (4) is narrower than the extant section 6(3) and (4) which would be replaced, if so why it is proposed that the exemption should apply in a reduced range of circumstances and how necessary protection would be maintained for injured deer and those who might find them.

On consideration of the points raised by the Committee the Department agrees with the Committee that the current amendment could have narrowed the scope of the existing subsections 3&4 in the way identified. This was not the intended purpose of the draft Order. The Department is grateful for the Committee having raised the matter and having reflected on the points made by the committee it is suggested that one way to resolve that could be to retain the current section 6(3) in the 1991 Act and in the following section renumber and replace the reference to 'it is so seriously diseased' with 'in such condition'. The effect will be that the current subsection (4) is replaced with.

4) A person shall not be guilty of an offence under section 4(1) or (2) above by reason of the use of any reasonable means for the purpose of killing any deer if he reasonably believes that the deer has been so seriously injured, otherwise than by his unlawful act, or was in such condition, that to kill it is an act of mercy.

(5) In subsection (3) above, "any reasonable means" means any method of killing a deer that can reasonably be expected to result in rapid loss of consciousness and death and which is appropriate in all the circumstances (including in particular what the deer is doing, its size, its distance from the closest position safely attainable by the person attempting to kill the deer and its position in relation to vegetative cover).

Subsection (5) will be renumbered accordingly.

Q14. Please comment on these concerns and explain why the Department did not consider they were sufficient cause to amend the proposals in the way in which respondents recommended.

Most of the stakeholder organisations (79%) and members of the public (71%) who responded to this question agreed with the proposal to allow the discharging of firearms from a mechanically propelled vehicle that is stationary with its engine switched off.

Only 2 respondents (the National Gamekeepers Association and the Country Land and Business Association) to the consultation raised the issue of leaving the vehicles engine running whilst shooting deer. This suggestion was disregarded on the following grounds:-

A) This could provide cover for those who are using the vehicle to drive deer (which will remain illegal), who could claim that they were using the vehicle as a shooting platform. This would create difficulties in enforcement.

B) The vibrations from a running engine could provide a less stable platform than if the engine is switched off. This could have implications for the accuracy of the shot and therefore public safety and deer welfare.

With regard to the concerns about deer becoming nervous around vehicles, the Department considers that the decision whether to use vehicles as a platform for shooting deer should be left to individual deer managers. They will then be able to decide on a case by case basis whether they use this management option or not. For example, the Royal Parks felt that this proposal would be of significant help in managing deer on their estates saving both time and money (around £8,000 per year).

Q15. Please indicate what evidence the Department has in addition to that received during consultations on the proposed Order to show that there is not an appreciable risk of non-fatal injury and unnecessary suffering to roe deer from the use of the guns and ammunition of the kinds here proposed and why the

Department has not excluded the shooting of roe deer from this element of the proposed Order in the light of the concerns of Natural England and the RSPCA.

The majority of stakeholder organisations (70%) and members of the public (78%) agreed with the proposal to permit .22 centre fire rifles for smaller species of deer including roe. Neither Natural England nor the RSPCA objected to the proposal. They did however; raise concerns about the lack of evidence available showing that lower calibre rifles were humane for roe deer.

Little research has been carried out on the effect of using .22 centre fire rifles for the killing of roe deer. The Department based its proposal on allowing the use of .22 inch centre fire rifles on the current legislation that exists in Scotland. .22 inch centre-fires are currently used to kill roe deer in Scotland, and this has been the case for over 40 years. The Deer Commission for Scotland (DCS) has informed the Department that no concern with their current use in Scotland in terms of deer welfare has been raised in an official capacity by any organisation and the DCS is not aware of any research that indicates to the contrary. The Scottish equivalent organisations to Natural England and the RSPCA, Scottish Natural Heritage and the SSPCA have made no formal representations to the DCS on this issue.

On the basis of the long standing situation in Scotland with respect to roe deer, the Department decided to proceed with the proposals to allow the use of .22CF rifles for that species in England and Wales.

Q16. Please indicate in what circumstances the Department considers the licensing authorities would be prepared to issue a licence for the shooting of deer at night and the basis for that belief.

Please see answer below

Q17. Please indicate whether the Department considers that risk to the public of accidental shooting will be increased by this element of the proposal and if not, why not.

Please see answer below

Q18. Please indicate what requirements the Department considers could be inserted into licences to mitigate risks to the public and to deer (for example such as that shooting can only be carried out by someone with a formally recognised degree of competence and that sniffer dogs might be required to be on hand to locate injured animals when the shooting sessions ends).

The Department considers that the questions 16-18, dealing with the proposed licensing regime are best considered together.

Licences to shoot at night will only be granted in exceptional circumstances. Natural England estimated that there will only be around 30 applications a year, the number in Wales will be considerably smaller taking account of the smaller population and range of deer in Wales. The licensing authorities will subject applicants to rigorous assessment, and in all cases will conduct at least one site visit to assess the case, before an application is approved. Some applicants could be subjected to up to four visits in order to assess damage and make night counts of deer before the issue of a licence. As a result it is estimated that only a small number of applications will be approved each year. Where appropriate, applicants will be encouraged to resolve problems through co-operative deer management rather than shooting at night, e.g. through formation of a Local Deer Management Group, and will be offered advice on setting up such a group.

The Committee may wish to note that the licensing authorities already have procedures in place to assess the suitability of night shooting for deer when assessing whether to introduce an Order to control deer under the Agriculture Act 1947. These procedures take account of issues such as deer welfare, public safety and access.

As is stated in paragraph 44 of the explanatory document, licences to shoot at night will be assessed on a case-by-case basis, it is therefore difficult to prescribe in what circumstances a licence will be granted. However, the tests set out in the explanatory document will have to be satisfied before a licence is granted.

- The licensing authority will balance the need to alleviate the risk posed by deer with the need to ensure the conservation of native deer is not adversely affected.
- Other satisfactory alternatives to licensed night shooting must have been shown to be impractical or ineffective. Alternatives could include open season shooting, non-lethal deterrents (fencing, tree guards, diversionary feeding and repellents) and licensed shooting during the close season during the day.
- Any licence will specify its period of validity and the means for taking or killing.
- It will contain conditions, such as restricting the species and number of animals that can be killed.
- As with current licences under section 8 of the 1991 Act, breach of these conditions would be an offence.

The Department is working with the Deer Initiative, Natural England and the Welsh Assembly Government to update a code of practice for night shooting. This document will draw on current practices for night shooting Orders under the Agriculture Act 1947, best practice guidance produced by the Deer Commission for Scotland and the expertise of stakeholders. The current draft of this guidance is attached at Annex 3. Applicants will have to comply with best practice guidelines (attached) as part of the licence requirements. If appropriate to the circumstances, the licensing authority could insist on a suitable level of qualification for those controlling the deer (such as an appropriate deer management qualification) and conditions could be included to ensure the use of sniffer dogs if necessary.

In addition to the safeguards identified above, employers and the self-employed whose undertakings involve the use of guns have a legal duty under health and safety at work legislation to take all reasonably practicable steps so that no-one is put at risk as a result.

The Department considers that these procedures will provide the necessary level of safeguard in terms of public health and safety and deer welfare.

Q19. Please explain why the proposed Order does not itself contain provision to require that licences must specify minimum standards or conditions to ensure protection of the public and animal welfare during night shooting.

The Act as amended by the Order makes general provision for animal welfare, amongst other things, by specifying minimum permitted rifle calibres and prohibiting certain methods of killing or taking. Police firearms licensing requirements will normally address some aspects of suitability of certificate holders/applicants as competent and responsible persons to hold a firearm. Some forces will now look for applicants to hold a deer management qualification before granted a firearms licence for the killing of deer. Additional levels of safeguards are considered best tailored to the specific conditions of the case, to take account of the deer species involved, local public access, farming practice and other land use.

Q20. Please indicate whether the Department considers that the relevant provisions of the proposed Order will have any effect in practice on freedom of access to the countryside at night and if not why not.

The Department does not consider that the provisions proposed in the draft Order will have anything more than a minimal effect on issues concerning access to open countryside or rights of way. The proposed increase in the open season adds an additional 14 days to the period when deer can be shot. This is an increase of approximately 7% of days available for shooting. Natural England advise that they do not expect more than 60 applications per year for the new licensing provisions and it is likely that not all such cases will result in a licence being issued.

The Countryside and Rights of Way Act 2000 allows landowners and tenants (where land is subject to certain types of tenancy) to exclude or restrict access to access land at their discretion for any purpose for up to 28 days each calendar year. Only 4 of those 28 days can be a Saturday or a Sunday and days cannot be used on certain summer weekends or on bank holidays. These provisions are currently used by those involved in shooting to restrict access at time when shoots are undertaken. It is not anticipated that the provisions in the Order will increase the amount of landowners or tenants using this provision, but may lead to an alteration of the times when these restrictions on access are used.

In addition to this, anyone with a legal interest in access land can apply to the relevant authority for a direction to exclude or restrict access for the purposes of land management, public safety or avoiding the risk of fire. Where deer need to be controlled in areas of open access, such directions can be issued. In considering an application relating to public safety, the authority must focus on whether restriction of the rights to the extent proposed by the applicant is actually necessary in order to avoid danger to the public from the things that will be happening on the land. This is the sole question for the relevant authority to answer in such a case. Procedures for assessing such applications are available from <http://www.openaccess.gov.uk/wps/portal/ra/guidance>

Q21. Please explain the steps the Department has taken to satisfy itself that there are no such obligations arising either from provisions with direct or indirect relevance to activities which would be affected by the proposed Order.

The Department considers the proposed order compatible with EU obligations because:

The only relevant EU provisions are Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora and Council Directive of 2nd April 1979 on the Conservation of Wild Birds (79/409/EEC) which are implemented through the Wildlife and Countryside Act 1981 and the Conservation (Natural Habitats etc) Regulations 1994.

- The offences under this legislation for protected species and habitats are not being affected by the Deer RRO so they will continue to apply to any activities under the Deer Act.
- In respect of native species of deer the RRO contains the requirement that licences under either s8 (3A) & (3D) should not compromise the population in its natural range on a long term basis ((3C(e) & (3F(f)).
- In respect of natural heritage part of the rationale of the licensing provisions is to help conserve natural heritage from deer induced deterioration (see 3C(b) & 3F(b)).

Q22. In the light of the comment in paragraph 79 of the Explanatory Statement that “the majority of measures proposed in the draft Order were subject to consultation...before the consultation on the draft Order” please indicate which provisions of the draft Order were not included in the earlier consultations here referred to and why it was felt that, in the light of the incompleteness of the earlier consultation in respect of the RRO proposal it was felt appropriate to reduce the standard consultation period by 4 weeks.

The 2004 consultation covered all the proposals in the current draft Order except:-

- a) The proposal in Article 3(2) of the draft Order concerning the control of dependent deer.
- b) The proposal in Article 3(3) of the draft Order to allow any reasonable means to kill as an act of mercy. The 2004 consultation did however propose widening the range of weapons available for mercy killing.
- c) The proposal to delay the start of the close season until 15 March. The 2004 consultation did, however, propose shortening the close season at the end of that season.
- d) The provisions to allow the issue of licences to kill or take deer for prevention of deterioration to the natural heritage. The 2004 consultation only covered licences to kill and take deer for reason of public health and safety and damage to property.
- e) The proposal in Article 2 of the draft Order on shooting from stationary vehicles.

Following the responses to the consultation in 2004 Defra, in conjunction with the Countryside Agency, English Nature and the Forestry Commission and after further discussion with stakeholders, published an action plan for the sustainable management of wild deer populations. The action plan outlined a series of commitment to alterations to deer legislation.

These commitments were developed to take into account the 2004 consultation, with some alterations to the proposals according to consultation responses. These included:

- a) Alter the Deer Act 1991 with regards to actions to prevent suffering, inline with the Scottish legislation; such that a person shall not be guilty of an offence in respect of any act done for the purpose of preventing

suffering. In Scottish legislation this includes the taking of dependent deer that are deprived of their mother and the use of any reasonable method to kill deer as an act of mercy.

b) Move the start of the close season to 15th March. In the 2004 consultation it was proposed that the shortening of the close season should occur by bringing the start of the open season forward to 20th October. This was changed as the majority view from the consultation was that it was better to risk killing pregnant females in March than orphaning young in October.

c) Extend the proposed licensing provision, so that licences can be issued to kill and take deer to conserve the natural environment.

d) Consider opportunities to clarify the Deer Act 1991 regarding shooting from mechanically propelled vehicles, to make it clear that it is intended to prohibit shooting deer from a vehicle whilst the engine is running, or the vehicle is in motion.

The legislative commitments listed in the Action Plan, including those above, reflected the proposals that were presented in the recent consultation on the draft Order. Therefore, the measures proposed in the draft Order have been subject to comprehensive consultation and public scrutiny before the consultation on the draft Order. As the measures had been subject to a large degree of previous discussion the consultation period on proposals for this draft Order was reduced to 8 weeks.

Q23. Please indicate whether the National Game Dealers Association and Hampshire Game were sent copies of the consultation document and explain on what basis the Department compiled the targeted consultation list for this proposal.

The National Game Dealers Association was included in the original consultation list, however, they did not receive their copy of the consultation document. Our records do not indicate that they requested a replacement copy. Fortunately, however, they did respond to the consultation and their response was considered alongside the others.

Hampshire Game was not included in the original list of consultees. Hampshire Game are members of The National Game Dealers Association and where a representative organisation is consulted it is not normal procedure to contact an individual member of that organisation unless they have specifically requested to be included in relevant Defra consultations. Our records do not indicate that Hampshire Game requested a copy of the consultation document. They did, however, respond to the consultation and their response was considered alongside the other responses.

The consultation list was constructed from those stakeholder organisations that are on a generic list for consultations concerning wildlife conservation issues, stakeholder organisations and individuals who have expressed an interest in the specific subject or issues subject to consultation, together with those who had responded to previous consultations on related issues.

In addition the consultation document was available on the Defra website, and was publicised by way of an official press notice. The consultation was also reported widely in the trade press (e.g. Shooting Times).

Q24. Please explain what consideration was given to the views of those who argued that the close season for does/hinds should commence on 1 April in the interests of better managing deer numbers and the reasons why the Department has not accepted these arguments.

The close season for the females of four species of deer (roe, red, sika and fallow) currently runs from the 1 March until 31 October. The female close seasons exist primarily to protect does/hinds while they are heavily pregnant or have dependant young.

The Department accepts that to ensure increased opportunities for the management of deer the close season should be reduced as long as this reduction did not cause a disproportionate reduction in the welfare protection of those animals. In the report "Current and Future Deer Management Options", published by Defra in December 2003 the proposal was put forward that the close season should be shortened at the end of the

season by ending the close season on 20 October. This would be consistent with the end of the close season in Scotland. This proposal was put forward in the joint Defra and Forestry Commission consultation, "Achieving the sustainable management of deer in England".

The response to this proposal indicated that the majority of those who expressed a preference were opposed to shortening the end of the close season and a majority agreed that the close season should be shortened at the start of the close season. After further consideration with key stakeholder organisations, including members of the Deer Initiative Partnership, the Department proposed shortening the close season by moving the start date to 15 March. This was outlined in the Deer Action Plan, and subsequently was proposed in the consultation paper on the draft Order.

In considering the responses to the proposal to shorten the close season for female deer, the Department was required to weigh up the welfare consideration of shooting heavily pregnant deer, with that of the need to increase control of those species. The Department recognises that a number of deer management respondents did request a four week reduction in the close season. However, concerns were expressed by the RSPCA – especially in relation to roe deer. Based on the responses received, the Department felt that a two week reduction was preferable because of:-

- A) The welfare concerns expressed by the RSPCA with regard to roe deer
- B) The need to maintain a common opening season for all female deer. This will ensure effective enforcement and reduce the possibility of female deer being incorrectly identified and shot.

The Department is aware that, since the scrutiny process has started the Deer Initiative and RSPCA have re-analysed the data on roe deer calving periods. It is our understanding that the RSPCA agree with their Deer Initiative partners that the welfare issues associated with a later start to the close season are considered minimal. For this reason, pending the views of the Committee, the Department is minded to alter the draft Order so the close season for females of the four species of deer mentioned above, and that of the Chinese water deer commences on the 1 April.

Q25. Please indicate who will be responsible for developing and agreeing the future policy on licences to shoot deer and explain in as much detail as possible the form and substance it is intended that this policy will take.

Natural England and the National Assembly for Wales in partnership with this Department and in consultation with the Deer Initiative will be responsible for developing and agreeing the policy on licences to shoot deer.

Licence applications will be subjected to a number of tests as outlined in the explanatory document (see question 18). Any licence is likely to be limited in the species covered, duration and location. The licensing authorities will carry out at least one site inspection visit, and probably four or more if there are difficulties in assessing the problem, for each application. Natural England is also drafting specific best practice guides on licensed operations, in cooperation with the Deer Initiative, as part of their series of 'best practice guides'.

Q26. Please explain what guidance will be made available to licence holders in respect of the taking and killing of deer and who will be responsible for providing such guidance.

The Deer Initiative is currently devising a wide range (around 80 in total) of best practice guides in cooperation with their partner organisations. The following guides will be relevant to licence holders when carrying out control: Firearms legislation; Culling out of season; Night shooting; Use of high seats for controlling deer; Shot placement; Reaction and follow up of shot deer; Dealing with injured deer; and, Use of dogs. The following guidance will be relevant to those who wish to apply for a licence: Risk assessment; Deer impacts; and, Woodland impact surveys. The guides relevant to this Order will be available on the Deer Initiative website once the Order has been enacted (expected 1st October 2007). The Deer Initiative will refrain from publishing these guides sooner than this date to avoid creating the erroneous impression that these activities are already legal.

Q27. Please explain how the Department intends to take forward the suggested process of informal monitoring of the effects of the proposed Order, if implemented.

This Department and National Assembly for Wales will primarily use the Deer Initiative for advice on the effect of the orders on deer management, welfare and conservation. Natural England will monitor the licences that they issue. The Deer Initiative are uniquely placed to advise on the wider outcomes affecting these issues, comprised as they are of stakeholder representatives of deer managers, land owners and welfare organisations. To improve the provision of data on deer related issues, the Department and Forest Research have provided new funding to establish improvements to deer data management. This will assist the Deer Initiative collate and manage all the different data sets and provide advice and protocols to deer liaison officers to ensure that data is collected effectively and used appropriately.

Information on the effectiveness of the licensing regime will be assessed by the licensing authorities. We would expect the licensing authorities to collect information on the numbers of deer controlled under licence, and the effectiveness of the licences in alleviating damage. Damage to Sites of Special Scientific Interest (“SSSI”) caused by deer will be monitored by Natural England under their periodic review of SSSI status. The condition of SSSI units is assessed once every six years, with more frequent assessments of those in unfavourable condition, such as those woodland SSSIs adversely affected by deer.

Q28. Please explain why, in the light of the increased scope of the power to amend the terms of the close seasons and the nature of the proposed licensing system when compared with current subordinate legislative power established in section 2(4) of the Deer Act 1991, the Department considers it would be appropriate for the proposed subordinate legislative powers which would be created by article 5 to be exercisable subject to the negative resolution procedure.

Q29. Please explain why the Department proposes that the close seasons need be amendable by means of a subordinate provisions order at all given that the existing procedure for altering them under the 1991 Act, including the benefit of a consultation requirement, continues in being in the absence of provision being made to the contrary in the proposed RRO.

ANNEX 3 – NATURAL ENGLAND DRAFT NIGHT SHOOTING LICENCES - CODE OF PRACTICE**Introduction**

The Deer Act 1991 (as amended) prohibits the shooting of deer at night³⁷, except to prevent suffering or in pursuance of a Notice under the Agriculture Act 1947, or if done under a Licence issued under the Act. This Guide explains the provisions for night shooting under licence and the best practice that those issued with a licence are expected to follow.

Under Section 8 (3D) of the Act a licence may be granted to any person by Natural England, in relation to land in England, or the National Assembly for Wales, for land in Wales, to allow the shooting of deer at night. The purposes for which licences may be issued are:

- Preserving public health or public safety;
- Conserving the natural heritage, or
- Preventing serious damage to property

Before granting a licence the licensing authority must be satisfied that there is a serious risk to public health or safety, or a serious risk of damage to natural heritage or property, as appropriate; there must be no satisfactory alternative, e.g. co-operative deer management through a Deer Management Group (see BP Guide XXX); and the applicant must have right of access to the land to cull deer.

³⁷ Defined in the Act as between the expiration of the first hour after sunset and the commencement of the last hour before sunrise.

Each licence is subject to specific conditions including the precise area covered, the species and number of deer which may be shot and the duration for which it is valid.

Firearms safety and the humane dispatch and welfare of deer are paramount in the issue of night shooting licences and must be the overriding considerations of all operators.

General principles

Before night shooting takes place the licensee and operators involved must make themselves thoroughly familiar with the site. Safe and unsafe areas must be identified; shooting must only take place where there is a suitable backstop. Anyone likely to be in the vicinity should be given advance warning and adjacent occupiers should be informed. In particular, if there are Public Rights of Way on the site, sufficient warning must be given to potential users, for example, by posting notices stating that “night-time shooting for essential wildlife management” is in progress. The local Police should also be informed – this will normally be a licence condition.

Only one rifle should be in use at any time – this is also likely to be a licence condition.

If there is any doubt about the safety or humaneness of a particular shot it must not be attempted.

Best Practice

Minimum Team: The minimum operating team is two; a **spotlight operator** and a **marksman**. If a vehicle is used a **driver** will also be necessary. The duties of each team member are:

- **Spotlight Operator** - To locate and help select deer to be shot and to mark the position of shot deer for prompt recovery.
- **Marksman** - To confirm identification of the target animal, to shoot and to observe the effect of the shot.
- **Driver** - To position vehicle on instructions of the spotlight operator and to observe and assist in locating fallen animals.

Vehicles: Section 4 of the Act prohibits shooting from a moving vehicle but a stationary vehicle can provide a suitable platform for the marksman to obtain a clean shot. Shots must never be taken by stretching across the driver or passenger or across the roof of a vehicle. Good communication between the marksman, the driver and the spotlight operator is essential and no one should step outside the vehicle unless given the all-clear by the marksman.

Visibility & Shot: Deer must be fully visible and clear of obstructions before a shot is attempted. Heart/lung shots give the surest and most humane kill, the ideal being broadside on, through the shoulder into the heart/lung area. Head or neck shots must never be attempted. Shots should be limited to the appropriate range and should normally be within 100m.

Dogs: A trained dog should be available to assist with carcass recovery if necessary.

Rifles and Ammunition: A larger calibre than the legal minimum is likely to be specified in the licence. This is to help ensure that the animal drops where shot and will normally be a minimum of 0.270” with ammunition of not less than 130 grains.

Telescopic Sights: Minimum specification 4 x 36. The use of light-intensifying, heat sensitive or other special sighting devices will not normally be permitted under licence. Telescopic sights must never be used as a substitute for binoculars.

Binoculars: Binoculars are an essential aid to clear identification of the target animals. A specification with good light-gathering properties, e.g. 7 or 8 x 40 is recommended.

Spotlight: A minimum spotlight rating of 200,000 candle-power is recommended.

Back-up Gun: It is recommended that either the spotlight operator or the driver act as back-up gun for the despatch of wounded animals at close quarters, where a second rifle shot may be unsafe. This should be done using a 12 bore shotgun and cartridges loaded with AAA shot.

Safety: A first aid kit should always be carried and portable communication equipment is recommended. Details of location and expected time of return should be given to a third party.

Further letter from Defra to Committee Specialist: Reply to Questions Raised by the Regulatory Reform Committee

Further to my letter of 9 February, I now attach the Department's response to questions 28 and 29 outlined in your letter of 1 February.

I hope the Committee finds these responses useful and informative. If, however, anything in the response is unclear, or any issue requires further clarification, please do not hesitate to contact me.

15 February 2007

Reply to Questions 28 and 29 Raised by the Regulatory Reform Committee

Q28. Please explain why, in the light of the increased scope of the power to amend the terms of the close seasons and the nature of the proposed licensing system when compared with current subordinate legislative power established in section 2(4) of the Deer Act 1991, the Department considers it would be appropriate for the proposed subordinate legislative powers which would be created by article 5 to be exercisable subject to the negative resolution procedure.

For ease of reference Section 2(4) and (5) of the Deer Act which are relevant to the replies to both questions are set out below (emphasis added).

(4) The Secretary of State may by order amend Schedule 1 to this Act by the addition of any species not mentioned in that Schedule and of a close season for any description of deer of that species, or by varying or deleting any such addition.

(5) Before making any order under subsection (4) above the Secretary of State shall consult any organisations that appear to him to represent persons likely to be interested in or affected by the order.

The Committee's observation highlights the increased scope of the power to amend the regulatory regime as regards the terms of the close seasons. The question relates to the use of the negative resolution procedure for the powers to amend the licensing regime and the close seasons.

So far as the terms of the close seasons are concerned, section 2(4) of the Deer Act 1991 confers power to amend Schedule 1 to the Act by the addition of a close season for any description of deer of a species which is added to the Schedule by an order under that section. The power is exercisable by order subject to the negative resolution procedure (see section 15(2)).

The additional scope of the power conferred by article 6 consists in enabling an order to be made amending the terms of the close seasons for the four species of deer currently specified in Schedule 1 to the Act (red deer, fallow deer, roe deer and sika deer) and the species added by article 5 (Chinese water deer).

The Department considered that it was appropriate that the same Parliamentary procedure should apply in relation to any subordinate provisions order varying the terms of the close seasons for the four species of deer

protected under the 1991 Act at present and the fifth species added to the regime by article 5 as applies in relation to any variation of the close seasons for any species of deer added to the regime by an order under section 2(4). The Department did not consider that the degree of Parliamentary scrutiny accorded to the variation should depend on the species in question. Moreover, it would make little sense if the negative resolution procedure applied for the purpose of adding species to the schedule (and any subsequent variation) while variations of the close season for those species in the schedule should be subject to an affirmative resolution procedure. As an example had sections 2(4) been used to add the hybrid species any subsequent changes to the close season for hybrids would be subject to a negative resolution procedure while the changes to the close seasons for the purebred species were by way of an affirmative procedure.

Further the addition of new species to the Schedule, which is currently subject to the negative resolution procedure, was considered to involve a greater degree of change than the variation of the close seasons for species already on the schedule. It would therefore seem to be illogical to use an affirmative resolution process to effect a lesser degree of change. So, while the proposed new provision in article 6 provides a wider power to amend the Act than the existing section 2(4), the effect of the additional powers would be less those currently subject to the negative resolution process. It was therefore considered appropriate to use the same negative resolution process for the combined powers.

In respect of the licensing powers the conditions under which these can be granted has been set out in detail. The precise details may change from time to time as new evidence or information on the populations of deer, or damage they can cause comes to light. It was considered that the negative resolution process would be suitable for such amendments of subordinate details.

Q29. Please explain why the Department proposes that the close seasons need be amendable by means of a subordinate provisions order at all given that the existing procedure for altering them under the 1991 Act, including the benefit of a consultation requirement, continues in being in the absence of provision being made to the contrary in the proposed RRO.

In respect of the reason for the removal of the existing provisions of sections 2(4) and (5) Deer Act it was considered appropriate because; they are more limited in scope than the replacement provisions; they could not be used to amend the substitute tables in schedule 1 (only to add and then vary any subsequent addition) and, while they could have been used to add the 2 new species, the necessary changes to the schedule would have required two different processes. The dual processes would have been more time consuming and administratively complex. It would also mean in future 2 different processes depending on whether the species had been part of the original schedule or been added under section 2(4).

Further it is arguable that section 2(4) is even more limited in that the reference to 'that schedule' means the 1991 schedule only and not to any subsequent replacement i.e. through the RRO. Once the 1991 schedule is replaced under the RRO it is therefore questionable whether the section 2(4) power could be exercised at all hence the comment in the Explanatory Document quoted.

It is accepted that article 5 relating to the close seasons makes no provision for consultation. The Regulatory Reform Act section 4(11) makes clear that subordinate provisions orders are not subject to the statutory consultation procedures required for the Regulatory Reform Orders. That said, while there is no statutory requirement for consultation for a subordinate provisions order, the Cabinet Office Code of Practice on Consultation (which applies to all Government Departments) makes it clear that effective consultation is a key part of the policy making process. The Code requires consultation throughout the process. Consultation with stakeholders and other affected parties would help inform the Minister about whether the proposed amendment was appropriate and within the scope of the Regulatory Reform Act which is not suited to highly controversial amendments. It is anticipated that any future changes to the close seasons would require similar consultation with stakeholders as has been undertaken for the current proposal.

To summarise the reasons for providing for the subordinate provisions order procedure:

- The Deer RRO was necessary to amend close seasons for species currently listed in the 1991 schedule 1 as this was beyond the scope of section 2(4);

- The existing procedure under section 2(4) being limited to new additions to the schedule could not be used in the future to amend the seasons for those species listed in the new schedule;
- The subordinate provisions order procedure was therefore necessary to enable the alteration of close seasons for species listed in the new schedule. It also has the benefit of enabling both existing and new species to be handled in a single procedure;
- It is also exercised within the general framework of the Regulatory Reform Act itself;
- The absence of a statutory requirement to consult does not preclude a consultation process being undertaken. Effective consultation is a key part of the policy process.

Appendix C

Email from the Committee Specialist to Department for Environment, Food and Rural Affairs: Proposal for the Regulatory Reform (Deer) (England and Wales) Order 2007: request for information

I refer to our telephone conversation today regarding the answers supplied to the Committee's questions 16 - 18, dealing with the RRO proposal on deer.

In order to assist the Committee's consideration of the response can I please ask you to comment on two matters arising from the text of the joint answer given to these questions:

1. A) Please explain the basis on which the Department states that future licences to shoot deer at night under section 8 of the Deer Act 1991 as proposed to be amended will be issued subject to a binding condition on the number of animals which may be killed. Is this based on the legal effect of the proposed Order or a statement of future policy of the licensing authorities? B) Does the Department consider the Order should not itself provide that licences should always be issued subject to a limit on the number of animals which may be killed under the licence and if so why?

2. Please explain the basis for the Department's statements about future policies of the licensing authorities should the proposed Order be approved, such as the assertion "The licensing authorities will...in all cases conduct at least one site visit to assess the case, before an application is approved".

I should be very grateful for your further comments in relation to these issues.

23 February 2007

Appendix D

Letter from Department for Environment, Food and Rural Affairs to the Committee Specialist: Proposal for the Regulatory Reform (Deer) (England and Wales) Order 2007: Reply to Further Questions Raised in Relation to the Deer Regulatory Reform Order. Questions 16-18

Further to your e-mail of 23 February, below is further information in relation to the questions you have raised.

1. A) Please explain the basis on which the Department states that future licences to shoot deer at night under section 8 of the Deer Act 1991 as proposed to be amended will be issued subject to a binding

condition on the number of animals which may be killed. Is this based on the legal effect of the proposed Order or a statement of future policy of the licensing authorities? B) Does the Department consider the Order should not itself provide that licences should always be issued subject to a limit on the number of animals which may be killed under the licence and if so why?

The Department's response to questions 16-18, regarding conditions applied to licences stated; *"It will contain conditions, such as restricting the species and number of animals that can be killed."* This reply was designed to indicate that licences could include a limit on the maximum number of deer that could be killed under that licence. The use of *"such as"* in the answer was meant to illustrate that these were examples of the types of licence conditions that may be imposed on a case by case basis, albeit that the species of deer to be killed must be stated in the licence under proposed new section 3(g)(c).

However, the Department considers that the maximum number of deer to be killed will be subject to a licensing condition in all but a minority of cases. Exceptions to this general presumption may include the control of deer for public health and safety, e.g. at airports, where it may be impossible to determine the number of deer that may encroach on an airfield at any one time. To allow flexibility for such situations the Department considers it would be inappropriate that the Order should create an obligation on the licensing authority to state the number of deer to be killed on every licence. This would be consistent with equivalent licensing powers under the Section 16 of the Wildlife and Countryside Act 1981 and regulations 44 and 45 of the Conservation (Natural habitats, &c.) Regulations 1994 which authorise licences being issued to control wildlife in similar circumstances.

It should be noted that the licensing authorities will be not be permitted to issue licences that would allow the killing of native deer³⁸, if it would compromise the ability of that species to maintain the population of deer in question on a long term basis within its natural range after the killing has taken place (proposed sections 3D(e) and 3F(f)). This condition will ensure that the conservation status of native species of deer is not compromised by any killing undertaken under the proposed new licensing regime.

2. Please explain the basis for the Department's statements about future policies of the licensing authorities should the proposed Order be approved, such as the assertion "The licensing authorities will...in all cases conduct at least one site visit to assess the case, before an application is approved".

The Department's statement that *"the licensing authorities will subject applicants to rigorous assessment, and in all cases will conduct at least one site visit to assess the case, before an application is approved"* was based on information provided by the licensing authority for England, Natural England, and it is a position to which the Welsh Assembly Government also subscribes.

As outlined in the reply, Natural England already has the power to issue orders under the Agriculture Act 1947. Working instructions for those orders already ensures that before an order for night shooting is issued a visit to the site is undertaken. Similar practice will be followed for night shooting licences. The draft code of practice produced by Natural England for the proposed night shooting licensing system (previously provided) clearly states that *"before night shooting takes place the licensee and operators involved must make themselves thoroughly familiar with the site. Safe and unsafe areas must be identified; shooting must only take place where there is a suitable backstop"*. The licensing authority would wish to satisfy themselves that this is the case and this would require a site visit.

The Department considers that the other safeguards imposed by the proposed licensing provisions – primarily that the licensing authority must be satisfied that no suitable alternative to night shooting - together with the proposed guidance mentioned above means that it is very unlikely that the licensing authorities would issue licences to shoot deer at night without a site visit.

The Department concedes that there is no requirement in the draft Order to legally oblige the licensing authorities to carry a site visit before issuing a night shooting licence. While it would be possible to insert such a condition, such a level of detail would be unusual in legislation of this type, for example no such statutory

38 For the purposes of this reply – native deer means red, roe or fallow deer.

provision exists for night shooting orders under the Agriculture Act 1947. To insert such a condition would also limit the ability of the Department and the licensing authority to react to currently unforeseen and exceptional circumstances where deer may be required to be killed at night for reasons of urgency.

I hope this reply provides a satisfactory response to the questions raised.

28 February 2007

Appendix E

Email from Committee Specialist to the RSPCA: Proposal for the Regulatory Reform (Deer) (England and Wales) Order 2007

I refer to our telephone conversation.

As you are aware, the Regulatory Reform Committee is currently considering Defra's proposal for this Regulatory Reform Order. A particular matter being examined is the proposed amendment of the start of the close seasons for taking and killing deer provided for in article 5, which presently provides that close seasons for hinds/does of deer of all species will start at 15 March. The Committee has received submissions from The Deer Initiative and The British Deer Society arguing that there is no reason why these close seasons should not commence at 1 April. The Committee has also noted that the RSPCA had been of the view in responding to the Defra consultations on the initial proposals that there was insufficient evidence to prove the welfare of female roe deer and their young would not be prejudiced if the close season for female deer of this species began on 1 April.

The Committee has now been informed by The Deer Initiative and Defra officials that having considered the available evidence further, RSPCA has no objection to a close season for female roe deer commencing on 1 April.

I would be very grateful for confirmation that the RSPCA has no further concern about this suggestion and for any additional comments the RSPCA may wish to make on the proposed Order.

8 February 2007

Appendix F

Email from the RSPCA to the Committee Specialist: Proposal for the Regulatory Reform (Deer) (England and Wales) Order 2007

I am happy to confirm, and amplify, the comments I made during our telephone conversation.

In the RSPCA's response to the Defra RRO consultation regarding deer we made the point that, in relation to animal welfare, we believed that the proposal to shorten the close season for all female deer by changing the start of the close season was preferable to bringing forward the end of the season (as had been previously suggested).

However, we were aware of some research, undertaken for the Deer Commission for Scotland, which suggested that some roe deer might be calving earlier than reported in the scientific literature. If this was the

case, it might only affect a small number of roe deer but, at the time, we thought it appropriate to sound a cautionary note against moving the close season commencement date to the 1st April for female roe deer.

We did have some reservations about the research, which had not been subjected to the peer review and publication process, and in our view it should really have been properly evaluated by Defra as part of the consultation exercise. However, it was apparently only as a consequence of our involvement with the Deer Initiative (DI) that consideration was given to this piece of research. This was undertaken by Peter Watson, the Executive Director of the DI, and he did liaise with me during the process.

I therefore can confirm that I was closely involved with the submission he sent on behalf of the DI to the Regulatory Reform Committee on the 17th January 2007 and that the submission did reflect the RSPCA's viewpoint now - namely that moving the start of the close season for female deer to 1st April presents minimal risk of a welfare issue for roe. As you are aware this is also the view of the British Deer Society.

We are also mindful of the fact that the key to deer management is considered control during the open season. We believe there is merit to the argument that extending the season in this way may facilitate this and thereby reduce the pressure for licensing deer culling in the close season or at night which carries a greater welfare risk.

Set against the background of the growth of the wild deer population and the various problems this is causing, our overall view of the proposed changes to the deer legislation is that although some of the proposals will increase the number of deer culled - which is the intention - this will not significantly increase the risks to animal welfare.

9 February 2007

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