

UK Environment Bill Legislative Consent Memorandum

Supplementary Written Evidence

April 2020

Introduction

Thank you for the opportunity to provide further written evidence on the Westminster Environment Bill. It is disappointing – but entirely right – that we were unable to join the Committee in person on 19th March as originally planned. We are all adjusting to new circumstances and ways of working but would like to offer our support going forward if the Committee is able to continue to undertake any scrutiny making use of online platforms.

Over the last year we have seen intensifying public concern over the state of the environment. New reports have emphasised the urgent need for a step change in our ambition to turn around nature's decline, and this has been underlined by the surge in public outrage shown by groups like the Youth Climate Strikers and Extinction Rebellion. The IPBES global assessment report on biodiversity and ecosystem services¹ made clear that nothing but transformational change will allow us to reverse biodiversity loss, and secure the essential services nature provides to society.

We need provision to be made urgently to avoid a dip in environmental protection and standards as a result of the UK leaving the EU; enshrining environmental principles and establishing robust environmental oversight and enforcement are critically important. In addition, we need to recognise that regardless of Brexit, our frameworks have been inadequate to stem nature's decline. Environmental targets and other tools are needed to clarify ambition and secure delivery for nature in Wales.

- Views on provisions in the Bill that relate to England only (e.g. conservation covenants, environmental targets) and whether they should be extended to Wales.

Environmental targets

WEL considers that Wales needs a framework of legally binding targets for nature's recovery. As with the UK Government's Environment Bill, new Welsh legislation should place a duty on the Minister to set targets via secondary legislation, by a certain date.

The Welsh Government has recognised that we are facing a climate and nature crisis. Work has already begun under the Convention on Biological Diversity to map out a post-2020 framework, and we know that Wales, the UK, and most if not all other countries will have failed to deliver the set of

¹https://ipbes.net/sites/default/files/ipbes_global_assessment_report_summary_for_policymakers.pdf?file=1&id=35329&type=node

targets agreed under the Convention in 2020 (the Aichi targets). Greater accountability at home will be a key ingredient in making sure global leaders do not find themselves in the same position in 2030.

The Environment (Wales) Act framework for the sustainable management of natural resources involves an iterative cycle – evidence (the State of Natural Resources Report/SoNaRR) informs policy (the Natural Resources Policy) which should drive delivery (including via Area Statements) – with an overarching objective to maintain and enhance the resilience of ecosystems and the benefits they provide. WEL believes statutory targets are needed to enable clear ambition to be set, based on evidence, and to ensure that if delivery falls short of ambition, remedial action is required. As well as long term targets, the Minister should be required to set milestones every five years. Progress would be reviewed in the SoNaRR, and responded to accordingly in the Natural Resources Policy.

Targets should be set in respect of key natural resources – e.g. biodiversity, air and water – and the aspects of resilience of ecosystems set out in the Act. These include diversity between and within ecosystems; the connections between and within ecosystems; the scale of ecosystems; and the condition of ecosystems (including their structure and functioning) – species and habitat metrics will be key to monitoring progress on these.

In keeping with the ecosystem approach set out in the Environment (Wales) Act, the policy response will likely need to address systemic, as well as specific issues. For example:

- The Committee’s own October 2019 report on the role of the Welsh Government’s Sustainable Farming Scheme in restoring biodiversity, noted the importance of specific targets for biodiversity restoration in relation to monitoring the scheme’s effectiveness and value for money².
- A new study published in *Nature, Ecology and Evolution*³ looked at UK trends in distribution in over 5000 species across 31 taxonomic groups, for the period 1970-2015, with some complex and surprising results. These included an upturn in the distribution trend in freshwater species, following a steep decline; the positive change appeared to coincide with the implementation of the EU Urban Wastewater Treatment Directive, designed to clean up our waterways. It also found a steady upsurge in the distribution of lower plant species (including lichens and mosses) – a group known to be sensitive to air pollution – which it is suggested is linked to the Clean Air Act and other policy measures which have given rise to improvements in air quality over time. Taken together, these two examples seem to demonstrate the positive role well-designed regulation can play in supporting the recovery of nature.

The targets framework should include a requirement for the Minister to obtain independent expert advice on target setting, and wider consultation. This should be linked to Wales’ new governance arrangements. WEL wants to see the targets framework introduced via Welsh legislation on environmental principles and governance, which needs to be progressed urgently.

² <https://www.assembly.wales/laid%20documents/cr-ld12831/cr-ld12831%20-e.pdf>

³ <https://www.nature.com/articles/s41559-020-1111-z> and see RSPB blog https://community.rspb.org.uk/ourwork/b/biodiversity/posts/let-s-hear-it-for-the-little-guys?fbclid=IwAR05O8mHGtCgIChJMpEFD48N1-noV2otmf_CwC85bOJOC3Lccc9ANNGwyzs :

Net biodiversity gain or benefit through development

WEL believes that securing net biodiversity benefits through development could play an important role in restoring nature. Planning Policy Wales (para 6.4.5) sets out a requirement that development **must provide a net benefit for biodiversity**. This is repeated in para 6.4.9, where it is explained as being part of ‘the broad framework for implementing the Section 6 duty and building resilience through the planning system’. It is questionable whether this approach is a sufficiently robust basis to refuse developments on net benefit or biodiversity enhancement grounds. A Chief Planning Officer letter in 2019 sought to clarify and strengthen the position set out in PPW, and while helpful, this too is ambiguous. Moreover, it still depends on the willingness and capacity of local planning authorities to promote net benefit, and in the absence of any metric or standard for quantifying net benefit it is difficult to see how an LPA might robustly defend a decision on the basis that the biodiversity benefit offered by a developer was insufficient. We are hopeful that the National Development Framework will bring forward a clear policy on biodiversity benefit which will provide greater weight than Planning Policy Wales. However, we note that evidence and experience from England is that a policy based approach within the English National Planning Policy Framework has not been effective in securing net biodiversity gain. Defra concluded that only 29% of current housing development and 15% of other development in England are currently delivering net gain. There is no comparable assessment for Wales, but we think it is unlikely that the situation will be significantly different and that there is a comparable need for placing net biodiversity benefit in Wales on a statutory footing.

Ultimately, it is important that clear requirements can be placed on developers, not only planning authorities, for net benefit to succeed. There are clear advantages in quantifying a minimum level of net benefit that must be provided by a developer. Such an approach will provide better outcomes for local planning authorities, developers and biodiversity. It would establish a basis for local planning authorities to assess developments for net benefit and a level playing field for developers to plan and cost net benefit into their developments. It would be imperative that biodiversity benefit requirements apply not only to local developments but also to larger developments such as Developments of National Significance, consented by the Welsh Ministers. It would need to be explicit that biodiversity benefit requirements would not undermine the mitigation hierarchy, existing designations and statutory and planning protections for sites and species.

WEL members are engaging with the Planning and Biodiversity Forum, and a specific Task and Finish Group on net biodiversity benefit established by Welsh Government. We are advocating that the advantages of legislative underpinning for net biodiversity benefit be considered in these processes. We are also advocating the need to consider what approach to quantifying net benefit would work best within Wales.

In designing a legislative approach for Wales it would be critical to note concerns about the current approach set out in the Environment Bill; these are set out in detail in Greener UK’s briefing for second reading^[1].

Conservation Covenants

^[1] [https://greeneruk.org/sites/default/files/download/2020-02/Greener UK and Link briefing for second reading of the Environment Bill February 2020.pdf](https://greeneruk.org/sites/default/files/download/2020-02/Greener%20UK%20and%20Link%20briefing%20for%20second%20reading%20of%20the%20Environment%20Bill%20February%202020.pdf)

The Environment Bill introduces a system of conservation covenants, whereby “responsible bodies” approved by the Secretary of State can enter into private arrangements with landowners. We believe conservation covenants are an important tool in enabling nature’s recovery and the delivery of the sustainable management of natural resources; in relation to the preceding section, they would also have an important role to play in delivering net biodiversity benefit through development. We would therefore welcome their introduction in Welsh legislation. Greener UK’s briefing for the second reading of the Environment Bill sets out concerns and suggests improvements to the Bill’s current provisions on conservation covenants, which should be kept in mind for future Welsh legislation.

Environmental governance:

➤ Views on the role of the Office of Environmental Protection (OEP) in Wales

The Office of Environmental Protection has been designed to operate in England to fill the environmental governance gap caused by leaving the European Union and the loss of the European Commission’s reviewing and scrutiny role. We expect that Welsh Government will establish an effective equivalent body for Wales in time for the conclusion of the UK’s trade negotiations with the EU. If this is not possible then Welsh Government must ensure interim arrangements are in place to avoid regression and/or a large backlog of potential complaints (we are already concerned that, understandably, very few complaints have been considered by the EU Commission in the last three years due to Brexit). Such options could include seeking the extension of the OEP to include Wales as a temporary time-limited measure with appropriate consideration of Wales’ unique legislative position. As you are aware the OEP is being extended to Northern Ireland and Schedule 3, the Westminster Environment Bill has some helpful provisions to ensure NI and its legislation will be catered for.

Given the current uncertainty; the devolution settlement; and the combined England & Wales legal jurisdiction there is currently confusion over the role and remit of the OEP in terms of reserved bodies and clarity on when the OEP will be the correct body for citizen complaints and when matters should be referred to the Welsh equivalent. To that end it would be useful for the Committee to gain clarification on the role and scope of the OEP and thus clarity on the remit of any new Welsh environmental governance body regarding operations of reserved bodies in Wales. A lack of clarity may cause jurisdictional confusion regarding citizen complaints, and over whether UK Ministers performing reserved functions in Wales would still be subject to OEP oversight or that of a new Wales only body.

➤ Views on whether the Bill provides for appropriate co-operation between the OEP and devolved environmental governance bodies.

It is essential that where there are new governance bodies in each country they have reciprocal duties of co-operation, acknowledging that environmental impacts do not recognise national borders (e.g. a pollution incident affecting a river system), and that some systemic environmental issues will benefit from a joined-up approach. We are supportive of the Welsh Government’s position that clause 24(4) should be strengthened to secure *co-operation* between the OEP and equivalent bodies

in the devolved nations, rather than just being, as currently drafted, a requirement to consult. Given the possibility of the OEP investigating a complaint which could be concerned with reserved and devolved matters, it would require a degree of partnership working.

- Views on the policy statement in the Bill on environmental principles which only applies in England (the Committee has previously heard calls for a UK co-ordinated approach)

We do not support the Environment Bill approach to environmental principles, wherein the Secretary of State is required to just create a policy statement on the application of the principles, and in turn, other Ministers of the Crown are required only to have due regard to the policy statement. This fundamentally downgrades these important environmental legal principles to mere matters for policy consideration, diluting their current legal status (including within international conventions as well as the TFEU) and we wish to see the Bill amended so that Ministers are required to apply the principles directly for all their functions not just new policy. Similarly, we are advocating for a direct duty to apply to the principles in Wales' forthcoming legislation.

All governments within the UK have stated their agreement to adopt a consistent (rather than common) set of environmental principles (via their own legislation), and that there will be some sort of joint statement - but we have no detailed information about this. It is our assumption that this approach has similarities to the approach taken with the UK Marine Strategy. We are also unsure what, if any, legal distinction is being made between a common set of principles and a consistent set of principles. It would be useful if the Committee could seek clarification of the Welsh Government's view on these points.

The principles listed in the Environment Bill go beyond the four core principles, and include the principle of integration which we consider to be a vitally important cross-cutting legal principle. The requirement for the environment to be integrated across policy functions in Wales must also be included in Wales' legislation.

- Any other concerns relating to the environmental governance provisions with the Bill.

The independence and powers of the Office of Environmental Protection (OEP) must be strengthened, including through greater Parliamentary oversight of OEP board appointments and the budget and for there to be truly effective and deterring sanctions and remedies. Such points are also relevant to Wales as we would expect to see similar provisions for a Welsh body. This body should be independent of the Welsh Government (in terms of both funding, key appointments and performance monitoring), with the Senedd providing oversight in these areas.

As you are aware, if matters cannot be resolved, the Environment Bill contains provision for the OEP to refer matters to the Upper Tribunal to determine. We are supportive of this Upper Tribunal approach in principle, however, we do have concerns about some of the specifics proposed which should not be replicated for Wales:

- There is a need to move away from traditional Judicial Review, which has proved unsatisfactory in dealing with environmental cases. While the Environmental Review model appears to be an attempt to do just that, the way it is currently curtailed by reference to Judicial Review principles means the substance of the review is, in essence, Judicial Review in disguise. We do not believe that this approach should be supported for Wales as it weakens existing approaches; something Welsh Government have committed to avoid.
- There is also a problematic difference between the approach and powers of the OEP and (as currently drafted in the Bill) those of the Upper Tribunal. The OEP will be able to reach different findings of fact to those of the public authority in question, and make recommendations on that basis, but it is unclear whether (and if so how) the Tribunal will be able to back up those findings. In addition, the Tribunal, like the OEP, may be limited in the recommendations it can make and may not be able to require a public body to reverse a decision if this significantly affects a third party or good administration. We are concerned a similar problem awaits the Welsh body.
- The remedies and sanctions available through the Environmental Review process are too weak. The Upper Tribunal must be empowered to grant meaningful, dissuasive and effective remedies including, where appropriate, financial penalties – just as the Court of Justice of the European Union (CJEU) is currently able to do. And as we all know, it is often the threat of these remedies and sanctions that are the true deterrent. The constraints imposed on the Upper Tribunal in clause 35(8) severely limit the ability of the Tribunal to grant meaningful remedies, undermining the entire enforcement process.

Please see Greener UK's full Second Reading briefing for further detail on these points.

Wales Environment Link (WEL) is a network of environmental, countryside and heritage Non-Governmental Organisations in Wales, most of whom have an all-Wales remit. WEL is a respected intermediary body connecting the government and the environmental NGO sector in Wales. Our vision is a healthy, sustainably managed environment and countryside with safeguarded heritage in which the people of Wales and future generations can prosper.

This paper represents the consensus view of a group of WEL members working in this specialist area. Members may also produce information individually in order to raise more detailed issues that are important to their particular organisation.



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