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Gweinidog yr Amgylchedd, Ynni a Materion Gwledig  
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Llywodraeth Cymru  
Welsh Government

Mick Antoniw AM  
Chair  
Legislation, Justice and Constitution Committee

14 May 2020

Dear Mick,

Thank you for your letter of 9 April, regarding the Legislative Consent Memorandum for the Environment Bill. As you will be aware scrutiny of the Bill is currently paused and subsequently a revised reporting date has been agreed for the Committee's report. I am grateful for the Committee's understanding of the impact of the unprecedented circumstances we find ourselves in and for allowing me to submit my responses by correspondence.

I have provided additional information as requested in the attached document.

Regards  
Lesley

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

## **Responses to Legislation, Justice and Constitution Committee questions on the Legislative Consent Memorandum for the UK Environment Bill**

### **General**

#### **1. Do you consider that the Bill, and all of the provisions contained within it, are necessary? If so, could you explain why.**

I am unable to comment on the wider Bill as this is a matter for the UK Government. However, in respect of provisions included in the Bill for Welsh Ministers, I can confirm I consider these to be necessary.

The Environment Bill supports the UK's collective obligation to transpose the EU's Circular Economy Package (CEP). In addition to meeting the needs of the CEP provisions, the Bill will also support Wales's ambition to move to a more Circular Economy. It provides the legislative tools to support how we tackle waste crime, littering, improve recycling rates, incentivise resource efficiency and ensure producers pay for the end of life costs of the products and materials placed on the market.

In addition, the existing legislative provisions are within a single piece of legislation and to provide continuity and accessibility for users the Bill provides a single source to amend the existing legislation therefore reducing the number of amendments within the source legislation.

In relation to air quality Clause 70 and Part 2 of Schedule 12, amends Part III of the Clean Air Act 1993, in relation to Wales. The effect of the proposed amendment to the Clean Air Act 1993 is to create a duty on Welsh Ministers to publish lists for recording authorised fuels and exempted classes of fireplace which can be lawfully used in Wales' Smoke Control Areas and to switch away from the making of subordinate legislation for achieving this goal. The rationale for using the UK Environment Bill is to bring about benefits for both manufacturers and consumers as soon as possible. Businesses and manufacturers will benefit as the delay between obtaining a recommendation from the technical experts who recommend products for use and placing products on the market will be reduced. The adoption of published lists will minimise the margin of error when recording and updating the lists of products which can be lawfully used; and a streamlined, more effective process will increase consumer choice as more products enter the market sooner. There will also be an environmental benefit as improvement to the operation of the smoke control regime in Wales will make it easier to identify products which can be lawfully used in smoke control areas.

The powers for Welsh Ministers in relation to water align with the commitments in the Welsh Government Water Strategy for Wales, including working with water companies, regulators and local authorities to introduce planning for waste water and sewerage management. Our aim is for sewerage and drainage systems to be resilient and well maintained both for present and for future generations, with sufficient capacity to manage the demand placed on them without causing pollution or sewer flooding of people's homes. This will enable us to move towards a preventative approach, another key principle of sustainable management of natural resources.

Land drainage powers are necessary to allow for the revision and update of the methodology of calculating the split of income between special levies and drainage rates. The Bill also makes provision to provide an alternative methodology for calculation of the value of chargeable land (agricultural land and buildings) to avoid the potential distortion of the apportionment calculation.

The powers in respect of REACH are necessary to deliver a functioning chemicals regime. Certain changes which would help UK REACH function more effectively were outside of the scope of the powers within the Withdrawal Act. We are going from a system designed for 28 member states to a single state with four nations. Therefore, some aspects of REACH are impracticable or overly burdensome on businesses. This is likely to require changes to the existing REACH regulations to ensure they are suitable for use on a UK-only scale. In addition, when we lose section 2(2) powers of the European Communities Act 1972, we will be unable to make any changes to REACH enforcement regulations.

Without these powers UK REACH would have to operate in the context of the EU Exit SIs. In this scenario we could quickly face a number of risks and issues, particularly in relation to the deadlines for registration and repeat animal testing. The powers may also be needed to mirror changes to the EU regime which we wish to maintain. REACH covers reserved matters such as workplace health and safety and product standards, as well as devolved areas like public health and the environment. In this respect, measures to restrict a chemical inflicting harm to human health as well as incurring environmental damage would require the same legislative instrument. Therefore, legislating for such powers in the Assembly would be difficult.

## **2. Does the Bill equate to a Common Legislative Framework? Which provisions are necessary to achieve the Common Legislative Framework?**

The Bill does not equate to a common legislative framework and does not establish any common legislative frameworks.

The UK Bill includes provisions for chemicals and extended producer responsibility, which are two areas with identified common frameworks. Whilst the Bill itself does not provide any provision for frameworks where administrations are jointly developing policies or legislation, which may apply across more than one administration, then an agreed common framework may provide an appropriate structure to discuss the policy and legislative development and address any differences of opinion.

## **3. What discussions have you had with the UK Government about the Bill? How often have those discussions been happening and what have the outcomes of the discussions been?**

The regular Inter-Ministerial Group Meetings on Environment, Food and Rural Affairs include an agenda item on legislation and I have used these meetings to raise issues about the UK Environment Bill.

As a result of these discussions we have secured amendments to the Bill regarding the application of environmental principles to reflect the devolved nature of the environment. As such, Ministers of the Crown making policies in relation to Wales will not be required to have regard to the approach in the UK Bill but to the approach we will introduce in future Welsh legislation.

We have also secured the Secretary of State's agreement to amend the Bill, if required, to include a carve-out of paragraph 11 of Schedule 7B to the Government of Wales Act 2006 in relation to concurrent plus functions. We anticipate that a section 109 Order will be brought forward shortly and that it will address the concurrent functions issue in this Bill. This would mean amendment of the Bill would not be required.

Discussions are continuing about the impact of clause 19 (non regression of environmental protection standards) on devolved competence and the duty on the Office of Environmental Protection (OEP) to consult devolved environmental governance bodies (clause 24(4)).

Clause 24(4) places a duty on the OEP to consult a devolved environmental governance body if it considers a particular exercise of its functions may be relevant to the exercise of a devolved environmental governance function.

It has long been the Welsh Government's view the respective environmental governance bodies in England and Wales will need to work closely together to identify and act on complaints which may be cross border in nature or touch on both reserved and devolved matters.

Citizens in both countries also need to have ease of access to a complaints process with the onus being on the environmental governance bodies to facilitate rather than citizens having to navigate the reserved/devolved landscape.

The proposed duty to consult falls short of providing for this cooperative approach, as it does not allow for early identification of where the bodies may need to work together and for the Welsh body to inform the determination of whether an investigation is of relevance to it. Moreover, it does not allow for joint investigations to be undertaken and for the sharing of best practice and expertise between the bodies. Accordingly, we are seeking an amendment to the Bill to enable cooperative arrangements.

**4. Did you provide the UK Government with specific instructions as to what provision the Welsh Ministers would need for Wales in this Bill? Were you and Welsh Government legislative counsel involved in the drafting of the provisions? If not, how did you proceed?**

Policy officials and legal services considered and, where appropriate, contributed to policy instructions produced by UK policy officials. Again in most cases, Welsh Legislative Counsel were not involved in the drafting of Welsh provisions in the Bill.

Clause 70 and Part 3 of Schedule 12 to the Bill is concerned with smoke control areas, which amends the Clean Air Act 1993. This provision is the exception as it is a Wales-only clause. This clause was subject to separate instructions prepared by legal services and drafted by Welsh Legislative Counsel.

**5. Are you aware of any amendments which the UK Government is seeking to make to the Bill? If so, have you had an opportunity to consider the drafting of those amendments, to ensure that they meet the needs of Wales? If additional amendments are made to the Bill, which require the Assembly's consent, will you lay a further Supplementary LCM in respect of the Bill?**

Prior to the pausing of the UK Environment Bill on 19 March, the UK Government had informed us of all of the amendments it proposed to the Bill. This enabled us to consider any potential impacts on Wales. The amendments up to the 19 March, were all technical in nature for example a number of amendments were tabled to amend the name of the National Assembly of Wales to Senedd Cymru. Once the Bill continues its scrutiny through Parliament, we expect the same level of involvement.

I can confirm I will lay a further Supplementary LCM in respect of the Bill if additional amendments are made which require the Senedd's consent.

## **6. The UK Government says that policy in the Bill has been informed by nine consultations with stakeholders. What consultations have you undertaken to inform policy in the Bill?**

In 2019, the Welsh Government and UK Government jointly consulted on proposals for extended producer responsibility. The Welsh Government is currently consulting on its circular economy strategy, which includes producer responsibility proposals. The consultation states the Welsh Government will “work with other governments in the UK in developing legislation for an Extended Producer Responsibility (EPR) scheme...”

The 2019 consultation on a Circular Economy<sup>1</sup>, *Beyond Recycling*, sets out the Welsh Government’s intention for a mandatory electronic tracking system to be introduced to provide annual information on industrial and commercial waste produced in Wales.

Work continues on a joint basis with England and Northern Ireland to develop a Deposit Return Scheme. This work is currently on going with preparations being made for a second consultation on the detailed design and preferred workings of the scheme.

In 2016 the Welsh Government and Defra held a Call for Evidence on waste crime (<https://gov.wales/proposals-amend-existing-powers-tackle-waste-crime-and-poor-performing-sites-waste-management>). Following the call for evidence, the WG committed to developing measures to tackle waste crime, to help improve competence in the waste sector, review regulatory regimes which were susceptible to abuse such as the waste permitting exemptions and to create a level playing field for industry.

Since 2016 a number of Statutory Instruments have been introduced to tackle the issues identified and a subsequent consultation took place in January 2018 (<https://gov.wales/reducing-crime-sites-handling-waste-and-introducing-fixed-penalties-waste-duty-care>). These consultations and discussion with the Waste Regulator generated a number of new ideas and proposals to tackle illegal waste activity, some of which are being worked on, for example improvements to operator competence and a requirement to have financial provision for non-landfill sites. However, in some areas of waste crime it has been identified strengthened powers would help maximise the potential benefits and these are now proposed in the UK Bill. Some of these proposals have also been consulted on separately for example in our 2019 consultation on a Circular Economy, *Beyond Recycling*, we set out the intention to consider a mandatory electronic tracking system, and in the 2017 the Environment, Animal Health and Welfare Bill consultation we included proposals to amend the Powers of Entry in section 108 of the Environment act 1995, both of which are now proposed in the UK Bill.

The provisions in the Bill for single use plastics were shaped by wider concerns about the impacts of plastic in the environment. This was driven by consultations and evidence collected at EU level. Our consultation, *Beyond Recycling: A strategy to make the circular economy in Wales a reality* will help to shape the way the Welsh Government will tackle these challenges.

On the UK wide plastic packaging tax, the latest consultation round comes to a close in August and we are encouraging views and evidence from key Welsh plastics industry stakeholders. With regards to proposals on litter and single use plastics, consultation will be undertaken prior to the introduction of regulations.

Clause 70 and Part 3 of Schedule 12 to the Bill are concerned with smoke control areas and amend the Clean Air Act 1993. We intend to move from the use of subordinate legislation to the creation of a duty on Welsh Ministers to publish lists for recording authorised fuels and exempted classes of fireplace. This will enable an easier, more effective way of identifying which fuels and classes of fireplace may be lawfully used in Wales' Smoke Control Areas. We are also ensuring manufacturers can sell their products without hindrance. We did not consult stakeholders or the wider public on this provision as it does not change policy (rather it improves the operation of the existing smoke control regime in Wales). The move away from subordinate legislation to published lists will bring Wales in line with the position in England and Scotland. In the Clean Air Plan, where we outlined and sought views on the work we propose to undertake in relation to domestic burning (such as the regulatory and non-regulatory actions listed in the consultation), we referred to existing work which was being undertaken through the UK Environment Bill to exemplify actions taken to date.

Part 5 introduces a range of measures to strengthen the resilience of water and wastewater services by enhancing the water industry's long-term planning regime and to modernise the regulation of water and sewerage companies to make it more flexible and transparent.

The 21<sup>st</sup> Century Drainage Programme was set up by Water UK (a national body consisting of water and sewage undertakers across the UK and Ireland), to consider how to ensure water company planning, investment, delivery and regulatory policy relating to the design of the UK's sewerage infrastructure can be improved and updated to meet the needs of current and future generations.

It undertook research and developed tools to better understand the current and long term issues facing the drainage sector. The aim of the Programme was to understand the current and long term requirements of our drainage networks and to develop an evidence based, transparent and collaborative planning framework to ensure the provision of resilient and affordable drainage services. It adopted a partnership-based approach, working with water companies, regulators, local authorities, and NGOs. Welsh Government and Natural Resources Wales are members of the Programme Steering Group.

The programme recommended putting planning for drainage and wastewater services on a statutory footing, following a similar approach already in place for water resources planning. The approach taken by the project, and the proposals strongly aligned with commitments in the Welsh Government Water Strategy for Wales, including the following;

- We will work with water companies, regulators and local authorities to introduce planning for waste water and sewerage management. Long term collaborative planning for wastewater and sewerage management is critical to address urban flood risk and deliver Water Framework Directive and Urban Waste Water Treatment Directive outcomes.
- Our aim is for sewerage and drainage systems to be resilient and well maintained, with sufficient capacity to manage the demand placed on them without causing pollution or sewer flooding of people's homes. This will enable us to move towards a preventative approach, another key principle of sustainable management of natural resources.
- The water company planning and regulatory framework for water and sewerage should include:
  - Embedding and aligning Water Company planning with our National natural resource policy and relevant area-based natural resource planning processes to

- ensure planning for water services both informs and takes account of our priorities for natural resources management.
- Collaborative catchment management plans and investment.
  - Resilience measures, such as climate change projections, population growth and new development.
  - A presumption in favour of sustainable solutions, and evidence of their use in preference to expanding or renewing existing infrastructure capacity.
  - A strategy for engaging with stakeholders.
  - Evidence sustainable waste water and treatment solutions have been considered, strong justification where they are not used.
  - Robust, up to date and credible evidence to demonstrate compliance with our mandatory domestic and European obligations.

The Water Strategy was extensively consulted on and laid before the National Assembly. Putting Drainage and Waste water Management Plans (DWMPs) on a statutory basis can ensure other planning processes have regard to the DWMP, and require the relevant stakeholders to engage with and share information with the undertakers for the purposes of preparing DWMPs and Ofwat taking them into account as part of the price review process and the development of the regulatory framework of the industry. It can ensure undertakers keep to their commitment to prepare and consult on DWMPs, enable the Welsh Government to ensure they align with Welsh Government policies and priorities, and provide a clear and transparent process and timetable for the plans. It can also give Natural Resources Wales a clear role to participate in the engagement of the development of the plans, to provide technical guidance to the undertakers and advise the Welsh Government on the quality and robustness of the plans. Without putting them on a statutory footing there is a risk NRW may not allocate or be provided with the resources to give the DWMP's a similar level of engagement as they do Water Resource Management Plans.

The Bill gives the Welsh Ministers powers to make regulations in respect of the content and procedures to be followed on the preparation and publication of the DWMP's. Before using the powers the Welsh Ministers would consult with stakeholders on proposed regulations.

In respect of land drainage, Clause 87 introduces a consultation provision which places a duty on Welsh Ministers to consult appropriate parties to ensure the mechanism for valuation is correct when appraising levies and drainage rates.

## **7. How does the Bill affect existing international obligations?**

I am unable to comment on the wider Bill as this is a matter for the UK Government. However, in respect of the provisions included in the Bill for Welsh Ministers, a number of will contribute to our general international obligations in relation to, for example, the Paris Agreement on climate change through the impact moving to a more circular economy has on decarbonisation. It will also contribute to the UN Sustainable Development Goals, particularly goal 12 Responsible Consumption and Production.

Improved resource efficiency helps us deliver our international commitments to the Sustainable Development Goals and sustainably use of our natural resources as under the Convention on Biological Diversity

Charges for single use plastics will contribute to the Welsh Government's international obligations relating to reducing marine litter, of which plastic is the largest material. It is the high levels of plastic in the marine environment, and the potential environmental impacts this is having, which is driving action on plastic at an international level. The UK Marine Strategy is an overarching framework covering several marine components including marine

litter. It is the UK and devolved administrations obligation to place measures and set targets in order to achieve 'Good Environmental Status'. The programme of measures is due to be reviewed in 2021 and will allow the opportunity for UK Government and devolved administrations to put in place necessary measures and reduce the amount of marine litter in our seas.

### **The Assembly's Legislative Competence**

**8. The UK Government's Explanatory Notes do not consider that clauses 19 and 43 of the Bill will require the Assembly's consent. In contrast, you state in your LCM that clause 19 and clause 43 (in so far as it relates to clause 19) do require the Assembly's consent. Could you please expand on the reasoning in the LCM as to why you consider that these clauses require the Assembly's consent? In particular, how can the National Assembly legislate to place a requirement on a Minister of the Crown to make certain statements during UK Parliament proceedings?**

My determination of the requirement for consent in relation to clause 19 (and by association clause 43) is based on our assessment of the purpose of this clause. In my view, the purpose of this clause is environmental protection, a devolved subject matter. Parliamentary process is the means of delivering protection against non regression, not the purpose in itself.

It is doubtful the Senedd could replicate such a provision requiring the Minister of the Crown to carry out certain Parliamentary actions. However, an argument could be made for the Senedd to legislate for Wales to provide 'substantially the same effect' as clause 19. For example, requiring a Minister of the Crown to lay a similar statement before the Senedd when proposing to legislate in relation to Wales.

Unlike the rest of the Bill, 'environmental law' for the purposes of this clause includes devolved legislative provision. The effect of this is the above requirements apply equally to UK Bills involving 'environmental law' applying in Wales, in the same way as England.

**9. Can you provide an update on the discussions taking place with UK Government around clauses 19 and 43? What is the Welsh Government's position if agreement cannot be reached on these clauses?**

Discussions have continued on these clauses, but have slowed during the pausing of the Bill. We have continued to press the UK Government to recognise the need for Welsh Ministers to be consulted before such a statement is made.

I believe we can reach some form of agreement in relation to these provisions. If agreement cannot be reached we will need to take this into consideration, amongst other factors, when we consider if a future UK Bill is an appropriate vehicle for delivering Welsh policy.

**10. What discussions have you had with UK Government around clause 24(4) of the Bill? Can you update us on the progress of those discussions? Will the UK Government be seeking to amend clause 24(4) to strengthen the co-operation duties of the Office of Environmental Protection with a future Wales governance body?**

Clause 24(4) places a duty on the OEP to consult a devolved environmental governance body if it considers a particular exercise of its functions may be relevant to the exercise of a devolved environmental governance function.



It has long been the Welsh Government's view the respective environmental governance bodies in England and Wales will need to work closely together to identify and act on complaints which may be cross border in nature or touch on both reserved and devolved matters.

Citizens in both countries also need to have ease of access to a complaints process with the onus being on the environmental governance bodies to facilitate rather than citizens having to navigate the reserved/devolved landscape.

The proposed duty to consult falls short of providing for this cooperative approach, as it does not allow for early identification of where the bodies may need to work together and for the Welsh body to inform the determination of whether an investigation is of relevance to it. Moreover, it does not allow for joint investigations to be undertaken and for the sharing of best practice and expertise between the bodies. Accordingly, we are seeking an amendment to the Bill to enable cooperative arrangements.

Discussions have continued with Defra on how the bodies can cooperate to consider complaints together, share information and, where appropriate, undertake joint investigations.

**11. The UK Government's Explanatory Notes do not consider that the general provisions in Part 8 of the Bill will require the Assembly's consent. In contrast, in your LCM, you note that the general provisions of the Bill will require the Assembly's consent. Could you please specify which general provisions you consider require the Assembly's consent? Could you provide an update as to any discussions you have had with the UK Government on this issue and whether the UK Government now agrees that these clauses will require the Assembly's consent? What is the Welsh Government's position if agreement cannot be reached?**

We consider the general provisions of the Bill will require consent in so far as they pertain to the provisions of the Bill which require consent as follows:

*Clause 21 in relation to Schedule 1 — The Office for Environmental Protection*

*Clause 45 in relation to Schedule 2 — Improving the natural environment: Northern Ireland*

*Clause 46 in relation to Schedule 3 — The Office for Environmental Protection: Northern Ireland*

*Clause 47 in relation to Schedule 4 — Producer responsibility obligations*

*Clause 48 in relation to Schedule 5 — Producer responsibility for disposal costs*

*Clause 49 in relation to Schedule 6 — Resource efficiency information in relation*

*Clause 50 in relation to Schedule 7 — Resource efficiency requirements*

*Clause 51 in relation to Schedule 8 — Deposit schemes*

*Clause 52 in relation to Schedule 9 — Charges for single use plastic items*

*Clause 63 in relation to Schedule 10 — Enforcement powers in relation*

*Clause 69 in relation to Schedule 11 — Local air quality management framework*

*Clause 70 in relation to Schedule 12 — Smoke control in England and Wales*

*Clause 78 in relation to Schedule 13 — Modifying water and sewerage undertakers' appointments: procedure for appeals*

*Clause 90 in relation to Schedule 14 — Biodiversity gain as condition of planning permission*

*Clause 100 in relation to Schedule 15 — Controlling the felling of trees in England*

*Clause 115 in relation to Schedule 16 — Discharge or modification of obligations under conservation*

*Clause 122 in relation to Schedule 17 — Application of Part 7 to Crown land*

*Clause 124 in relation to Schedule 18 — Consequential amendments relating to Part 7*

*Clause 125 in relation to Schedule 19 — Amendment of REACH legislation*

These clauses are only relevant provisions (and thus requiring an LCM) insofar as the Schedules which they relate to make relevant provisions, those general provisions could be made by the Senedd.

### **Delegated powers**

#### **12. The Bill provides a number of delegated powers to the Welsh Ministers. Can you outline why all of these powers are necessary? Did the Welsh Government request these powers?**

The powers are required primarily to ensure policies will continue to function in the long term, by providing some flexibility to accommodate future changes in evidence, approaches, policymaking, industries or technologies which are not necessarily predictable at this time.

In the case clause 66, to amend existing penalties for the FPNs relating to fly-tipping and householder duty of care and clause 125 for REACH, the powers are required to replace those lost under of s2(2) of the European Communities Act, which enables us to update secondary legislation.

I can confirm in all cases Welsh Government requested these powers.

**Clause 47 Schedule 4 Producer responsibility obligations** - Provides the flexibility to state, in regulations, which producer or business to impose producer responsibility obligations on and on what products or materials and what steps are required in order to achieve those obligations.

**Clause 48 Schedule 6 Producer responsibility for disposal costs** - Facilitates the making of separate provision about enforcement for Wales. It will also provide flexibility to make different provision in relation to particular types of products, for example by specifying different bodies as enforcement authorities in different cases.

**Clause 49 and 50 Schedules 6 and 7 - Resource efficiency information** - Allows the Welsh Government to develop policy proposals for, and make separate regulations for each type of product regulated.

It will also provide flexibility to make different provision in relation to particular types of products, for example by specifying different bodies as enforcement authorities in different cases.

Product-specific information requirements may be detailed and technical and thus more suitable for inclusion in regulations than in primary legislation.

**Clause 51 Schedule 8 Deposit schemes** - Allows Welsh Government to develop policy proposals for, and make, separate regulations for each product group regulated.

**Clause 52 Schedule 9 Charges for single use plastic items** - Although we work in conjunction with other administrations, Waste and recycling is a devolved matter. Having this devolved power allows Welsh Ministers to define items subject to any charge, the amount charged and the requirements and the appointment of any administrator to oversee the charge which reflect Welsh priorities.

**Clause 55 Electronic waste tracking** - Aligns waste tracking legislation with legislation for waste management, which is currently controlled through secondary legislation.

The waste tracking regulations will provide essential data to help develop a circular economy and future waste policy. Gathering data on wastes and those who are managing it will make it easier to determine who is (or was) responsible for the waste at any given time. This will support regulation of wastes and help identify those responsible for any illegal waste.

**Clause 57 Hazardous waste: England and Wales** - Aligns with the current regulatory system for hazardous waste, which is currently controlled through secondary legislation. See also the answer to Q13 below.

**Schedule 10 (Linked to clause 63 enforcement powers)** - There is a gap in the Welsh Ministers current powers in relation to waste enforcement. There are circumstances where rogue operators dump waste illegally with potentially severe consequences for local communities and the environment. There may also be situations where a waste collection contract fails, or a company or authority enters into receivership and it cannot carry out or pay for waste collection and removal liabilities which it is contracted to deliver which can also impose environmental costs and negatively affect communities.

Welsh Ministers can currently direct any person keeping waste on land to take the waste to a specified place and to direct waste operators to take and treat the waste. However, they cannot direct a waste carrier to collect waste from a specified place and take it to a specified waste site. This means in circumstances where waste has been dumped illegally and the landowner and/or criminal cannot be traced or the landowner cannot fund the removal, and in the case of major incidents, or where a waste collection contract fails, Welsh Ministers do not have the power to direct a waste carrier to remove the waste.

This provision would allow Welsh Ministers to give direction to authorised waste carriers to collect waste from a specified place and take it to a specified waste management site in circumstances where public health, communities or the environment are at risk. As with the current powers of direction, Welsh Ministers would also have the power to direct the keeper of the waste to pay the waste carrier's reasonable costs. If this is not possible, Welsh Ministers will also have the power to reimburse the waste carrier directly.

**Clause 65 Littering enforcement** - Welsh Ministers will need the flexibility to be able to change or update the prescribed conditions an authorised officer of a litter authority must meet to reflect changing needs and developments within the sector, meaning primary legislation would not be an appropriate vehicle for this power.

Whilst the existing regulations to deal with littering operate on an England & Wales basis and our guidance is broadly the same, there are some differences in how we implement our policies which warrants Welsh Ministers having delegated powers. For example, the Welsh Government works very closely with Local Authorities and the Third Sector to help develop and implement the educational and behavioural change aspects of tackling littering. We may, therefore, wish to have the flexibility to incorporate this type of approach into any new enforcement guidance we develop.

The power to issue statutory guidance is necessary to ensure the various litter authorities undertake littering enforcement functions in a consistent and proportionate way.

**Clause 66 Fixed Penalty Notices** - Taking a power to amend penalties in secondary legislation, allows for them to be kept under review, see if they are working effectively and amend them if needed.

See also the answer to Q13 below.

**Clause 67 Regulation of polluting activities** - Allows for the detailed conditions for any exemption (from the prohibition on carrying out an activity without a permit) to be set and amended by the regulator.

See also the answer to Q13 below.

**Clause 75 Water resources management plans, drought plans and joint proposals** - Allows flexibility to consider which undertakers should be directed to prepare joint proposals and when.

**Clause 76 Drainage and sewerage management plans** - Allows Welsh Ministers to intervene to ensure drainage and sewerage management plans address emerging challenges which may arise and therefore remain efficacious

**Clause 82 Power to amend legislation to make technical updates in the field of water quality** - Required to ensure substances and standards in relation to those substances or in relation to the chemical status of surface water or groundwater do not remain fixed after the UK withdraws from the EU. The power would enable action to be taken legislatively to tackle those new priority substances most accurately representing harm to the water environment.

**Clause 87 Valuation of other land in drainage district: Wales** - It is necessary to revise and update the methodology of calculating the split of income between special levies and drainage rates. The provisions within the Bill would allow the value of other land to be calculated via an alternative methodology (as IDBs will be able to make use of alternative data for these calculations), which will be set out in secondary legislation subject to the affirmative procedure.

Setting out the valuation calculation in regulations is appropriate and proportionate, because these provisions deal with details of a subsidiary and technical matter.

**Clause 88 Valuation of agricultural land in drainage district: England and Wales** - The Bill makes provision to allow the secondary legislation to provide an alternative methodology for calculation of the value of chargeable land (agricultural land and buildings) to avoid the potential distortion of the apportionment calculation.

Setting out the valuation calculation in regulations is appropriate and proportionate, because these provisions deal with details of a subsidiary and technical matter

**Clause 89 Disclosure of Revenue and Customs information** - The power to add to the list of qualifying persons set out under new section 37A(3)(h) is needed in order to ensure other persons requiring access to HMRC information for a qualifying purpose, who are identified at a later date, may be added to the list in secondary legislation, in circumstances where the framework of regulatory bodies operating in this area changes.

**Clause 125 Amendment of REACH legislation** - Section 1 of the European Union (Withdrawal) Act 2018 repeals the European Communities Act 1972. This means after exit day the only way to amend the REACH Enforcement Regulations 2008 and REACH EU Exit Regulations would be through primary legislation.

This power is needed to ensure the REACH Enforcement Regulations 2008 and REACH EU Exit Regulations can be kept up to date.

**13. Could you outline the policy you will seek to make in regulations, using the powers contained in the Bill? When do you envisage that such regulations would be laid?**

We would require secondary legislation in the form of regulations to implement both DRS and EPR for packaging. These are key work areas which are progressing as a joint programme of work. The exact timetabling for when these regulations will be laid has not been finalised as the current focus of work has been the progressing a second round of consultation on both schemes. In due course we will consider other waste streams for new legislation on EPR, and we consulted on this in our recent consultation on a new Circular Economy Strategy for Wales. In due course we will discuss new legislation for environmental product labelling and standards with the other UK administrations.

**Clause 55 – Electronic tracking of waste:** This provision comes into force two months after the Act comes into force. The timetabling for when the Regulations will be laid has not been finalised, as Welsh Government and Natural Resources officials are working with their counterparts in the other UK nations on how we can digitise waste tracking processes. In particular, how we record what happens to waste as it moves from production to recovery or disposal.

**Clause 57 – Hazardous waste:** The Welsh Minister have discretion to decide when the provision comes into force. Much of the law on hazardous waste is derived from EU law. The amendments being made by the Bill would enable the Welsh Ministers to continue to be able to amend or replace regulations which govern how hazardous waste is managed, after the UK has left the EU.

**Clause 61 – Charging powers:** The exact timetabling of bringing these powers into force has not yet been finalised. The powers:

- add new charging powers for NRW in relation to new or amended duties conferred on them in the future. The new powers will allow NRW to recover their reasonable costs of appropriate investigation, intervention and enforcement of current producer responsibility schemes and, as they are established, new EPR schemes;
- allow NRW to apply existing environmental permitting scheme charges to exempt waste operations, including registration and subsistence charges where appropriate, to fund compliance monitoring of these operations; and
- for NRW to create charging schemes for its functions related to the illegal disposal of waste and permitted waste sites. This would allow NRW to recover its reasonable costs of appropriate investigation, intervention and enforcement of illegal waste sites from those illegal waste sites. Currently, NRW is able to charge for the operation and compliance checking of the environmental permitting regime. However, they are unable to charge for the enforcement of those uncompliant with permitting requirements or operating illegally outside of the permitting regime.

**Clause 66 - Fixed Penalty Notices:** We will not be making regulations at this time. The Welsh Ministers have discretion to decide when the provision comes into force. Repeal of the ECA removes the current power to alter the levels of these penalties through secondary legislation, and so a new power is required to enable the level of these penalties through secondary legislation, to enable the level of the fines to be amended either up or down.

**Clause 67 - Exemptions:** This provision comes into force two months after the Act comes into force. The power allows the Welsh Ministers to set out in regulations which conditions relating to exempt activities (i.e. those not requiring an Environmental Permit) NRW can

determine, instead of those conditions having to be set out in regulations. Setting conditions currently requires Welsh Ministers to make new regulations each time a condition is changed. Allowing NRW to set the conditions will help ensure appropriate controls are in place as the waste market shifts. The timetabling for making regulations under this Clause have not been finalised.

**Clause 52 - Single Use Plastics** These powers will help support the Welsh Government's commitment to reduce the use of unnecessary single-use plastic items and to help meet our long-term goal of zero waste by 2050. The Welsh Government is already seeking to ban or restrict the sale of several commonly littered single-use plastic items including plastic cotton buds, straws and plates.

However, there are other single-use plastic items not included in the above measure and have ongoing negative externalities arising from their production, use and inappropriate disposal, for example disposable coffee cups and food containers. Since many of these plastic items are provided to the consumer seemingly "free of charge" and complementary to the purchase of other products, consumers are currently not incentivised or actively encouraged to limit their consumption to sustainable levels. We believe without further intervention, consumption levels could remain the same or even increase over time. This contributes to waste ending up in landfill and incineration following their use, or as litter causing pollution and harm to the natural environment.

We believe such items could, potentially, be dealt with through the provision of a charging regime similar to the one in place for single use carrier bags. We have seen applying a charge to single-use plastic items has led to positive change in consumer behaviour. Without the powers to require levies on other single-use plastic items where it will effectively reduce consumption, the negative externalities outlined above cannot be mitigated using legislation. However, secondary legislation will only be implemented for such items where the evidence shows charging is the most effective policy mechanism to reduce consumption in favour of readily available and more sustainable alternatives.

**Clause 65 - Litter enforcement:** We intend to create a specific power for Welsh Ministers to issue statutory guidance on the use of the enforcement powers in Part IV of the EPA 1990, to which those exercising the powers must have regard. This is intended to address the perception enforcement action may be used by Local Authorities or private companies, to raise revenue at the expense of 'unwary' citizens or enforcement action is otherwise illegitimate, unfair or disproportionate, by providing clear guidance to Local Authorities on the appropriate use of their enforcement powers, to which they must have regard. This is intended to promote greater consistency and improve public confidence in the legitimacy of enforcement action.

We also intend to extend Welsh Ministers' power to prescribe conditions to be satisfied before a person may be authorised to issue fixed penalties for littering. This is intended to act as a further safeguard against inappropriate enforcement activity by ensuring authorised persons must have met certain conditions relating to the skills, quality and professionalism of their activities before they can issue fixed penalties.

We will consult further with the industry, training providers, Local Authorities and other key stakeholders before exercising this extended regulation-making power. This could potentially result in prescribing conditions such as the attainment of a specific qualification, accreditation or charter-mark.

**Clause 87/88** - provides a regulation making power for the Welsh Ministers to make provision for the value of other land in a Welsh internal drainage district to be determined.

As the law stands IDBs calculate the value of drainage rates for non-agricultural land using a methodology based on valuation lists which are outdated and incomplete. The regulations would be subject to the affirmative procedure. There is currently no timescale for new regulations to be in place

**Clause 125** - The powers in respect of REACH are necessary to deliver a functioning chemicals regime. Certain changes which would help UK REACH function more effectively were outside of the scope of the powers within the Withdrawal Act. We are going from a system designed for 28 member states to a single state with four nations. Therefore, some aspects of REACH are impracticable or overly burdensome on businesses. This is likely to require changes to the existing REACH regulations to ensure they are suitable for use on a UK-only scale. In addition, when we lose section 2(2) powers of the European Communities Act 1972, we will be unable to make any changes to REACH enforcement regulations.

Without these powers UK REACH would have to operate in the context of the EU Exit SIs. In this scenario we could quickly face a number of risks and issues, particularly in relation to the deadlines for registration and repeat animal testing. The powers may also be needed to mirror changes to the EU regime which we wish to maintain. REACH covers reserved matters such as workplace health and safety and product standards, as well as devolved areas like public health and the environment. In this respect, measures to restrict a chemical inflicting harm to human health as well as incurring environmental damage would require the same legislative instrument. Therefore, legislating for such powers in the Assembly would be difficult.

**14. Some of the delegated powers are powers to amend primary legislation. Two of these powers (clauses 66 and 76) are subject to the negative procedure. Do you think the negative procedure is appropriate in these cases? Why have you not asked for regulations made under these powers to follow the affirmative procedure?**

**Clause 66 Powers to Vary Fixed Penalty Notices** - Negative procedure is considered appropriate as the fixed penalty notice scheme is already in place and this power allows only amendment to the amount of penalty to be charged. Welsh Ministers are required to act in accordance with public law principles and, accordingly, any increase in the penalty amount will need to be reasonable and fair. The approach is consistent with similar powers in section 34A(10), 46B(5), 47ZB(6) and section 97A(3) [EPA 1990](#), which are subject to the same procedure.

**Clause 76 Drainage and sewerage management plans** - Negative procedure is appropriate as the regulations would be making minor and technical changes to the way in which plans are published and this may need to be done frequently. The Regulations would not make amendments to the content of the plans themselves.

The primary legislation puts the plans on a statutory footing and sets in place a regulatory framework. The regulatory powers relate to detailed procedural aspects of the preparation, consultation, timing and publication of the plan.

**15. Clause 75 amends the Water Industry Act 1991 to omit certain procedural requirements regarding the preparation and review of Water Resources Management Plans from the primary legislation. Instead, the Welsh Ministers will have a power to set the requirements out in regulations. Why is it appropriate to move this requirement from primary to secondary legislation?**

The primary legislation puts the plans on a statutory footing and sets in place a regulatory framework. These sections regulatory powers relate to detailed procedural aspects of the

preparation, consultation, timing and publication of the plan. This will align the water resource planning procedures more closely with the procedure for preparing drainage and wastewater plans.

**16. Clause 75(3) omits sections 37B and 37C from the Water Industry Act 1991. Can you explain why these provisions are being removed? Will the Welsh Ministers be replacing these provisions through secondary legislation?**

The primary legislation puts the plans on a statutory footing and sets in place a regulatory framework. These sections relate to detailed procedural aspects of the preparation, consultation, timing and publication of the plan which are more appropriate to be prescribed by secondary legislation, which we will consult on before making.

**17. Clause 76 inserts sections 94B and 94D into the Water Industry Act 1991. Sections 94B and 94D provide that where the Assembly resolves that an instrument containing regulations made by the Welsh Ministers is annulled, “Her Majesty may by Order in Council revoke the instrument”. Why is this different to the approach for regulations made by the Welsh Ministers set out in the Statutory Instruments Act 1946?**

Section 11A(5)(b) of the Statutory Instruments Act 1946 provides in a case of a statutory instrument made by Welsh Ministers alone, the power of Her Majesty to revoke, by Order in Council a statutory instrument laid before the National Assembly for Wales, is a power of the Welsh Ministers to revoke it by order.

The newly inserted sections 94B and 94D to the Water Industry Act 1991 contain powers to make Regulations (new s.94D) and Orders (s.94B) made by both the Welsh Ministers in relation to Wales and the Secretary of State in relation to England, due to the cross border nature of those instruments.

Therefore, s1A(5)(b) will not apply to these instruments. The 1946 Act does not make express provision for a scenario where an instrument is made by both Welsh Ministers and Secretary of State. Therefore it was felt most practical for Her Majesty to provide for the revocation of both instruments.

**18. Clause 76 also inserts section 94C into the Water Industry Act 1991 which provides a power for the Welsh Ministers to make provision, by regulations, about the procedure for preparing and publishing a drainage and sewerage management plan. Those regulations can confer a power on the Welsh Ministers to make provisions by directions. Do you think the negative procedure is appropriate for regulations made under section 94C?**

The primary legislation puts the plans on a statutory footing and sets in place a regulatory framework. The regulatory powers relate to detailed procedural aspects of the preparation, consultation, timing and publication of the plan. The negative procedure is appropriate for regulations made under this section.

**19. In relation to the Secretary of State’s powers in clause 81 (Water quality) can you explain why the Secretary of State’s powers are more limited in Scotland than in Wales? What discussions have you had with the UK Government about this matter?**

There have been no discussions with the UK Government on this matter,

**Concurrent plus powers**



**20. The Bill includes a number of ‘concurrent plus’ powers (including in clauses 47 to 51, 81, and 125, and Schedules 4 to 8) which reduce the Assembly’s legislative competence in the respective areas. Can you explain why you consider the concurrent plus powers are appropriate? What is the Ministerial commitment that is referred to in your LCM?**

The policy intention of Clauses 47-51 is to develop a joint UK wide regulatory approach to Extended Producer Responsibility which allows for a consistent scheme to operate across the UK for packaging, and potentially other products. The ability to have the option to develop a consistent scheme is important for market reasons. This includes the porous nature of the extensive border with England and the way many retailers operate their distribution systems. Operating different EPR systems between Wales and England might incentivise fraud, and would be confusing for both retailers and the public.

To enable this consistency, we are seeking a concurrent plus approach, the effect of which would be, Welsh Ministers, unless consent is provided, would carry out functions in Wales. Where it was considered appropriate, the Welsh Ministers could give consent to the Secretary of State (SoS) to exercise the powers in relation to Wales. Obtaining the powers for Welsh Ministers enables them to have flexibility in the future, and would also allow them to bring in EPR recovery for other products in Wales (for example disposable nappies). The inclusion of these powers in the Bill is in line with the First Minister’s criteria on the use of UK Bills as the interconnected nature of the relevant Welsh and English administrative systems mean it is most effective and appropriate for provision for both to be taken forward at the same time in the same legislative instrument.

Concurrent powers are also sought in respect of clause 81, which is concerned with technical updates in the field of water quality. It allows for the Secretary of State to make regulations or modify legislation for the purposes of:

- making provision about the substances to be taken into account in assessing the chemical status of surface water of groundwater;
- specifying standards in relation to those substances or in relation to the chemical status of surface water or ground water

The application of such powers will be in relation to river basin districts. Whilst we have one river basin district wholly in Wales, two of our river basin districts are cross border (the Dee and the Severn). The Ministerial powers in respect of those districts are currently exercised jointly by the Welsh Ministers and SoS. Given the existing legislative framework is exercised in such a way it is desirable be closely aligned with Defra on these matters so as to ensure a common approach in relation to the cross-border river basin districts.

Clause 125 and its associated schedules provides for the amendment of the REACH regulations and the REACH enforcement regulations. This provision is connected to the EU Exit SIs and provides an enabling power to make future amendments to retained EU law. The powers can only be exercised by the Secretary of State with consent of Welsh Ministers where they concern matters within devolved competence. This matches the approach taken with UK-wide powers in the EU Exit correcting SIs for REACH, which are required to enable a UK-wide regime.

Concurrent plus powers are also required in relation to the REACH enforcement regulations. Welsh Ministers currently have the power to amend REACH enforcement regulations in Wales under the European Communities (Designation) (No.2) Order 2007 (<http://www.legislation.gov.uk/ukxi/2007/1349/made>), as does the Secretary of State. The

concurrent plus power has been requested to maintain the status quo and retain powers currently exercisable by both Welsh Ministers and the Secretary of State under EU law.

We have secured the Secretary of State's agreement to amend the Bill, should this be required. This will enable us to include a carve-out of paragraph 11, Schedule 7B of GoWA, which restricts the Assembly's legislative competence to remove or modify Minister of the Crown functions without consent from the relevant UKG Minister. The function is applied where there is a qualified devolved function which includes a function which is to any extent exercisable concurrently.

**21. Will a section 109 Order be brought forward to deal with the carve-out in respect of paragraph 11 of Schedule 7B of GOWA? We are aware that a section 109 Order is being drafted and should be brought forward in the near future; will the issues raised by this Bill be dealt with in this forthcoming section 109 Order? If not, why not and when will these matters be dealt with?**

We anticipate that a section 109 Order will be brought forward shortly and that it will address the concurrent functions issue in this Bill. This would mean amendment of the Bill would not be required.

**22. Are there any areas in which the Welsh Government intends to give consent for the UK Government to make secondary legislation on the Welsh Government's behalf? Will the Welsh Ministers formally notify the Assembly when consent has been given, as per the Standing Order 30C process?**

A concurrent plus approach, has the effect of Welsh Ministers, unless consent is provided, carrying out functions in Wales. Where it was considered appropriate, the Welsh Ministers could give consent to the Secretary of State (SoS) to exercise the powers in relation to Wales.

Welsh Ministers will formally notify the Assembly when consent has been given, as per the Standing Order 30C process

### **Reasons for making provisions for Wales in the Environment Bill**

**23. Are the powers in the Bill intended to be temporary in nature (i.e. will they be replaced by powers in a future Welsh Environment Bill)? If not, why not? If so, why has a sunset clause not been included in the Bill?**

The enabling powers in the Bill will assist us in delivering current and future Welsh policy. We have used the UK Environment Bill as at present there are no immediate plans for a Welsh Environment Bill.

**24. You say, as one of the reasons for making these provisions for Wales in the Environment Bill, that there is currently "no time within the Assembly's timetable to bring forward an Environment Bill that could be used to take forward these provisions." The Government's legislative programme is a matter for it alone to decide upon. Why couldn't the Welsh Government include an Environment Bill in its legislative programme?**

The Welsh Government has finite resources for developing its legislative programme, particularly in respect of those specialists who draft and translate legislation. It makes decisions on the content of the programme based on the available resources and capacity to deliver, which in my portfolio has been significantly affected by the work required to

respond to EU exit. Developing legislation takes time to ensure it is fit for purpose. In addition a Bill has to be introduced by a certain point in a Senedd term to ensure the Senedd has sufficient time for its scrutiny and approval before the next Senedd elections, otherwise the Bill falls. These challenges, combined with the necessary and ongoing work on legislation to respond to EU exit and transition, have meant a Welsh Environment Bill has not been possible. The UK Bill has provided us with an alternative opportunity to put legislation in place in some key areas.

**25. Whilst the environmental governance provisions in the Bill seem to directly relate to the UK's departure from the EU, not all provisions in the Bill seem to be 'Brexit' related. How many of the other provisions in the Bill need to be in place before the implementation period completion day? Are any provisions in the Bill "time critical", and if so why?**

I am unable to comment on the wider Bill as it is for the UK Government to determine how to deliver its policy objectives.

With the loss of section 2(2) of the European Communities Act, which enables us to update secondary legislation where appropriate we have taken enabling powers to update the legislation in some areas such as hazardous waste, water quality powers (priority substances) and REACH.

Under the transition agreement, the UK is obligated to transpose Article 8A amendments to the EU Waste Framework Directive as part of the EU's Circular Economy Package. The Extended Producer Responsibility provisions in the Bill are there to allow us, along with the other nations within the UK, to meet the general minimum requirements in relation to producer responsibility in the Circular Economy Package.

Powers in relation to REACH will need to be implemented shortly after the transition period. When we lose powers under section 2(2), we will be unable to make any changes to REACH enforcement regulations to enable us to keep pace with technical changes. By taking powers in this bill, Government will be able to respond promptly to any implementation issues arising and make workable what is a large and complex piece of EU-derived legislation.

The reason this is time sensitive is due to the fact that there are deadlines and activities/decisions to be made under REACH which are triggered by the end of the implementation period. The loss of the section 2(2) powers is less time critical compared to the need to potentially amend deadlines or to streamline the REACH process when it becomes operational. The section 2(2) powers relate to amending the REACH enforcement regulations. The rest of the REACH regulations were amended by EU law and applied to the UK without the need for domestic legislation. Without the powers included in the Bill, primary legislation would be necessary to address any teething issues with REACH (such as businesses being unhappy with the two year registration deadline).

More generally we would like to introduce all changes as soon as possible, given the benefits described in answer to question 1.

**26. How and when will you review the effectiveness of the Bill for making environmental policy in Wales?**

The review of the effectiveness of the Bill with respect to environmental policy will form part of the on-going policy and evidence review that takes place within Government. This is informed over time from a variety of evidence sources and feedback mechanisms such as

the State of Natural Resources Report prepared by Natural Resources Wales and other environmental metrics and targets that are in place, for example recycling rates, reported fly tipping.

The published lists for authorised fuels and exempted classes of fireplace will be updated, monitored and reviewed annually.

The effectiveness of the land drainage rates & levies provisions will be assessed by the introduction of a more consistent mechanism for review.

### **Accessibility**

#### **27. How will you ensure that the provisions in the Bill, and the subordinate legislation made under it, are accessible to stakeholders and to the wider public?**

As regulations are developed to enact the powers in the Bill our usual call for evidence, engagement and consultation processes will be followed.

#### **28. Are you concerned that having these provisions in UK legislation will have a negative impact on the accessibility of the law, at a time when the Welsh Government is seeking to make Welsh law more accessible?**

We have considered accessibility of law to be a key consideration in taking powers in this Bill. As much of the legislation being amended operates on, at a minimum, an England and Wales basis using the UK Bill to make these amendments ensure there are not multiple similar amendments to a single provision, making it more accessible for the user.

In light of the Counsel General's programme for codification, we of course will consider at some point in the future how we can make environmental law in Wales more coherent and accessible.