

EPGBTWB 24 - Tystiolaeth gan | Evidence from: NFU Cymru

Senedd Cymru | Welsh Parliament

Pwyllgor Newid Hinsawdd, yr Amgylchedd a Seilwaith | Climate Change, Environment, and Infrastructure Committee

Bil yr Amgylchedd (Egwyddorion, Llywodraethiant a Thargedau Bioamrywiaeth) (Cymru) | Environment (Principles, Governance and Biodiversity Targets) (Wales) Bill



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Dear Committee

Consultation on the Environment (Principles, Governance and Biodiversity Targets) (Wales) Bill

NFU Cymru welcomes the opportunity to respond to the Senedd Climate Change, Environment and Infrastructure Committee's consultation on the Environment (Principles, Governance and Biodiversity Targets) (Wales) Bill.

NFU Cymru champions Welsh farming and represents farmers throughout Wales and across all sectors. NFU Cymru's vision is for a productive, profitable and progressive farming sector producing world renowned climate-friendly food in an environment and landscape that provides habitats for our nature to thrive. We see a key role for Welsh food and farming delivering economic, environmental, social and cultural benefits for all the people of Wales whilst meeting our ambition for net zero agriculture.

The importance of the farming industry in Wales cannot be overstated. Welsh farming businesses are the backbone of the Welsh rural economy, the axis around which rural communities turn. The raw ingredients that we produce are the cornerstone of the £9.3 billion Welsh food and drink industry which is Wales' largest employer employing over 228,500 people.

We are proud that the Welsh public associate Welsh farmers, first and foremost, with providing safe, high quality and traceable food and at NFU Cymru we want to ensure that consumers in Wales, the UK and further afield can continue to enjoy and choose the top-quality food that we produce here in Wales – now and in the future.

NFU Cymru recognises that first and foremost the provisions of the Bill create certain obligations in respect of Welsh Ministers, NRW and public bodies relating to their environmental responsibilities. NFU Cymru is however alive to the fact that the creation of these obligations may well ripple out and impact the agricultural sector.

Given farming's role in managing over 80% of land in Wales, and playing an integral part in protecting, maintaining and enhancing our environment alongside their core role in producing high quality, safe affordable food, NFU Cymru is also well aware of the potential implications to the sector of the statutory biodiversity targets under the auspices of the Bill.

We are therefore particularly keen to feed in the Union's views as our membership may well be indirectly and directly affected by this new piece of legislation.

The general principles of the Bill and the need for legislation to deliver the stated policy intention

NFU Cymru recognises that as a result of EU exit, an oversight gap has opened up with regard to environmental governance in Wales. We have seen the UK home nations legislate in slightly different ways in order to close this governance gap in their respective territories, with Wales the last of the home nations to do so, beginning with the introduction of this Bill.

Although we note that it is desirable to close the governance gap that is before us, and move away from the interim arrangement which has subsisted for the last few years, we do have a number of concerns about the way it is proposed that the Office of Environmental Governance Wales is to operate, the objective and principles as well as the biodiversity targets, and we will expand upon these issues in the course of this submission. It should be noted that the comments below very much reflect NFU Cymru's early thinking with regard to the Bill, and that these views may evolve and change during the course of the passage of the Bill.

The Bill's provisions, including whether they are workable and will deliver the stated policy intention

Part 1 – The Environmental objectives and principles

The environmental objective

In its draft legislation, Welsh Government has decided to set out the environmental objective on the face of the Bill, and to incorporate it into several other provisions of the Bill, setting the context against which many of the other provisions will apply.

For example the Bill imposes requirements on Welsh Ministers and certain public bodies to apply the environmental principles in such a way as to further the environmental objective. Whilst this may offer certain attractions, the putting of the objective on the face of the Bill and the close integration of the objective to several other provisions in the Bill does mean that any changes or updating of the objective will mean that a number of changes will have to be made in lock-step.

NFU Cymru believes that there should be an express reference to social and economic considerations under the environmental objective. Although the references in the Bill to the Wellbeing of Future Generations Act do arguably bring social and economic considerations into scope, we would argue that these need to be put on the face of the Bill.

The environmental principles

The draft Bill obliges Welsh Ministers to have 'special regard' to the environmental principles when making policy which could have an impact on the environment. NFU Cymru considers the requirement to have 'special regard' to be particularly stringent and we would consider an obligation to have 'due regard' to be sufficient, i.e. that Ministers show that the principles have been considered and given due weight, rather than they have been given special regard.

Our view is that a 'special regard' provision, particularly without any reference to proportionality in the application of the environmental principles (as is the case in the draft legislation) is too rigorous.

These principles and the level of regard attached to them would also apply to Natural Resources Wales when making policy and as NRW has enforcement functions, this could impact on enforcement as an enforcement policy may fall within the scope of these provisions.

The obligation placed on public bodies when assessing programmes and plans relating solely to Wales under the Environmental Assessment of Plans and Programmes (Wales) Regulations 2004, is to 'have regard' a weaker formulation than a 'special regard' obligation. Public bodies will still be required to integrate environmental protection in the carrying out of their functions, and until the Welsh Government produces further guidance in this regard, via the 'environmental principles and integrating environmental protection statement' it is difficult to predict exactly what this will look like.

The Bill makes no express requirement for the statement to include definitions of the environmental principles, although the Welsh Ministers may include 'any other matters the Welsh Ministers consider appropriate'. If the principles are left undefined, then this creates uncertainty as to what is meant by the principles for all those charged with having 'special regard' to them.

It is quite possible therefore, that the interpretation of the principles may end up being subject to litigation and therefore develop and evolve through case law. The risk here is that the principles end up being interpreted in a manner which is not currently envisaged, and once a body of case law exists, it is likely that Welsh Ministers would need to legislate once again to take control of the meaning of these principles.

Part 2 – The Office for Environmental Governance Wales (the OEGW)

The second part of the Bill provides that the OEGW must exercise its functions for the general purpose of contributing to the environmental objective, impartially, objectively, proportionately and transparently. We would question the use of the mandatory language of 'must' in relation to the 'transparency' provision, and feel that 'have regard' would be a more appropriate formulation in relation to transparency, as there are likely to be situations where transparency might not be appropriate, and for example, certain details may well need to be kept confidential whilst an investigation is ongoing.

In relation to investigations the OEGW will be equipped to investigate whether a public body has at any time failed to comply with environmental law, with no apparent restriction on how far back the OEGW can look when investigating past failures, with the explanatory memorandum confirming that this includes failures which occurred before the OEGW was established.

NFU Cymru's view is that there should probably be a cut-off date beyond which the OEGW cannot investigate, this could perhaps be the day on which the Act comes into force, the day on which the Interim Environment Protection Assessor was appointed or perhaps the day on which the UK left the EU's single market and the role of the oversight role of the EU Commission fell away.

Given that that the OEGW's resources are going to be limited, NFU Cymru believes that its priorities should be the investigation of alleged breaches which are recent, near recent and current.

Investigations and Compliance notices

Section 15 empowers the OEGW to investigate any matter relating to the failure to comply with environmental law, the implementation and application of environmental law and the effectiveness of environmental law. Potentially this puts any breach, no matter how minor within the scope of the OEGW, whereas in England for example, it is only suspected serious failures which the Office of Environmental Protection can investigate. This lower threshold does potentially mean that the OEGW could have a higher case load than might otherwise be expected as potentially minor breaches fall within the scope of the OEGW.

Compliance notices may be issued where the OEGW 'consider that' a public authority is failing to comply with environmental law, this would appear to be a lower bar than that set for the serving decision notices by the Office of Environmental Protection in England ('satisfied beyond reasonable doubt') and for the serving of information notices ('has reasonable grounds for suspecting')

NFU Cymru believes the period of time which compliance notices allow for the required actions to be taken to be quite short at 30 days, compared to the two months, for example, that is available for public bodies comply with a decision notice in England.

If a public authority fails to comply with a compliance notice, the OEGW can seek a High Court order compelling the public authority to take the action specified in the notice or as varied by the court. The court can also order the OEGW to withdraw part of the compliance notice if it considers the notice, or part of it to be unreasonable.

In contrast to the situation in England, the High Court process as provided for in the Bill only allows the High Court to consider whether the compliance notice has been complied with, whereas the process in England allows the High Court to consider if there has been a breach of environmental law. This is a significant difference and NFU Cymru believes there may be merit in looking at whether the High Court should be able

to consider whether there has been a breach of environmental law in Welsh cases as well.

The OEGW has the power to publish an improvement report where it is satisfied that a public body is failing or has at any time failed to comply with environmental law or implement environmental law effectively. An improvement report can also be published where the OEGW considers that the Welsh Ministers have failed to make effective environmental law. Welsh Ministers will then be obliged to publish a response to an improvement report, in the form of an improvement plan, which must include either what actions Welsh Ministers propose to take to implement the recommendations, the timescales and the reporting and monitoring processes they intend to follow, or alternatively an explanation as to why the Welsh Ministers do not intend to implement the recommendations.

We note that the OEGW does not appear to have any particular recourse if Welsh Ministers do not implement the recommendations, other than perhaps reverting to the compliance notice procedure.

Funding of the OEGW

NFU Cymru notes that the funding basis for the OEGW is *'That the Welsh Ministers may make payments to the OEGW of such amounts, at such times and on such conditions as the Welsh Ministers may determine'*. This formulation is perhaps somewhat problematic as it creates no obligation for example, to ensure that there is sufficient funding available to enable OEGW to fulfil its obligations and additionally conditions can be imposed on any/all of the funding provided to OEGW, and this has the potential to weaken the effectiveness and independence of the OEGW.

Biodiversity Targets

The Bill does not include a requirement for biodiversity targets to be set over a minimum period of time nor does it set a maximum duration, this leaves Welsh Ministers with significant latitude to determine whether a short or long-term target is most suitable for a particular issue. Whilst this allows for greater freedom, it often takes considerable time to see measurable progress, and so it is open to question whether short term targets would be the most effective or suitable approach. However, and conversely, it is also open to Welsh Ministers to set long term targets and so, how this power is exercised will be key.

The definition of native species chosen in the Bill is of concern to NFU Cymru. Welsh Government has opted for the following definition *'those that currently occur naturally in Wales, as well as those that have done so in the past, even if they became extinct and have since been reintroduced'*. NFU Cymru's members would rightly be concerned about the potential implications of this chosen definition in the context of re-introduced species.

Species re-introductions are controversial and a cause of concern for our members. As well as legal, government sanctioned re-introductions, we are of course seeing an

increasing trend of illegal, unapproved species reintroductions. Such illegal releases need to be dealt with swiftly and effectively, with the animals in question removed before becoming established in the wild, with those responsible for such illegal releases subject to legal proceedings.

NFU Cymru would suggest that the definition of native species on the Bill be amended or made more specific, by for example limiting it to species currently present in Wales, or which have been naturally present in Wales within a particular timeframe, for example all those species present in Wales on the day on which the UK ceased to be a EU member state, creating a baseline position or snapshot from 31st January 2020.

Without prejudice to our concerns and deeply held misgivings about species re-introductions, NFU Cymru's view is that there must be sufficient weight given to the views of landowners and land managers if at any time in future, species re-introductions are being considered.

The Bill as drafted does not create an express requirement to engage with landowners or their representatives when setting or reviewing biodiversity targets, the only requirement is that the Welsh Ministers must 'seek advice from persons they consider to be independent and have relevant expertise'.

This is concerning, not least because such changes could impact how land is used and managed, and of course around 80% of land in Wales is used for agriculture, and without a duty to consult landowners and their representatives there is a significant risk that their valuable insights are lost and that important considerations could be overlooked. Such an approach also risks that relations between Welsh Government and farmers could be strained and damaged.

The Bill will place an obligation on Welsh Ministers to review biodiversity targets 'from time to time', however no fixed time period is set, except in cases where a target has not been met by its stated deadline, expressed another way, unless a target has been missed, there is no legal requirement for regular or scheduled reviews. We would suggest that the Bill does need to specify the review of such targets at intervals, perhaps the mid-point where suitable, in order to ensure that the targets remain relevant and up to date.

We consider the provision for the revoking or lowering of targets to be sensible in order to allow for changes in circumstances or changes in the evidence base to which Ministers had regard when originally setting the targets.

With regard to reporting on biodiversity targets, Welsh Ministers must report on how much progress is being made towards meeting the biodiversity targets set out in regulations, and whether those targets are likely to be achieved. These reports will need to be produced every three years to show what has been done during that time.

Whilst regular reporting will help keep track of developments, a three-year period might not be sufficient to show any meaningful progress towards biodiversity targets, particularly if set over the long term. Because progress might not be visible, reports

produced too early may lead to the inference that little is being achieved, when in reality it might be too soon to measure progress in a meaningful way. Producing such reports takes time and resource and so it is important that the duration is appropriate to ensure that the reports are meaningful.

We therefore advocate a flexible reporting process according to the nature and/or timescale of the target in order to help address these concerns, for example longer term targets could have five-year reporting periods instead of three-year periods, while short term targets could maintain a three-year reporting cycle. Reporting requirements could also include interim updates looking at key milestones rather than requiring full progress reports each time, or alternatively reports could be tied into the review of the targets, with the mid-point and end dates serving as natural junctures at which a report may be produced.

NFU Cymru trusts that the Committee will find these views and comments useful as part of its consultation with stakeholders. The views and comments above represent and reflect NFU Cymru's early thinking and initial impressions of the draft Bill, and these views may evolve and change during the course of the passage of the Bill.