EPGBTWB 34 - Tystiolaeth gan: Y Gynghrair Cefn Gwlad | Evidence from: Countryside Alliance

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

1. What are your views on the general principles of the Bill, and is there a need for legislation to deliver the stated policy intention?

The Alliance supports the general principles of the Bill and agrees with the concept of an overarching environmental objective and with the statutory environmental principles. There is undoubtedly a governance gap in terms of the enforcement of environmental law following Brexit and it is clear that legislation is required. We note that the Bill is very similar to the Environment Act 2021. We believe the regimes in the constituent parts of the UK should be as similar as possible and recognise that meeting environmental targets must be done in a collaborative way across the whole of the United Kingdom, not least to meet the UK's international commitments. As such we welcome that the proposed Office of Environmental Governance Wales (OEGW) is very similarly constituted to the Office for Environmental Protection (OEP). However, we believe that the Bill could go further and that the OEGW would benefit from a greater degree of independence as we argued should have been the case for the OEP. The Welsh Government has an opportunity to improve on the Environment Act 2021 in England.

2. What are your views on the Bill's provisions (set out according to Parts below), in particular are they workable and will they deliver the stated policy intention?

- **Part 1 - Environmental objective and principles (sections 1 to 7)**

Section 1 - We agree with the general concept of the overarching environmental objective to which ministers must "have special regard" when making policy.

Section 2 - The environmental principles listed reflect those in the Environment Act 2021. As the Alliance commented at that time of the 2021 legislation in England, there are a number of other principles that we believe should be included. While we appreciate that the 4 principles in the Bill are those “core principles” as far as the TFEU is concerned there are others that would merit inclusion. Principles that we believe should be included are:

Innovation Principle: It would encourage a positive policymaking framework and ensure that policy makers are able to use innovation as a way of protecting and improving the health of the environment.

Non-Regression Principle: Essential if we are to leave the environment in a better place than we found it and this should, along with the other principles, apply across all public bodies.

Net-Gain Principle: One of the key objectives of the 25 Year Environment Plan in England, the first Environmental Improvement Plan under the Environment Act 2021, is to embed an ‘environmental net gain’ principle. This principle is equally important for Wales and should be included in the environmental principles set out in the Bill.

Appropriate Scale Principle: Many of the environmental challenges are not limited to particular places and therefore should be managed at the most appropriate scale. This would ensure a proper landscape-scale approach was taken; recognising the interconnectedness of areas such as water catchment areas, wildlife corridors and the marine environment where an ecosystem-based approach is essential. This is particularly important when the OEGW is looking at how public bodies are complying with environmental law as this may involve looking at more than one public body e.g. several local authorities. It also recognises that the Welsh government and OEGW will need to work with other bodies such as the OEP and the other UK administrations.

Section 3 – states that Ministers must “have special regard to the environmental principles when making policy in relation to Wales that has, or could have, any effect on the environment.” It is hard to think of any policy that would not be covered by this wording. We are concerned that if the duty applies too widely then this could reduce the effectiveness of the legislation, especially when resources are limited.

Section 4 – NRW seems to be singled out from other public bodies (section 5) and placed under the same duties and in the same terms as Welsh Ministers (section 3). Welsh Ministers are directly democratically accountable while NRW are not. NRW is supposed to be the independent statutory adviser to Ministers. It is unclear from the Bill as to what happens were NRW to diverge in its application of the environmental principles in policy making from Welsh Ministers, accepting that there is to be an agreed "environmental principles and integrating environmental protection statement" and NRW will have guidance. This does also raise a question regarding the degree to which NRW is independent in its policy making, although guidance is also to be provided to other public bodies.

Section 6 – As with so much recent legislation, most of the detail and how these admirable objectives are to be achieved is unknowable. We shall have to wait for the "environmental principles and integrating environmental protection statement"

It is regrettable that so much that will determine the effectiveness of this Bill seems yet to have been decided. We would also note that while the statement must explain how environmental principles relate to each other and the section 3(1)(b) duty it does not seem that the statement needs to set out what the principles mean and how they are to be understood and applied. In England there is the Environmental Principles Policy Statement. This was finalised after the Act had been passed but a draft was available to Parliament before it completed its parliamentary stages. Perhaps a draft statement should be available to the Senedd as the Bill progresses. When examining an earlier version of the Environment Bill (now Environment Act 2021), the Environmental Audit Committee Report of 18 July 2018 noted that "The original policy statement should be included as a schedule to the Bill itself – allowing it to be scrutinised fully by Parliament. Substantive amendments to the statements should only be made following a debate on the floor of the House." In our view there should be a consistent understanding of the environmental principles across the UK, and this should be reflected in the statement under this part.

We would also like to take this opportunity to draw the Committee's attention to issues surrounding the precautionary principle and that the way in which it is being applied has become increasingly problematic in recent years, not just in Wales but across the UK. This is especially so in the context of the various environmental bodies like Natural England and Natural Resources Wales.

It is vital that there is a proper understanding of the principle and that it is applied consistently across the UK and to the various activities to which it should

apply. Too often the principle is applied (misapplied) especially in relation to designated sites to restrict some activities such as shooting and wildlife management while other activities seem not to have the precautionary principle applied, even where this should be the case. For example, increasing recreational access to land seems never subject to the principle despite a body of robust scientific evidence that ramblers and dogs, along with predation (which is significantly reduced by the management practices associated with game management) represent a significant threat to the breeding success of ground nesting birds etc., which make up most of the designated species on SPAs.

We would suggest that the principles are understood and applied in a way which enhances both the environment and communities. That they are not 'gold plated' and that they are applied proportionately. The precautionary principle has increasingly been applied in a way that is counterproductive. The threat of legal challenge using the precautionary principle is increasingly driving environmental policy, which properly rests with ministers. As the European Commission's guidance on the principle makes clear, "what is an acceptable level of risk for the EU is a political responsibility." Now that the UK is outside the EU that "political responsibility" is a matter for the UK administrations. The Alliance does not want to see a reduction in environmental protection but also believes that the precautionary principle should once again be understood and applied based on realistic assessment of risk and not become a weapon of protectionism.

A proper understanding of the precautionary principle should include the element of risk assessment. The debate surrounding the precautionary principle and how it should be understood and applied is of long standing. There has never been a single agreed view, although various court judgements, especially in some more recent European judgements have moved towards a view of the principle which seems not to recognise the relationship of the principle to risk. Some suggest that the precautionary principle is purely risk prevention (avoiding the possibility of harm) and does not include risk assessment (quantifying the risk of harm). Other definitions include both risk prevention and risk assessment.

We need an understanding that recognises the prevention of harm and the need to evaluate risk, which will help prevent it being exploited by those who are opposed to a particular activity. It is important to note that the European Commission's guidance on the principle states that we should "avoid unwarranted recourse to the precautionary principle, as a disguised form of protectionism". The precautionary principle "is neither a politicisation of science nor the acceptance of zero risk". The level of risk "is a political responsibility. It

provides a reasoned and structured framework for action in the face of scientific uncertainty and shows that the precautionary principle is not a justification for ignoring scientific evidence and taking protectionist decisions."

Over the years the risk assessment element of the application of the precautionary principle has been eroded so that the level of risk which is acceptable is increasingly low. This enables the principle to be invoked to ban or restrict activities, even where there is no evidence of existing harm or where any harm may be limited and temporary. For example, those opposed to shooting have to do little more than suggest that there may be some harm caused by shooting activity to protected sites and invoke the precautionary principle and the regulator feels obliged to stop the activity or heavily restrict it. The burden then falls not on those opposed to an activity to show serious irreversible damage but on those who have carried out an activity over many years to show that the activity does not cause any harm, not just "serious or irreversible" harm. This 'reverse burden' is unfair and disproportionate. There also seems to be no need to assess whether the intervention could cause more harm than it is aimed to prevent such as restrictions on shooting ending the vital management, including predator control which protects rare ground nesting birds for which many sites are designated in the first place and where shooting activity predates the designation. Regulators and government apply the precautionary principle based on its most restrictive interpretation because they fear that if they do not, they will face legal action.

While the principle is applied to activities such as shooting and wildlife management practices, largely due to anti shooting activists and threats of legal action, it is not applied to other activities which can cause harm, even greater harm, such as rambling or dog walking on protected sites as noted above. We also understand that it has been applied so as to prevent scientific research being conducted. This makes it hard, or impossible, to obtain the evidence that there is no serious or irreversible harm. Those who wish to end shooting on sites, or other activities, simply suggest there may be damage and the precautionary principle (understood in it most restrictive version) is invoked and the research to demonstrate that no serious or irreversible harm is being caused cannot take place.

We would suggest that the statement provides an opportunity to clarify how the precautionary principle is applied in Wales and we would note the EU Commission's guidance that:

"In addition, the general principles of risk management remain applicable when the precautionary principle is invoked. These are the following five principles:

proportionality between the measures taken and the chosen level of protection;

non-discrimination in application of the measures;

consistency of the measures with similar measures already taken in similar situations or using similar approaches;

examination of the benefits and costs of action or lack of action;

review of the measures in the light of scientific developments."

If the precautionary principle is not to continue be weaponised in the courts and not to frustrate development, innovation, research and wildlife management, it needs to be clarified not simply in relation to policy making, but also for those who are responsible for its application as part of their regulatory role in environmental protection. The statement needs to make clear that the risk must relate to 'serious and irreversible' damage and define this; that the burden of proof in general rests on those alleging harm, unless the seriousness of the threat warrants a reversed burden; that the risk of harm caused by any intervention is assessed as well as risks from no intervention; and that an assessment of risk is an integral part of applying the precautionary principle in a fair, consistent and proportionate way.

Section 7 – We believe that the Senedd should be required to approve the statement or at least have the opportunity to consider a draft as is the case under section 18 of the Environment Act 2021.

3. What are your views on the Bill's provisions (set out according to Parts below), in particular are they workable and will they deliver the stated policy intention?

- **Part 2 - The Office of Environmental Governance Wales (sections 8 to 32 and Schedules 1, 2 and 3)**

We would make the following observations regarding the proposed Office of Environmental Governance Wales (OEGW). The OEGW is constituted in a similar manner to the Office of Environmental Protection (OEP) in England. The OEGW seems to lack the independence necessary to ensure that it does not become politicised. Ministers have broad powers of appointment despite the provisions of Part 4 of schedule 1 for an advisory panel. There is no independent method of appointment to the OEGW and ministers also have very broad powers to suspend and/or remove members simply because ministers are satisfied they

are “unfit”. We think that there should be some role for the Senedd and/or relevant Senedd committee to be able to scrutinise appointments not simply consulted as provided for in schedule 1, 8(2). The OEGW is also entirely financially dependent on ministers. We have seen how so-called independent bodies can become compromised due to political interference. For example, NRW has undertaken research where the evidence points one way, but it has been directed by ministers to take a contrary course of action.

If OEGW is to be effective, it needs to be adequately resourced and enjoy financial independence. The “Lessons Learned” report from the Interim Environmental Protection Assessor in Wales concluded that “the most important lesson we have learned is that the role of the organisation needs to be matched against the resources it needs to carry out this role. There is no point in establishing a body with comprehensive powers if it is not resourced well enough to use them effectively."

The Bill should make clear that the OEGW must always take an evidence-based approach to delivering its functions and especially in any advice to Welsh Ministers. It should also ensure that Ministers may not interfere with the OEGW and that if they choose to ignore the OEGW’s advice then they should have to give reasons.

In schedule 2, 1(1) (e) the OEGW must set out in its strategy and how it intends to “exercise its functions in a way that seeks to avoid overlap with functions by other bodies such as NRW. There is no reference to UK-wide bodies such as the Climate Change Committee. We note that the Environment Act 2021 at section 23(5)(b) specifically requires the OEP to set out in its strategy how it will cooperate with “other UK environmental governance bodies”. It is important that environmental policies, targets etc are considered across all parts of the UK, just as environmental principles need to be understood and applied consistently across the UK, not least because the UK must meet its international environmental obligations.

We also think that persons who are employees of environmental charities/campaigning organisations should be disqualified from being a member of the OEGW. That would not preclude the OEGW from seeking their advice where they have the necessary expertise.

Welsh Ministers (section 12(5)) must have regard to advice given by OEGW but should they choose not to take that advice there is no duty to give reasons in contrast to provisions elsewhere such as section 22(2)(b) with respect to improvement plans.

Section 15(1) – We would draw attention to the retrospective effect of allowing OEGW to investigate whether a public authority has failed to comply with environmental law "at any time". We would suggest that this should be limited by only allowing the OEGW to investigate failings prior to the passing of the Bill where those failings are part of an ongoing failure or directly relevant to a new failing. The same retrospective effect is found at section 20(1).

Section 18 – We welcome the inclusion of a review mechanism for compliance notices. This is not however an independent process. We would suggest that there should be some sort of independent process for appealing a compliance notice rather than the public authority having to refuse to comply, forcing the OEGW to take action for non-compliance via the courts.

We have noted that the OEGW cannot issue fines. This is also the case with the OEP and is in contrast to the situation pre-Brexit. Despite repeated assurances that the new oversight body will have powers that are at least equivalent to those enjoyed by the EU institutions in enforcing environmental law, the Bill does not empower the OEGW to issue fines. Under the EU arrangements, the power to issue fines proved remarkably effective in bringing about compliance where a breach of environmental law and in deterring governments from ignoring or breaching environmental law. We recognise that EU fines were issued against states and not public bodies within states. As such, fines from the OEGW may need to be limited to a form of fixed penalties, but this penalty should be available. We believe that any fines resulting from enforcement action should, as the Environmental Audit Committee suggested during its scrutiny of the Environment Act 2021 "be ring-fenced and used for an environmental fund for remediation works".

4. What are your views on the Bill's provisions (set out according to Parts below), in particular are they workable and will they deliver the stated policy intention?

- **Part 3 - Biodiversity targets, etc (sections 33 to 38)**

This part contains extensive new regulation making powers for Welsh Ministers especially in the new clauses inserted into the Environment (Wales) Act 2016 by section 33. It is unclear whether these require positive approval by the Senedd. We think the Committee should look at the regulation making powers and strengthen the oversight of the Senedd. For example, in section 33 new section 6c (Duty to make regulations setting targets etc) Welsh Ministers must lay a draft

of those regulations before the Senedd but it is unclear whether these are subject to Senedd approval.

While we are generally supportive of the provisions of Part 3, we do think that in the making of regulations consultation requirements should be strengthened. In setting targets Ministers should have to consult the farming sector and others most directly impacted and without whom the targets cannot be met. The need for proper consultation and engagement with the Senedd applies equally to any review or modification of targets.

5. What are your views on the Bill's provisions (set out according to Parts below), in particular are they workable and will they deliver the stated policy intention?

- **Part 4 - General (sections 39 to 45 and Schedule 4)**

We are satisfied with the general provisions of Part 4.

6. What are the potential barriers to the implementation of the Bill's provisions and how does the Bill take account of them?

The OEGW's lack of the independence, especially in financial terms could impact its effectiveness. The delivery of the Bill's provisions will in large part depend on whether the OEGW has the resources necessary to hold Minister's and public bodies to account. We also note that like the OEP in England the enforcement powers available to the OEGW are somewhat limited.

7. How appropriate are the powers in the Bill for Welsh Ministers to make subordinate legislation (as set out in Chapter 5 of Part 1 of the Explanatory Memorandum)

See Question 4 – We are concerned that the majority of regulations under the Bill do not seem to require positive approval by the Senedd.

8. Are any unintended consequences likely to arise from the Bill?

No comment.

9. What are your views on the Welsh Government's assessment of the financial implications of the Bill as set out in Part 2 of the Explanatory Memorandum?

No comment.

10. Are there any other issues that you would like to raise about the Bill and the accompanying Explanatory Memorandum or any related matters?

We would seek clarity as to how the environmental principles and objective, and the biodiversity targets will interact with the sustainable land management objectives in the Agriculture Act and what they will mean in terms of arrangements and payments under the Sustainable Farming Scheme (SFS). In particular how they may be applied to farmers and land managers who choose not to enter the SFS.

The Bill could also be improved by ensuring that in setting biodiversity targets there is a requirement to consult those, such as farmers, who will play a large part in delivering those targets. As the Farmers' Union of Wales has stated, regulations need to be proportionate, practical, implementable and effective, pointing out that this has not always been the case, with the Control of Agricultural Pollution Regulations as an example of how not to implement regulatory change.