

Environmental Principles, Governance and Biodiversity targets for a Greener Wales



30 April 2024

Legislation and
Governance Unit

We welcome this important consultation which is an opportunity to deliver a step change in the health of Wales' natural environment as well as to close the gap in environmental governance and oversight that has existed in Wales since the UK left the EU. This response is from the Green Alliance Legislation and Governance Unit.

Part A – Environmental principles

We support the approach taken in the White Paper to setting out the role and application of environmental principles in Welsh law and policy making. We especially welcome the inclusion of integration in the list of principles in the bill as this will help ensure that the environment is explicitly considered in all policy making.

EP1. To what extent do you agree or disagree with the proposals relating to the preparation of guidance that will explain how the environmental principles are intended to be interpreted?

Strongly agree.

We strongly support the proposals to embed environmental principles in Welsh law through a direct duty on Welsh Ministers (see our response to EP2 and EP3 on the standard and scope of the duty), an overarching objective to ensure a high level of environmental protection and the publication of guidance to support the application of the principles and to provide a clear understanding and transparency on their meaning.

This mirrors the approach taken in Scotland which places a direct duty on Scottish Ministers in relation to the environmental principles in developing policies, including proposals for legislation.¹

It avoids the weaker approach of the UK Government in the Environment Act 2021 in which the “almost total relegation of the role of environmental principles to the Policy Statement ... undermines their legal influence to the greatest extent possible ... To fail to articulate their legal effect in any substantive way in the draft Bill is to fail to give environmental principles the kind of overarching legal role [that they currently have]”.²

We welcome the proposal in paragraph 32 on page 17 that the Welsh Government's intention is for the bill to make provision to require Welsh Ministers to publicly consult on the guidance and on subsequent changes to it. The bill should include a robust process for drawing up and revising the guidance, including a requirement for public consultation, and a requirement for Welsh Ministers to request and take account of the advice of the new Governance Body.

We suggest that the draft guidance should be subject to scrutiny by the Senedd and that this process should be set out in the bill. The guidance should be laid before the Senedd in draft form for a specified period before it can be published. This should include a pre-publication evidence session by the relevant Senedd committee.

The Welsh Government should clarify that policy making includes the developing, adopting, revising, or repealing of policy, and proposals for legislation.

This is an opportunity to ensure that environmental principles are at the heart of all Welsh policy and law making. We look forward to contributing to the next stage of this important process.

EP2. The Welsh Government proposes to place a duty on Welsh Ministers to have due regard to the environmental principles and accompanying guidance during the development of their policies and legislation. To what extent do you agree or disagree with this approach.

Partly agree.

We strongly agree that there should be a duty on Welsh Ministers (as well as public authorities – see our response to EP3) to ensure that environmental principles actively inform the making of policy and legislation. However, we would want to see the duty strengthened in the following ways:

- The duty should apply to public authorities as well as Welsh Ministers (see EP3).
- The duty should be more strongly formulated – ‘apply’ or ‘act in accordance with’ is preferable to ‘have due regard’.
- The duty should not be fettered with exemptions.
- The duty should apply to administrative decision making, as well as to the making of policy and legislation.

Standard of the duty

We are concerned that a ‘due regard’ duty provides a relatively weak framework for accountability and that its inherent frailty would mean that public authorities would be able to exempt themselves too readily from applying environmental principles.

We note that a Welsh Government commissioned research report on strengthening and advancing equality and human rights in Wales found that the current model of indirect incorporation of select human rights in Welsh law using the ‘due regard’ approach is perceived as a weak form of legal accountability for human rights and “had done little to enhance legal accountability for children’s Rights in Wales”. It also commented that although “the duty to have ‘due regard’ to the [Convention on the Rights of the Child] has increased the potential for judicial review of Ministerial decisions which impact on children, it has not strengthened the position of individual children whose rights are violated”.³

We would therefore encourage the Welsh Government to strengthen the standard of its proposed duty on principles. A duty to ‘apply’ or ‘act in accordance with’ the principles would be most compatible with the existing duty on Member States under European Union law.

A duty to ‘apply’ or ‘act in accordance with’ would provide a stronger framework for legal accountability. It would require serious and in-depth consideration by a public authority on how the principles apply in a particular context and would ensure that the principles are brought to bear in practice, rather than considered and dismissed.

Exemptions

The Welsh Government should avoid the heavily caveated approach taken by the UK Government in which policy making relating to the armed forces, defence, national security, taxation, spending and the allocation of resources within government are exempted from the duty on the principles.

Scope of the duty

As mentioned in our response to EP1, the Welsh Government should clarify that policy making includes the making, developing, adopting, revising, or repealing of policy, and proposals for legislation.

The environmental principles perform several different roles in EU law, including guiding policy development and policy implementation, guiding the interpretation of legislation, structuring the exercise of discretion by public decision makers, and, in some cases, providing a standard for judicial review.

The impact of the principles extends deeply and routinely into administrative decision making, often having a binding effect on those delivering EU measures. The impact of the environmental principles in EU law therefore goes beyond guiding environmental policy making and legislation.

Environmental principles are the bedrock of environmental law and set the framework for policy development and implementation.

The environmental principles should play a role in routinely guiding and shaping day to day administration affecting the environment in Wales. This would be neither novel nor disruptive.

The duty should therefore apply to all administrative decision making by public authorities and not only to the making of policy and legislation.

Review of the duty

The Welsh Government should commit to reviewing the implementation of the duty within a specified timescale so that lessons can be identified, and adjustments made. This should evaluate the impact of the duty on the policy making process and the effectiveness of implementation processes and resources. Defra has committed to an implementation review within two years of the duty coming into force.

EP3. Do you have any views on whether a separate duty should be placed on Welsh public bodies (other than the Welsh Ministers) to apply the principles and accompanying guidance? If you consider the duty should apply to Welsh public bodies, please set out in the text box below which Welsh public bodies and why, as well as any views you have on how the duty should apply to those bodies.

We consider that the duty on principles should apply to Welsh public authorities as well as Welsh Ministers and that this should be clearly stated in the bill (for example, “All public authorities shall apply the environmental principles in the exercise of their functions”). This would avoid the confused position in England where it is not clear which public authorities may be developing policy for ministers and therefore which authorities are within scope of the UK Government’s duty and when.⁴

We propose that the duty to apply the principles in Wales should extend to all bodies that fall within a generic and established definition of public authorities, rather than a schedule in the bill. This would be the most efficient approach, as it would not require legislative updates should the landscape of public authorities change in the future.

Possible definitions

The definition in Section 6(3) of the Human Rights Act 1998 encompasses “any person certain of whose functions are functions of a public nature.”⁵ The UK Parliament considered that it was better to leave ‘functions of a public nature’ undefined to encourage a broad approach by the courts.⁶

Section 31(3) of the UK Government’s Environment Act 2021 defines a “public authority” as a person carrying out any function of a public nature that is not a devolved function.⁷

Incorporating this type of definition in the Welsh Government's bill would allow for the duty to apply to private organisations when they are performing functions of a public nature, for example companies that provide energy and water services, or the management of waste.

Public authorities have always had an obligation to consider the principles in decision making under the EU system, and we do not consider that extending the duty to apply the principles to them would result in any undue burdens.

For the avoidance of doubt, the exercising of existing public authority functions and duties, including the duties in the Environment (Wales) Act 2016 that relate to the sustainable management of natural resources, should be done compatibly with the duty on environmental principles.

EP4. Do you have any additional comments relating to the Welsh Government's intention to embed the environmental principles and overarching objective into Welsh law that are not captured in your answers to the above questions?

Yes. See below.

Overarching objective

We welcome the proposal in the White Paper that the environmental principles will be supported by an overarching objective, as recommended by the Environmental Governance Stakeholder Task Group.

The Task Group noted that the overarching objective could provide a similar focus for policy development as was provided within the Treaty for the Functioning of the European Union, and that a key element should be how the principles will secure a high level of environmental protection and environmental improvement. We support this and suggest it provides a sound basis for drafting the overarching objective.

While we appreciate that the wording in the White Paper is not legal drafting, we are keen to ensure that speculative language such as "aiming to ensure" is avoided in the bill, and that more determinative language is used, for example "must be integrated...and ensured". We suggest that the drafting of the overarching objective is subject to targeted consultation before the bill is introduced into the Senedd.

The Welsh Government should clarify that the environmental principles are cross cutting and apply across all policy and decision making, not just in primarily environmental contexts.

The Governance Body should be provided with a principal objective in the bill, but as we explain in our response to GB1, this performs a different role to the overarching objective and the two should not be muddled up.

Definitions of principles

While we understand that the descriptions of the principles in paragraph 8 on page 13 of the White Paper are indicative, it is essential that accurate and up to date formulations are used, fully reflecting the role played by the principles in EU law. The White Paper cites an outdated description of the precautionary principle from the 1992 UN Rio Declaration on Environment and Development, which has been criticised for the thresholds it sets for action.

As the principles apply differently in different policy areas, we suggest that definitions should not be included on the face of the bill. This would be consistent with the current approach in EU treaties and would allow for principles to be defined on a case-by-case basis, as they are now. Describing principles in the Guidance would allow for a more nuanced approach.

Guidance on the principles should encapsulate their distinct natures and purposes and should:

- Reflect existing best practice from the EU, including interpretation and application from case law.
- Ensure consistency with international definitions and obligations.
- Reflect how the principles need to be applied in different policy areas.

Adding other principles in the future

We support the five principles included in the White Paper. However, we suggest that this list should be regarded as non-exhaustive, and new principles could be added in the future if needed, for example to keep pace with developments in environmental law and policy. This process should entail public consultation, advice from the Governance Body and appropriate Senedd scrutiny.

Enshrining non-regression

Non-regression is an environmental legal concept that has received increasing levels of attention over recent years. It is conceptually simple: at its heart, it requires that environmental regulation and standards should not be diminished, promoting a ratcheting up of ambition in subsequent law reform and policy.

A strong version of non-regression does not simply prevent rollback but requires continual advancement in environmental laws and commitments. This is sometimes termed the ‘progression’ principle and is reflected in the Paris Agreement’s requirement that all new “nationally determined contributions [to emission reduction] will represent a progression” beyond current commitments.⁸

In its 2019 consultation document on environmental principles, the Welsh Government stated that EU Exit was an opportunity to develop a structure which supports a commitment to non-regression.⁹

Welsh Ministers have made welcome statements in the Senedd on their commitment to upholding environmental standards. For example, during the Stage 3 Senedd debate on the Law Derived from the European Union (Wales) Bill, Julie James, then Leader of the House and Chief Whip stated:¹⁰

“We’ve been clear and consistent in our message that Brexit must not result in any dilution of the rights that currently flow from our membership of the EU or of the standards that apply across member states. This includes environmental standards.”

Non-regression is an important element of various international agreements, including the UK-EU TCA.¹¹

We note that the Integrated Impact Assessment accompanying the White Paper states that the introduction of the Governance Body “will help to ensure non-regression of environmental rights”.¹²

But the White Paper itself is silent on this matter. The Welsh Government is therefore at risk of missing this opportunity to enshrine its welcome commitments to non-regression in law.

Embedding the principles in government and public authority systems

Embedding the principles in cross government policy mechanisms, systems and templates will be key to successful implementation. This should include the Integrated Impact Assessment process, guide to legislative drafting, financial management principles and business case templates.^{13,14,15,16}

Training and guidance should be provided to all bodies caught by the duty on how to apply the principles. The Welsh Government should consult the Defra environmental principles team on its experience of cross government implementation and the development of training and awareness raising tools and resources.

Providing interim guidance

We welcome the statement in paragraph 25 on page 16 that “For the avoidance of doubt, the Welsh Ministers' policy position is that, whilst there is currently no statutory duty on the Welsh Ministers to apply the environmental principles ..., they will continue to underpin policy in Wales until the Bill comes into force”.

Given the lengthy delays that have occurred to date, and the uncertain timescales going forward, we do not consider that merely making this statement will be sufficient to achieve its aspiration.

We therefore propose that the Cabinet Secretary lays a written statement in the Senedd and simultaneously writes to all Welsh Government Ministers and public authorities to reiterate that environmental principles will continue to underpin public authority policy making in Wales until the new legal duty is in force.

Given that much policy development has already been done on environmental principles and that draft guidance has been shared for informal consultation, the consultation on the new guidance on the principles should be fast tracked and final guidance published within six months of the bill passing. The principles duty should come into force on the day the bill passes.

Building towards a rights-based approach

The bill provides an opportunity for the Welsh Government to progress a rights-based approach to environmental law. This could include enshrining the rights to environment information, participation and access to justice, protected under the Aarhus Convention and the introduction of right to a clean, healthy and sustainable environment. At the very least, the Welsh Government should commit to a publishing a Green Paper to explore how to embed these important rights more fully in Welsh law.

Application to non-devolved public bodies

In our view non-devolved public bodies when exercising functions in Wales should be subject to the duty on environmental principles.

Precedent for this already exists in Welsh law. For example, certain parts of the Environment (Wales) Act 2016 can apply to non-Welsh bodies where relevant. Section 6(9) explicitly includes a “Minister of the Crown” and “a person holding an office under the Crown” in the definition of a public authority required to seek to maintain and enhance biodiversity in the exercise of their functions in relation to Wales.¹⁷

This means that the Welsh biodiversity duty applies to non-Welsh bodies exercising reserved functions. Given the broadly comparable nature of the duty on environmental principles, there is no reason for it not to apply to non-devolved public bodies exercising reserved functions in Wales.

Application of environmental principles across the UK

We would encourage the Welsh Government, Northern Ireland Executive, Scottish Government and UK Government to explore ways to share experiences on their systems of applying environmental principles, to minimise the risk of intra-UK policy fragmentation.

Part B Establishing an environmental governance body for Wales

We strongly support the proposals to establish an Environmental Governance Body for Wales and make some detailed comments below on how its independence should be strengthened and role clarified.

GB1. To what extent do you agree or disagree with the proposed purpose and objectives for the new Welsh environmental governance body?

Agree.

We agree that the primary purpose of the Governance Body should be to provide oversight of the implementation of, and compliance with, environmental law in Wales by Welsh public authorities. Enshrining a clear purpose for the Governance Body will provide clarity on its role and act as a safeguard for its independence. However, the Body's purpose should also focus on the protection and improvement of the natural environment. We suggest that the principal objective of the Office for Environmental Protection offers a helpful starting point for this.¹⁸

“(1) The principal objective of the OEP in exercising its functions is to contribute to— (a) environmental protection, and (b) the improvement of the natural environment.”

While we support the development of an overarching objective to support the environmental principles, this should not be adopted as the primary purpose of the Governance Body.

The two perform distinctly different roles and should not be confused.

We support the proposed objectives for the Body set out in paragraph 12 on page 21 of the White Paper with detailed suggestions below in red.

- ii. Receive complaints **and** representations from the public as to alleged failures to comply with environmental law by Welsh public authorities.
- x. Draw on practice **from other parts of the UK and** within the European Union, while recognising the distinct legislative framework applying in Wales.

GB2. To what extent do you agree or disagree with the governance body's proposed strategy and reporting requirements?

Agree.

We agree that the Governance Body should be required to produce and publish a strategy and that this should be subject to public consultation, as is the case for the Office for Environmental Protection and Environmental Standards Scotland, with preference for the UK Government’s approach as this is less prescriptive and affords the body more discretion on content and process.^{19,20}

We also agree that the Governance Body should publish an annual report and suggest that this includes a Sufficiency Statement (see GB15).

We agree that all of the Governance Body’s reports should be laid in the Senedd and that there should be opportunities for Senedd committees to discuss and hold evidence sessions on the Body’s work, resourcing and performance, including hearing directly from its Chair and Chief Executive.

The Governance Body should have complete discretion to develop its strategy. This discretion should be embedded in the bill as is the case for other oversight bodies.

For example, the Comptroller and Auditor General has complete discretion in the carrying out of the functions of that office.²¹ The Office for Budget Responsibility has complete discretion in the performance of its duty to examine and report on the sustainability of the public finances.²²

It is essential that the Governance Body’s strategy and reporting requirements remain free of potential interference, with no power of direction for Welsh Ministers. The bill should include a clear statement along the lines of this safeguard in Scotland: “In performing its functions, Environmental Standards Scotland is not subject to the direction or control of any member of the Scottish Government”.²³

We agree that the matters identified in para 14 on page 23 should be included within the first strategy, especially an enforcement policy.

GB3. We propose that the remit of the governance body should apply to the Welsh Ministers and the relevant Welsh public authorities exercising environmental functions Wales listed in Annex 2. To what extent do you agree or disagree with this?

Disagree.

While we agree that the remit of the Governance Body should apply to Welsh Ministers and public authorities, for the reasons we set out in our response to EP3, its remit should extend to all bodies that fall within a generic and established definition of public authorities, rather than a restricted schedule in the bill. This would be the most efficient approach, as it would not require legislative change should the landscape of public authorities evolve in the future.

Incorporating this type of definition in the Welsh Government's bill would ensure that the Governance Body's remit extends to private organisations when they are performing functions of a public nature (for example companies that provide energy and water services) and bodies that undertake devolved public functions including UK Government departments and The Crown Estate.

If the Welsh Government decides to proceed with a schedule-based approach, then provision should be made for the schedule to be updated subject to consultation with the Governance Body and scrutiny by the Senedd.

GB4. Are there any other public authorities, or private bodies exercising functions of a public nature, that you think should be added to (or removed from) the list in Annex 2? Please use the text box below to explain your answer.

Please see our response to GB3. We support a definition-based rather than a list-based approach.

UK government departments and non-reserved public authorities such as The Crown Estate must fall within the scope of the Governance Body where they are undertaking functions that fall under the legislative competence of the Senedd. This would ensure that there is no remaining governance or enforcement gap in Wales and provide consistency with other Welsh law, for example Section 6(9) of the Environment (Wales) Act 2016.

The Governance Body should also cover private companies that exercise functions of a public nature.

If the Welsh Government wishes to insist on a list-based approach, the bill should include a power to revise the list of relevant public authorities through secondary legislation to provide a sufficient degree of flexibility in the future, subject to appropriate scrutiny by the Senedd.

GB5. To what extent do you agree or disagree with the proposed scope and role for the governance body in relation to monitoring and reporting, including the scrutiny of statutory targets?

Agree.

Monitoring the implementation of, and compliance with, environmental law by public authorities in Wales will be a key function of the Governance Body. Welsh Ministers and public authorities must be required to respond to reports issued under the Body's monitoring environmental law functions within a specified timeframe, for example three months, as is the case for the Office for Environmental Protection.

We support the proposal in paragraph 36 on page 27 of the White Paper for the Governance Body to monitor statutory environmental targets.

However, we do not agree that the Body's regular reporting should be done through the annual report or indeed by exception. Environmental law reports should be published when relevant and the Body should have the discretion to decide its publication priorities and timescales.

The annual report is the vehicle for reporting on the year's performance, corporate governance, financial statements and cashflow, rather than detailed reports on the effectiveness of environmental law.

As part of its scrutiny and advisory functions, the Governance Body should report annually on how the Welsh Government and public authorities are contributing to the delivery of environmental goals and statutory targets, but this is separate to the annual report and should be named differently (see our responses to the biodiversity targets questions).

GB6. To what extent do you agree or disagree with the proposed scope and role of the governance body's advisory functions?

Agree.

We support the types of advice that the White Paper anticipates the Governance Body will give in paragraph 40 on page 27. The Body should be able to advise Welsh Ministers on the content of policy, the need for new policy and legislation, how to improve the effectiveness of legislation and the setting of standards to enable Wales to deliver its domestic and international commitments.

We strongly recommend that the Governance Body should be able to provide advice on its own initiative, and not just when requested to do so by Welsh Ministers. The Office for Environmental Protection has an 'own initiative' advisory power, which it has used to good effect, for example to provide advice to Defra Ministers on biodiversity net gain.^{24,25}

Public authorities that receive advice from the Governance Body should be required to respond to that advice within a specified timescale. The bill should stipulate that the advice of the Governance Body and the response of the public authority should be published.

The Governance Body should consider how best to draw on expertise from outside its board and executive team to inform the exercising of its advisory functions. For example, the Office for Environmental Protection has established a College of Experts and holds regular meetings with stakeholders to discuss environmental law and policy.²⁶

GB7. To what extent do you agree or disagree with the suggested approach for managing complaints and representations.

Broadly agree.

The Governance Body should be able to receive and consider complaints, which relate to specific breaches of environmental law, as well as representations, which relate to other matters.

It is important to retain a clear distinction between the term ‘complaint’ and ‘representation’. Complaints refer to a specific breach in environmental law (and reflect the EU Commission’s process) whereas representations can cover wider issues including systemic environmental law failings.

The Governance Body should publish its procedure for considering complaints and representations, including prioritisation criteria, as well as information to raise public awareness of and support engagement with the complaints mechanism. This could include FAQs, signposting complainants to public authorities, case studies and an eligibility checker.

Complaints data from the Office for Environmental Protection suggests that:²⁷

- Numbers of representations have been much higher than anticipated and increase at times when the body is visibly active. This provides useful information and intelligence which can inform the body’s functions. It also requires adequate resources for the handling of representations.
- Most complaints relate to pollution control, nature conservation and environmental monitoring and assessment, which might suggest these are useful areas on which to recruit expertise in the Governance Body.
- The largest barrier to complaints being considered eligible is the failure to exhaust the relevant public authority’s complaints procedure. This is often because there is no clear process, or because it takes some time and effort to locate and navigate it. In cases where there is a lack of clarity, the Governance Body should take an expansive approach to deciding whether to investigate a complaint, especially on urgent issues. The bill should not set a rigid requirement to exhaust a public authority’s internal complaints procedure before making a complaint to the Governance Body.

We do not agree with the proposal that the Governance Body should not deal with complaints relating to specific decisions taken by public bodies (for example, issuing of licenses or planning consent) unless it relates to an issue with how the public body is more widely complying with environmental law. We think that this is overly prescriptive. The Governance Body should of course not be obliged to investigate every complaint it receives, but it must have discretion to decide for itself and this arbitrary exclusion seems unnecessary.

GB8. To what extent do you agree or disagree with the proposals to enable the body to investigate?

Strongly agree.

The Governance Body must be able to carry out investigations on its own initiative as well as in response to complaints or representations, as the Office for Environmental Protection can.²⁸ We agree that the Governance Body should have discretion on when and what to investigate. The Body's approach to investigations should be included in its enforcement policy.

We agree that to effectively exercise its investigation functions, the Governance Body will need to be able to request relevant information from public authorities which must be provided in a timely manner. We therefore welcome the proposed duty to co-operate (see GB13) and proposed requirement in paragraph 57 on page 31 of the White Paper for public authorities to respond to Information Notices within the timescale set out in the notice and to provide the requested information.

GB9. To what extent do you agree or disagree with the Welsh Government's proposed process for formally handling non-compliance through compliance notices and court or tribunal procedures?

Agree.

We welcome the proposal for the Welsh Tribunal system to provide the forum for referrals regarding non-compliance with or appeals on compliance notices.

The Tribunal system offers several advantages over the High Court as the UK Government recognised during the pre-legislative scrutiny of the draft Environment (Principles and Governance) Bill.²⁹

“However, we have made provision for a new environmental review mechanism in the Upper Tribunal for the OEP to bring legal challenges. The approach will have a number of benefits compared to that of a traditional judicial review in the High Court. In particular, taking cases to the Upper Tribunal is expected to facilitate greater use of specialist environmental expertise”.

We suggest that further work is needed at pace to explore the potential role of the Tribunal, especially given the potential timing challenges which may mean the new system is not up and running in time.

The Tribunal should be empowered to review issues before it more thoroughly than the approach generally adopted in judicial review cases.

While the intensity of review should be flexible and suited to the matter under consideration, in the context of environmental litigation – where issues are generally technical in nature – a high standard of review should usually be adopted.

The Tribunal should consist of legally qualified judges and non-legal technical expert members. The Tribunal should be capable of sitting as a three or five person panel. The precise size and composition should depend on the facts (including technical aspects) and complexity of the case being heard. The views of judges and expert members should be afforded equal weight. As with judicial decision making, verdicts should be capable of being achieved either by unanimity or a simple majority.

The technical expert members of the Tribunal should be able to seek support from additional independent experts. This ability would be valuable where particularly specialist or complex matters require consideration. Any matters put to external experts must be formulated carefully in order to guide their analysis and investigations. Parties to the case may wish to raise questions on which they believe the Tribunal should seek external expert advice.

The suggested ability for the Tribunal to draw on additional knowledge and experience of additional experts can be sensibly compared to various existing processes that enable decision makers to call on the expertise of others.

For example:

- Coroners have broad discretion to call witnesses to satisfy the investigation and inquest requirements of the Coroners and Justice Act 2009. This includes an ability to call expert witnesses such as psychiatrists.³⁰
- In the competition context, the Competition Appeal Tribunal can appoint its own expert.³¹
- In planning, an examining authority is able to request that the Secretary of State appoints an assessor to provide advice and assistance “When it seems likely that evidence to be given about an application will be of a specialist nature, or of a level of complexity outside the normal experience of the persons appointed to examine an application, the Examining Authority can request that the Secretary of State appoints one or more assessors to advise and assist them.”³²

GB10. To what extent do you agree or disagree with the Welsh Government’s proposal to include improvement reports/plans as an enforcement stage to provide space for resolution where systemic issues are evident, and a compliance notice is not considered the optimal mechanism to address the issue.

Partly agree.

We can see the potential merit of Improvement Reports and Plans in tackling systemic issues involving Welsh Ministers. However, care will be needed to avoid these becoming the default approach for managing potential compliance issues involving Welsh Ministers. The use of more formal enforcement mechanisms should be determined by the seriousness of the issue, as well as the effectiveness or otherwise of more informal approaches.

The power to publish an Improvement Report should be included in the bill, along with a duty on Welsh Ministers to respond with an Improvement Plan within a specified period. Our response to GB13 on the duty of co-operation and the timely provision of information is relevant to this process.

We note that very few cases have reached “Improvement Report” stage in Scotland so would encourage the Welsh Government to explore the reasons for this.

GB11. To what extent do you agree or disagree with the proposal for the governance body to, by exception, be able to apply for judicial review and / or intervene in civil proceedings.

Strongly agree.

Application for judicial review

The power to apply for judicial review should be an express one and included in the bill. Most potential breaches of environmental law will be most appropriately dealt with through the Governance Body’s enforcement powers. However, in those cases where there is a suspected serious or urgent failure to comply with environmental law, the Body should be able to apply for a judicial review.

We note that the Office for Environmental Protection has the power to apply for judicial review and has only sought to use it once.³³ In that instance, it sent a Judicial Review Pre-Action letter to DAERA and the NIEA requesting that they immediately cease relying on the Operational Protocol to provide advice to planning authorities in relation to ammonia emissions. This had the desired effect as the public authorities announced they will no longer rely on the published Ammonia Standing Advice.

Intervention in civil proceedings

The power to intervene in civil proceedings should be an express one and included in the bill. Equipping the Governance Body with this power will enable it to intervene in those cases where its expertise would usefully inform the proceedings.

We note that the Office for Environmental Protection has only exercised its power to intervene on one occasion when it was granted permission by the Supreme Court to intervene in the appeal of R (Finch) v Surrey County Council to highlight the importance of clarity in the law to promote good environmental decision making.³⁴

The Governance Body should prepare and publish an enforcement policy which explains when it would seek to access this power, for example when it considers that its intervention would assist the court by enabling the court to consider wider contextual information which, without its intervention, would not be available.

The Governance Body should be sufficiently resourced to enable it to bring or intervene in judicial reviews where it considers this necessary.

For context, the UK Government and Parliament considered these issues during the pre-legislative scrutiny of the draft Environment (Principles and Governance) Bill.³⁵ The draft bill did not include express powers for intervention, but based on its evidence gathering, the Environmental Audit Committee recommended that the Office for Environmental Protection should be empowered to bring a judicial review in rare cases where a delay could cause further environmental harm and that it should be given the power to act as an intervener in environmental judicial reviews undertaken by other parties.³⁶ The EFRA Committee reached similar conclusions.

The UK Government agreed with the Committees' recommendations:³⁷

“We agree with the Committee’s recommendation that the OEP should be able to bring a judicial review without going through its earlier notice process in those rare cases where it is necessary to prevent serious damage to the environment or human health. We have therefore made provision in the Bill introduced today for the OEP to be able to use this mechanism...Regarding the recommended provision for the OEP to have a power to act as an intervenor in third party judicial reviews, we recognise that it may be beneficial for the OEP to be able to intervene in such cases where appropriate. We have therefore made provision for the OEP to apply to intervene in third party judicial reviews, for confirmation by the court”.

GB12. The Welsh Government consider financial penalties would be an ineffective and, in some cases, counterproductive method by which to remedy the non-compliance of Welsh public authorities with environmental law. To what extent do you agree or disagree with this position?

Disagree.

We think that the Welsh Government's dismissal of financial penalties is premature, and that further work should be done to look at the potential role financial penalties might play in the new system.

This is a chance for the Welsh Government to develop a novel approach in which financial penalties act as a powerful deterrent to non-compliance with environmental law, strengthen other parts of the enforcement process and support environmental priorities.

Any system of financial penalties would need to be carefully designed to ensure that any funds levied are invested in environmental protection and improvements in Wales.

The ability to levy financial penalties would need to be significant enough to provide a strong incentive for public authorities to comply, and to work with the Governance Body in the earlier stages of the process. It may be preferable for penalties to be imposed at these earlier stages where a public authority demonstrates a reticence to engage with the Governance Body, which could result in better co-operation and faster resolutions.

While hypothecation has traditionally not been favoured by government finance departments, this view may be changing as evidenced by the establishment of a Water Restoration Fund through which fines and penalties from water companies in England are directly channelled into environmental improvement.³⁸

Consideration should also be given to the role that other remedies might play alongside fines, especially where a private body performing a public function is suspected of breaching an environmental law. These could include, for example, injunctions or the disqualification of directors.

GB13. The Welsh Government proposes that the governance body should set out how it intends to co-operate with the organisations specified, including how they will avoid duplication and overlap when exercising their functions? To what extent do you agree or disagree with this approach?

Agree.

We agree with paragraph 89 on page 37 of the White Paper that it will be particularly important for the Governance Body to explain how it will work with certain organisations where their strategic objectives are closely aligned, for example in its Strategy or Corporate Plan.

Co-operation with partners including other environmental governance bodies

The Governance Body should establish ways of working with the organisations listed in paragraph 94 on page 38 of the White Paper.

This could include agreeing a memorandum of understanding. The Governance Body should pay special attention to its relationship with the Future Generations Commissioner given the complementary nature of their functions and the need to avoid duplication.

The Office for Environmental Protection and the Climate Change Committee are required to prepare a memorandum of understanding.^{39,40} The Office for Environmental Protection has also agreed a memorandum of understanding with the Local Government and Social Care Ombudsman and with Environmental Standards Scotland and the Interim Environmental Protection Assessor for Wales, as recommended by Defra.^{41,42,43}

Co-operation between the UK's environmental governance bodies is fundamental to ensuring that cross border issues and matters that concern both devolved and reserved environmental law are dealt with effectively. The governance bodies should co-ordinate their functions where appropriate, as recently happened on an investigation into possible failures to comply with environmental law in relation to Special Protection Areas for wild birds in England, Northern Ireland and Scotland.^{44,45}

Both the UK Government's Environment Act 2021 and the Scottish Government's UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 contain provisions which require consultation with other governance bodies when relevant.^{46,47} An equivalent provision should be included in the Welsh Government's bill.

Duty of co-operation for other public authorities

The Welsh Government's bill must require public authorities to co-operate with the Governance Body to enable an efficient use of resources for all parties and to facilitate swift investigations and remedies on any breaches in environmental law.

Public authorities are required to co-operate with the Office for Environmental Protection and Environmental Standards Scotland and to give the body "such reasonable assistance as it requests (including the provision of information)".^{48,49} Equivalent provision should be made in the Welsh Government's bill.

Requiring public authorities to respond within a specific timescale would help to avoid the delays that have occurred in England, where information has not always been provided in a timely or willing manner. In February 2024, the Chair of the Office for Environmental Protection told MPs "It concerns me greatly that some delays are built into our own work because of that lack of co-operation or delay" and that "It takes a long time, sometimes almost two years, to get information about something that is a matter of complaint or, indeed, the suggestion that we are not entitled to any information for core purposes, if it is not already in the public domain".⁵⁰

The Welsh Government should therefore consider setting time limits for public authorities such as those set for compliance under the Environmental Information Regulations 2004.⁵¹

GB14. Our preferred model for the governance body is a ‘Commission’, but consider alternative models, such as an arms-length body, could provide similar benefits. To what extent do you agree or disagree with this approach?

We note that since the White Paper was published, the Welsh Government has clarified that its preferred model for the Governance Body is a Non-Departmental Public Body (NDPB) which we support.⁵²

As NDPBs are sponsored by government departments, it will be important to install as many safeguards as possible in the bill and the structures of the Governance Body to provide for its independence both initially and in the long term.

The Welsh Government should therefore:

- Include clauses in the bill to clarify there is no power of direction for Welsh Ministers (GB2) and to set a duty on Welsh Ministers to respect the Body’s independence akin to the UK Government’s Environment Act 2021.⁵³
- Stipulate that all Governance Body reports should be laid in the Senedd with opportunities for Senedd committees to discuss and hold evidence sessions on the Body’s work, resourcing and performance, including hearing directly from its Chair and Chief Executive (GB2).
- Ensure that the Governance Body has complete discretion to develop its strategy and enforcement policy (GB2).
- Provide a ring fenced budget for the Governance Body in each Senedd term, agreed through a bespoke process (GB15).
- Introduce a requirement for the Governance Body to publish an annual Sufficiency Statement in relation to its resourcing (GB15).
- Include a strengthened role for the Senedd in the public appointment process for the Chair and other board members (GB15).
- Provide sufficient resourcing to allow the Governance Body to maintain an independent website and communications function, an in house legal team (including a general counsel) and its own IT system.

We are concerned that a Commission model could have an adverse impact on the governance of the Body. Experience of similar models has not always been positive.

For example, an independent review of the governance arrangements of the Independent Police Complaints Commission found that “Commissioners are engaged in both the governance of the organisation and its operational activity”.

It noted that “the fundamental problem of the tension which inevitably arises from the dual accountability of operationally focused Commissioners also being members of a Board with responsibility for scrutiny of the organisation and which has resulted in blurred lines of decision-making on cases as well as excessive delays in concluding cases”. The Commission was later disbanded and replaced with an NDPB.⁵⁴

GB15. To what extent do you agree or disagree with the Welsh Government’s approach in respect of appointing members and allocating resources to the governance body?

Appointment of members

We agree with the proposal to appoint a board for the Governance Body to provide strategic leadership and oversight, rather than a single commissioner, and for this to be done through a public appointments process.

The Chair should be appointed first and be involved in the appointment of the other board members. Independent panel members should be involved in the sifting and interviews of all board members, including the Chair.

Senedd involvement in the appointment of the board

Paragraph 16 of the White Paper says that Welsh Ministers will consult the appropriate Senedd Committee when appointing the Chair and board members. This weak commitment does not reflect the need for an additional degree of independence from government control over the person(s) appointed to the Governance Body, given its explicit enforcement and oversight role over Welsh Ministers.

A standard public body appointment process in which Welsh Ministers hire and fire the Chair and other board members is therefore not appropriate. The Senedd must play a stronger role in the appointment process to safeguard the independence of the Governance Body and to provide a check on ministerial power over the individuals that will be providing oversight of government and other public authority activity. The Welsh Government and the Senedd should explore alternative appointment options as a matter of urgency, for example requiring the consent of the relevant Senedd committee on all board appointments.

Expertise of board members

The expertise listed in paragraph 14 of the White Paper covers most of the essential capabilities that the first board will need. Essential board member competencies should be included in the bill, and these should also include investigatory and enforcement proceedings, mirroring the approach taken to the Office for Environmental Protection.⁵⁵

It would also be desirable for the first board to have some experience or insight into the setting up of a new public body.

Size of the board

We suggest that the size of the board should be reduced slightly, for example to 5-6 members, which would rebalance it in relation to the proposed indicative size of the executive team, while still enabling it to comprise the necessary expertise and provide effective strategic leadership.

Terms of appointment

We agree that appointments should be for up to five years and for a maximum of two terms, with staggering to avoid gaps in board composition.

Funding

The process and quantum of resourcing for the Governance Body will be essential in providing the independence and means for it to fulfil its functions.

The Governance Body should be required to publish an annual Sufficiency Statement, mirroring the requirement for the Office for Environmental Protection which must include its assessment of whether the Secretary of State has provided it with sufficient resources to carry out its functions in its annual accounts.⁵⁶

The Welsh Government and the Governance Body should agree a bespoke process for setting the budget of the Governance Body, which recognises its special status. We note Defra and the Office for Environmental Protection have put in place such a process.

The budget for the Governance Body should be ring fenced for each Senedd term and the baseline carefully agreed and reviewed to inform annual budget allocations.

The funding for the Governance Body should be sufficient to allow it to operate independently, for example to maintain an independent website, an in house legal team (including a general counsel), communications and procurement functions and an IT system. It should be new money and not reallocated from existing environmental commitments or public bodies.

The budget proposal of around £3 million for a staff of 23 is a similar level of resourcing to that allocated to Environmental Standards Scotland and we note has evolved since the White Paper was published.⁵⁷

While we understand the need for a placeholder figure, the funding allocation for the Governance Body can only be determined once its functions and nature are known and an operating model developed.

Development of an operating model would provide answers to the following questions, all of which would inform the budget and funding allocation:

- What is our remit?
- What outcomes are we seeking?
- What is our legal framework?
- What must our business do to achieve our goals?
- What volumes are we expecting to handle?
- How many people do we need with what sort of skills?
- What organisation structure works best?
- How can we operate most efficiently and effectively?
- Where are our operations best located?
- What information do we need to run our business?
- What systems do we need?
- What are our key cost drivers?

GB16. Are there any other views you would like to provide in relation to our proposals to set up a governance body?

Transitional and interim arrangements

The transition to the new system will need to be carefully managed to avoid further delay and ensure that permanent arrangements are in place as quickly as possible. This must be done concurrently with the development and passage of the bill. An indicative timeline should be set out in the Welsh Government's response to the consultation.

The Interim Environmental Protection Assessor for Wales is confirmed in post until February 2025 and continues to lack resource, not least because of the delay in appointing a deputy assessor. A clear timetable should be provided for the transition between this role and the vesting of the full Governance Body.

Consideration should be given to setting up an Interim Governance Body to receive complaints about environmental law so that these can be gathered for the fully vested Body to consider.

A stakeholder advisory group should be established to support the Welsh Government on the transition to and set-up of an Interim and full Governance Body, with oversight by the Senedd to ensure this process is conducted as independently as possible.

Defining environmental law

The bill will need to provide a definition of environmental law. We would welcome further engagement on this.

Part C: Targets for the protection and restoration of biodiversity

The inclusion of a target setting framework is a very welcome part of the White Paper and forthcoming bill. The long term nature of environmental matters makes this particularly important. Environmental improvement cannot be achieved over the short time frame of a political cycle.

Putting targets into law gives them certainty and clarity that benefits everyone and drives long term investment in environmental improvements. However, while we broadly support the target setting framework in the White Paper, it must be strengthened to be effective and durable as we suggest in our responses below.

BT1: To what extent do you agree or disagree with the inclusion within the Bill of the Wales Nature Recovery Framework proposed in the paper?

Strongly agree.

We welcome the proposal for a new, statutory nature recovery framework and broadly support its principal elements – a headline target in primary legislation; a suite of supporting statutory targets introduced through secondary legislation; a long term national strategy; a shorter-term national delivery plan; and a process to support and secure delivery at a local level.

Putting targets into law provides certainty and clarity and will drive long term investment in environmental improvements. As well as being legally binding, targets must also be ambitious, enforceable and complementary.

Drawing on our experience from the development and implementation of the target setting framework in the UK Government’s Environment Act 2021, there are two main areas where we suggest that the proposed framework in the White Paper should be strengthened.

Introducing binding interim targets

Successful implementation of long term targets will depend on sustained and targeted progress in the short term.⁵⁸ Binding interim targets are supported by many in the business community as they can provide near term certainty for businesses, creating a stable environment which encourages investment in their workforce, and in green products and services.⁵⁹

Binding interim targets would focus businesses and other actors on planning the trajectory towards the long term targets and help drive innovation in their business models. They would also mitigate the risk of backloading actions to meet targets. Evidence in the Dasgupta report shows that delaying action by even ten years is likely to ratchet up costs considerably.⁶⁰

Experience of voluntary government nature targets is that many have been missed or in some cases abandoned.⁶¹ For example, the 2019 State of Nature report found that the UK was not going to meet most of the Convention on Biological Diversity's Aichi targets.⁶²

The UK Government declined to adopt binding interim targets in the Environment Act 2021 because it said the environment “is an ever-changing, flexible scene”.⁶³ While we agree that change towards long term goals, and progress towards meeting them, does not always happen in a linear way, this is not an argument not to make the interim targets legally binding. It is an argument to apply some flexibility in the type of interim targets that might set.

We recommend therefore that the Welsh Government follows the successful model of the Climate Change Act 2008, in which five year interim targets (carbon budgets) are legislated for.

Strengthening the link between aspiration and delivery (see also our response to BT8)

The link between biodiversity targets and the Nature Recovery Action Plan should be clear from the outset. The Plan must include time bound, specific measures that are explicitly linked to the delivery of the targets.

The bill should therefore require the Welsh Government to set out the proposals and policies needed to meet long term and interim targets in the Nature Recovery Action Plan.

Without this, there could be a lack of impetus for successive governments to ensure that policies are in place to deliver the targets and that progress remains on track, with meaningful actions potentially backloaded towards the end of the plan period.

The largely narrative nature of the UK Government's Environmental Improvement Plan is a case in point. The Office for Environmental Protection has recommended that the UK Government should clearly translate its vision into policies, commitments and actions for the whole of government, establish clear and simple governance arrangements that drive delivery on the ground and have a unifying overall delivery plan and one for each goal area.⁶⁴

Section 13 of the Climate Change Act 2008 offers a useful model for drafting on providing a link between the targets and the Nature Recovery Action Plan in law.⁶⁵

BT2. To what extent do you agree or disagree with the inclusion within the Bill of the statutory nature positive headline target: ‘to reverse the decline in biodiversity with an improvement in the status of species and ecosystems by 2030 and their clear recovery by 2050’.

Strongly agree.

We strongly welcome the proposal to include a headline target on the face of the bill, and to align this with the ‘nature positive’ goal. However, we suggest that the wording is made more specific.

A duty to meet the target must be placed on Welsh Ministers.

The Welsh Ministers must be required to take all necessary steps to reverse the loss of biodiversity by 2030 and to restore biodiversity by 2050.

To restore biodiversity means the process of assisting the recovery of species populations, habitats and ecosystems towards or to healthy and resilient levels.

The loss of biodiversity is reversed if the status of biodiversity (species, habitats and ecosystems) has improved by the end of 2030 relative to a 2020 baseline.

Biodiversity is recovering if by 2040, the status of species, habitats and ecosystems has improved substantially relative to 2030.

Biodiversity is restored if, by 2050, the status of species, habitats and ecosystems has improved substantially relative to 2040; is considered to have increased to healthy and resilient levels or has improved relative to a [1970s] baseline.

These components must be additive so biodiversity can only be considered to be ‘recovering’ in 2040 if, in 2030 the loss of biodiversity had been reversed (ie the status had improved in 2030 relative to a 2020 baseline). Similarly, biodiversity could only be considered ‘restored’ in 2050 if the 2040 reference point had previously been met.

Welsh Ministers should be required to lay a statement before the Senedd to set out how they will assess whether these 2030, 2040 and 2050 headline targets have been achieved, including with reference to the supporting targets set via secondary legislation. This duty should be time bound.

Welsh Ministers should be required to seek advice, in developing their approach to making this assessment, from Natural Resources Wales, independent experts and the Governance Body (if it is in place by that point).

The advice should be published, and if Welsh Ministers depart from this advice, they should be required to explain the reasons for this. Ministers should have the ability to review their approach, for example in relation to scientific developments, subject to the same provisions around independent advice, transparency and consultation.

BT3. To what extent do you agree or disagree with the proposal to include a duty that the Welsh Ministers must set statutory biodiversity targets in secondary legislation?

Strongly agree.

Welsh Ministers should be required to set both long term and interim targets in secondary legislation. There should be a duty on Welsh Ministers to ensure that the targets are met. In setting the targets, Welsh Ministers should be required to have regard to the Global Biodiversity Framework.

The duty on Welsh Ministers to lay the secondary legislation containing the supporting targets should be time bound. We recommend this should be done 6 months after the bill is passed, so that the targets are able to drive progress leading up to 2030.

This will require evidence gathering and policy development on the targets to be undertaken concurrently with the development and passage of the bill. While the power to lay secondary legislation cannot be exercised until it exists, preparatory work on targets must begin immediately following the publication of the Welsh Government's response to this consultation once a firm policy outcome has been published.

The bill should also empower Welsh Ministers to make additional targets where these are considered necessary to achieve the headline target and set out the requirements for the target setting process, including:

- Undertaking consultation and seeking independent expert advice – before setting targets, Welsh Ministers should seek advice from independent experts and Natural Resources Wales and should publish the advice they receive. There should also be wider public consultation. If it is in place in time, the Governance Body should be asked to provide advice before the targets are finalised and the Welsh Government should be required to respond to that advice.
- Ensuring transparency – Ministers should publish a commentary to accompany the laying of the secondary legislation on the targets in the Senedd, including the rationale for setting the targets at the standard chosen. An explanation should be provided if this differs substantially from the expert advice received.

- Reviewing targets – Welsh Ministers should be required to review the biodiversity targets at least once every Senedd term, to consider whether meeting the supporting targets would adequately contribute to meeting the headline target or whether the targets need to be revised. This process should include advice from independent experts, Natural Resources Wales and the Governance Body. The advice should be published, and Welsh Ministers should publish their response to the advice, including reasons for any departure.

BT4. Potential suite of supporting targets, to underpin the headline target, are likely to be: Species – distribution abundance and extinction risk; Habitat – protection, management and restoration; and Ecosystem health and resilience – recognising the key role and contribution of ecosystems. To what extent do you agree or disagree with the key areas proposed for the biodiversity targets to be introduced in secondary legislation in the Wales Nature Recovery Framework?

Strongly agree.

We support the inclusion of species measures – abundance, distribution and extinction risk – which link to Goal A and Target 4 of the Global Biodiversity Framework.

We support the inclusion of habitat measures, linked to Goal A and Targets 1-3 of the Global Biodiversity Framework.

The targets should also include the commitment for the protection and effective management of at least 30 per cent of land and sea by 2030, with associated targets on the condition of terrestrial, freshwater and marine protected sites and targets for habitat restoration outside protected sites.

We welcome the commitment in the White Paper to seek advice from independent experts on the development of the targets and to facilitate effective engagement and consultation with key stakeholders. Our response to BT6 explains why the wording of the UK Government’s Environment Act 2021 is not a desirable approach to follow on the commissioning of expert advice.

We note the intention to set targets based on practical action, whereas the proposed list of areas for supporting targets also includes outcome-based measures. We consider that both will be needed. It is important that national targets articulate outcomes/ends (for example, an increase in species abundance) to assess whether biodiversity is recovering, as well as the desired delivery of actions/means to meet biodiversity commitments.

BT5. To what extent do you agree or disagree that Natural Resources Wales reports on the biodiversity targets as part of the State of Natural Resources Report?

Partly agree.

We agree that Natural Resources Wales should include data, indicators, and metrics on the biodiversity targets in the State of Natural Resources Report.

However, as proposed in the White Paper, the responsibility for reporting on whether targets have been met should lie with Welsh Ministers, with the Governance Body assessing and reporting on the adequacy of progress.

Ministers should be required to publish an annual report on progress in meeting the targets and implementing the Nature Recovery Strategy and Action Plan and other relevant environmental plans.

As part of its scrutiny and advisory functions, the Governance Body should report annually on how the Welsh Government and public authorities are contributing to the delivery of environmental goals and statutory targets. The framing of the Office for Environmental Protection's analogous power is largely sound and produces an independent, comprehensive, and robust assessment of progress.⁶⁶

The Welsh legislation should specify a timeline for a statutory reporting cycle, avoiding the undesirable and perverse approach in the Environment Act 2021 in which UK Government ministers have up to a year to respond to the Office for Environmental Protection's progress report. This means it is impossible for the UK Government's response to be considered in the following year's assessment by the Office for Environmental Protection.

For example, Defra responded on 16 January 2024 to the Office for Environmental Protection's progress report from 19 January 2023, the day after the Office for Environmental Protection published its next progress report on 18 January 2024.⁶⁷ This time lag is confusing for the public, has resulted in reporting incoherence and allows ministers to dodge or defer important recommendations.

BT6. To what extent do you agree or disagree that Welsh Ministers publish a statement, before the Senedd, to report whether the statutory biodiversity targets have been met by the date specified in regulation?

Partly agree.

We strongly agree with the requirement for Welsh Ministers to publish a statement before the Senedd to report on whether the statutory biodiversity targets have been met. This will provide transparency and an opportunity for scrutiny of progress.

We note that paragraph 67 on page 56 of the White Paper proposes that if the biodiversity targets are not met, Welsh Ministers will be required to seek

independent and expert advice on the reasons why the targets have not been met and on the action considered necessary to achieve them.

This is welcome, but we suggest that the wording in the bill should be less discretionary than Section 4 of the UK Government’s Environment Act 2021, which requires the Secretary of State to seek advice from persons they consider to be independent and to have relevant expertise. This vagueness resulted in a target setting process that lacked transparency.⁶⁸

Giving future ministers wide discretion to decide how and from whom to source advice in circumstances where binding targets are set to be missed would not be in the public interest. Instead, the bill should require Welsh Ministers to obtain, with a strong expectation to follow, the advice of the independent Governance Body on the reasons why targets have not been met and any remedial action needed to address this.

We also note that Welsh Ministers will be required to take “further reasonable action” to achieve any missed targets as soon as is practicably possible after receiving independent advice. We are concerned that this wording is too open ended. Instead, we suggest that the Welsh legislation more closely follows the ‘comply or explain’ model in the Climate Change Act 2008, which comprises:⁶⁹

- A duty on the Secretary of State to prepare proposals and policies for meeting carbon budgets.
- A duty on the Secretary of State to report on proposals and policies for meeting carbon budgets.
- If a carbon budget is not met the Secretary of State must explain why and set out proposals and policies to compensate.
- Changing carbon budgets requires the advice of the Climate Change Committee.

Welsh Ministers should therefore be required to set out the steps they intend to take to bring them back into compliance at the earliest opportunity, with an associated requirement to report to the Senedd and the Governance Body on their progress at specified intervals.

While we agree in principle that provision should be made for a case where biodiversity targets are not met, the wording should be strengthened as we propose above.

We also suggest that in the Welsh Government’s response to this consultation, Welsh Ministers should clarify their commitment to meeting the targets and that these provisions should be seen as a power of last resort.

As we set out in our response to BT1 and BT3, setting binding interim targets will help to propel progress towards meeting the statutory targets and minimise the risk of missing statutory long term targets.

BT7. To what extent do you agree or disagree with the proposal that Welsh Ministers be required to produce a statutory long term Wales Nature Recovery Strategy, outlining the approach to delivery of the statutory targets as well as the Welsh Government’s response to the Global Biodiversity Framework?

Strongly agree.

Together with the Nature Recovery Action Plan (NRAP), the Nature Recovery Strategy should set out the Welsh Government’s approach to delivering the domestic statutory biodiversity targets and the targets and commitments in the Global Biodiversity Framework.

The Strategy should be cross cutting, cover all relevant sectors including farming, forestry and land use planning and embrace both the terrestrial and marine environments. Progress reports on the Strategy should directly contribute to the UK Government’s National Biodiversity Strategy and Action Plan.

We note that the Nature Recovery Strategy will sit alongside other environmental frameworks such as the Clean Air Plan for Wales.⁷⁰ Consideration should be given to how to integrate and align the complex mix of legislative and non-legislative environmental commitments that exist in Wales to provide a holistic and joined up approach to environmental action.

The Welsh Government should also put in place systems to ensure senior cross government ownership of the Nature Recovery Strategy and Action Plan, for example a cross government implementation board to set and oversee clear accountabilities for all departments’ contribution to delivery.

Examples from the UK Government include:⁷¹

- The Climate Change Integrated Review Implementation Group, chaired by the Department for Energy Security and Net Zero.
- The Climate Resilience Steering Board, chaired by the Cabinet Office and Defra.
- The Climate Adaptation Research and Innovation Board, chaired by the Government’s Chief Scientific Advisor.

BT8. To what extent do you agree or disagree that the Wales Nature Recovery Action Plan sets out a detailed programme of work required to deliver the statutory biodiversity targets?

Strongly agree.

Experience from elsewhere in the UK shows the importance of providing clear and transparent delivery plans and programmes.

The UK Government's Environmental Improvement Plan lacks detailed delivery information and pathways and, as a result, has not yet proved effective in driving action at the pace and scale required to deliver statutory environmental targets and other goals.⁷²

The Office for Environmental Protection found in its annual assessment of the UK Government's progress on improving the natural environment in England that "Government remains largely off track to meet its environmental ambitions" and that "...overall progress and prospects are impeded by the lack of an effective and transparent delivery plan".⁷³

The National Audit Office has examined how the UK Government has set itself up to deliver its long term environmental goals. In its 2020 report on achieving long term environmental goals, it recommended that:⁷⁴

"Alongside clear objectives, government needs a realistic outline plan for delivery. This is important for understanding where new policies or initiatives are likely to be needed to meet the goals, and how soon associated decisions need to be made. Transparency over government's delivery plans should also help stakeholders understand how they might be affected or involved, and so give them the confidence to invest and plan accordingly."

In 2023 the National Audit Office reviewed progress against the recommendations it made in its 2020 report and recommended that the UK Government "...should incorporate detailed operational plans for how it will achieve the goals of the [Environmental Improvement Plan]".⁷⁵

To be effective, the NRAP must therefore be a clear delivery plan with SMART actions. It should identify specific policies and activities and explicitly link their contribution, individually and together, towards achieving the specified outcomes. It should be clear how much progress is expected to be made, and by when, and where responsibility lies. The current NRAP will need significant refocusing and redesign to convert it into such a plan.

The Welsh Government should publish a dedicated investment plan alongside the NRAP to provide transparency and assurance on how actions to deliver the targets will be funded. In respect of the UK Government's delivery of long term environmental goals, the National Audit Office recommended that:⁷⁶

"...delivery plans will need to be flexible enough to accommodate different scenarios, with associated costings reflecting the underlying uncertainties. However, they are still important as otherwise there are risks that decisions about funding allocations are made in a piecemeal way, rather than on the basis of a strategic view about how best to resource long-term changes."

BT9. To what extent do you agree or disagree that there should be a duty on public authorities which requires them to contribute to delivery of the biodiversity targets?

Strongly agree.

Public authorities must be required to contribute to the delivery of the statutory biodiversity targets. This would complement the existing public authority biodiversity duty and ensure that all public authorities embed biodiversity as a strategic priority within their plans and programmes.⁷⁷ The new duty should be carefully designed to avoid it becoming another responsibility in an already crowded compliance landscape – it must drive change and not be viewed as a manual for ‘business as usual’.

BT10. To what extent do you agree or disagree that named public authorities should produce a Local Nature Recovery Action Plan to outline local action and priorities for delivery of the statutory biodiversity targets?

Agree.

Public authorities should be required to produce a Local Nature Recovery Action Plan (LNRAP) which sets out their priorities and actions for delivering biodiversity targets.

We agree that the Welsh Government should provide statutory guidance to public authorities on LNRAPs. This should emphasise the importance of embedding biodiversity recovery as a strategic priority and require authorities to set out how they intend to (a) contribute to delivering targets; (b) integrate biodiversity with their other functions, and (c) resource their biodiversity priorities.

As part of its monitoring and advisory functions, the new Governance Body should be required to undertake an assessment of whether LNRAPs, in combination with the NRAP, are effective delivery plans for the statutory biodiversity targets. It should provide advice on where improvements are needed, and Welsh Ministers and public authorities should be required to respond to this advice within a specified timeframe.

BT11. Please indicate whether you would prefer the duties proposed in this section to apply to the longer list of public authorities included in Annex 2, or the shorter list included in Annex 6?

To ensure a consistent approach in Welsh law, the biodiversity duties proposed in this section should apply to the same public authorities that are subject to the biodiversity and resilience of ecosystems duty in Section 6(9) of the Environment (Wales) Act 2016.⁷⁸

The acts of non-devolved bodies in Wales should also be subject to these revised duties, as provided for by Section 6(9) and as proposed in our response to EP3.

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Endnotes

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