Agenda – Climate Change, Environment, and Infrastructure Committee

Meeting Venue:	For further information contact:
Committee room 4 Tŷ Hywel	**Marc Wyn Jones**
and video Conference via Zoom	Committee Clerk
Meeting date: 6 July 2023	0300 200 6565
Meeting time: 09.30	SeneddClimate@senedd.wales

Private pre-meeting (09.15–09.30)

Public meeting (09.30–11.40)

1 Introductions, apologies, substitutions, and declarations of interest

(09.30)

2 Infrastructure (Wales) Bill – Evidence session with the Minister for Climate Change

(09.30–10.30) (Pages 1 – 34)

Julie James MS, Minister for Climate Change

Neil Hemington, Chief Planner – Welsh Government

Owen Struthers, Head of National Consenting – Welsh Government

Nicholas Webb, Lawyer – Welsh Government

Attached Documents:

Research brief – Infrastructure (Wales) Bill Stage 1 scrutiny

Break (10.30–10.40)

Senedd Cymru
Welsh Parliament

3 Infrastructure (Wales) Bill - Evidence session with the Minister for Climate Change

(10.40-11.40)

Julie James MS, Minister for Climate Change

Neil Hemington, Chief Planner – Welsh Government

Owen Struthers, Head of National Consenting – Welsh Government

Nicholas Webb, Lawyer – Welsh Government

4 Papers to note

(11.40)

4.1 Environmental Protection (Single-use Plastic Products) (Wales) Act 2023

(Pages 35 - 36)

Attached Documents:

Letter from the Minister of Climate Change to the Chair in relation to the Environmental Protection (Single-use Plastic Products) (Wales) Act 2023

4.2 Welsh Government Draft Budget 2023-24

(Pages 37 - 39)

Attached Documents:

Letter from the Chair of the Finance Committee to the Minister for Finance and Local Government in relation to the documentation accompanying the Welsh Government's Draft Budget

4.3 Resources and Waste Common Framework

(Page 40)

Attached Documents:

Letter from the Minister for Climate Change to the Chair in relation to The Environmental Permitting (England and Wales) (Amendment) Regulations 2023

4.4 The UK Emissions Trading Scheme

(Pages 41 - 49)

Attached Documents:

Letter from the Minister for Climate Change to the Chair in relation to the provisional common framework for the UK Emissions Trading Scheme

4.5 The Interministerial Group for Housing, Communities and Local Government

(Pages 50 – 51)

Attached Documents:

Letter from the Minister for Finance and Local Government to the Chair in relation to the Outcome of the Interministerial Group meeting for Housing, Communities and Local Government

4.6 The Environment (Air Quality and Soundscapes) (Wales) Bill – Additional technical information from the Minister for Climate Change

(Pages 52 – 82)

Attached Documents:

Correspondence from the Minister for Climate Change in relation to the written technical briefing on the Environment (Air Quality and Soundscapes) (Wales) Bill

Letter from the Minister for Climate Change in relation to a discrepancy between the EM and the Bill relating to smoke control

4.7 The Infrastructure (Wales) Bill – Correspondence between the Minister for Climate Change and the Secretary of State for Levelling-Up

(Pages 83 – 95)

Attached Documents:

Correspondence between the Minister for Climate Change and the Secretary of State for Levelling-Up in relation to the Infrastructure (Wales) Bill

4.8 Ffos-y-Fran opencast coal mine – Legal opinion commissioned and shared by Coal Action Network

(Pages 96 – 128)

Attached Documents:

Legal opinion commissioned and shared by Coal Action Network

5 **Motion under Standing Order 17.42 (vi) and (ix) to resolve to exclude the public from the remainder of today's meeting**
(11.40)

Private meeting (11.40–14.00)

6 **Infrastructure (Wales) Bill – Consideration of evidence received under items 2 and 3**

7 **Consideration of the Committee's forward work programme – Autumn 2023**

(Pages 129 – 135)

Attached Documents:
Paper – Forward work programme

8 **The Environment (Air Quality and Soundscapes) (Wales) Bill – Consideration of the Committee's Stage 1 draft Report**

(Pages 136 – 194)

Attached Documents:
Draft report – The Environment (Air Quality and Soundscapes) (Wales) Bill: Stage 1 report

Lunch break (12.30–13.15)

9 **The Environment (Air Quality and Soundscapes) (Wales) Bill – Consideration of the Committee's Stage 1 draft Report**

Agenda Item 2

Document is Restricted

Julie James AS/MS
Y Gweinidog Newid Hinsawdd
Minister for Climate Change

Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref: MA/JJ/1638/23

Heledd Fychan MS
Interim Chair
Climate Change, Environment and Infrastructure Committee
Welsh Parliament
Cardiff Bay
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19 June 2023

Dear Heledd,

Thank you for your letter of 25 May requesting an update on work undertaken by the Welsh Government to raise awareness amongst businesses and develop detailed guidance in relation to The Environmental Protection (Single-use Plastic Products) (Wales) Act 2023.

Our ongoing communications plan to engage key stakeholders was initiated ahead of the introduction of The Environmental Protection (Single-use Plastic Products) (Wales) Bill to the Senedd last September. Following the passing of the Bill in December, awareness raising materials were immediately released. Since then, we have continued to release national communication materials, including social media content via Welsh Government and partner channels, including Business Wales. Here is an example of Twitter messaging.

As of 5 June, we have stepped up national campaign activities with the release of an informational animation clip. Similar activities will continue in the months before the bans come into force. We have recently engaged a marketing agency to help take the targeted national campaign forward and will further develop our plans in conjunction with them.

The Welsh Government website has been updated with information regarding the changes in law and the expected timetable, providing information to businesses about how they can prepare for the changes. This will continue to be updated as the Act is implemented.

We are also producing comprehensive guidance that will support implementation of the Act, which is due to be published later this month. In developing this, officials have worked collaboratively with a range of key stakeholders including representative bodies for impacted businesses, environmental NGOs, protected characteristic groups, local authorities and community groups.

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A number of provisions in the Act are already in force, as they came into effect automatically on the day after Royal Assent. Our plan to bring forward the first bans in October is on track. Bans on products already in the Schedule will be given effect by an Order. Our consultation on proposals to introduce civil sanctions as an alternative enforcement regime to the criminal sanctions already contained in the Act closed on 9 June. Drafting of the resulting Regulations will take place over the summer so they may be considered by the Senedd using the affirmative procedures in time to come into force with the first bans in October.

Yours sincerely,

Julie James AS/MS
Y Gweinidog Newid Hinsawdd
Minister for Climate Change

Senedd Cymru
Y Pwyllgor Cyllid
—
Welsh Parliament
Finance Committee

Rebecca Evans MS

Minister for Finance and Local Government

23 June 2023

Dear Rebecca,

Documentation accompanying the Welsh Government's Draft Budget

In our report on the scrutiny of the Welsh Government Draft Budget 2023-24, we made the following conclusion:

> *"Conclusion 1. We welcome the Minister's willingness to consider ways in which budget documentation can be improved. While we have reflected our views above, the Committee has decided to consult Senedd committees on their experiences of scrutinising this year's budget documentation and ways in which improvements can be made."*

A letter was subsequently issued to Senedd Committee Chairs on 8 March 2023, asking the following question:

> *"What improvements would you like to see in the Welsh Government's Draft Budget documentation and subsequent ministerial written evidence?"*

We received responses from the Chairs of the following committees which have all been published on the Senedd's website:

- Climate Change, Environment and Infrastructure Committee (CCEI)
- Health and Social Care Committee (HSC)
- Equality and Social Justice Committee (ESJ)
- Local Government and Housing Committee (LGH)
- Culture, Communication, Welsh Language, Sport and International Relations Committee (CCWLSIR)
- Children, Young People and Education Committee (CYPE)
- Economy, Trade and Rural Affairs Committee (ETRA)

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The responses identified a number of common themes and areas where improvements could be made to the budget process. These are summarised below:

Timeliness

As a general point, a number of Committees noted the trend in recent years towards publishing the Draft Budget later in the year, resulting in a truncated budget timetable, has made it challenging to meaningfully assess the impact of the Draft Budget on the policy areas within their remits. Some committees considered this to be a key weakness which significantly hampers the ability of Committees to consider budgetary proposals in detail.

Transparency

Many Committees felt that the Welsh Government could be more transparent in the way it presents its information in the Draft Budget. In particular, Chairs felt that the impact of budget decisions on policy areas within each Committee's remit should be clearly set out.

This echoes Recommendation 13 in our report on the Draft Budget 2023-24 which called on the Welsh Government to make changes to the way it presents information in documentation published alongside the Draft Budget so that it provides:

- an assessment of the impact of spending decisions across portfolios, including the impact of reprioritisation exercises and clarity on the real terms effect of decisions within portfolios; and
- an assessment of how the Welsh Government's spending decisions are (or are not) supporting preventative measures.

In response, you accepted this recommendation in principle, stating that:

> *"While we are committed to improving how we undertake and outline the impacts of our spending decisions, such an approach must be proportionate.*
>
> *We already publish a suite of documents as part of the Draft Budget, which includes individual Ministers' responses to their respective Senedd scrutiny committees, and which provides a more detailed account as to how Draft Budget decisions have impacted on different groups or considered issues such as prevention. The Strategic Integrated Impact Assessment (SIIA) continues to outline the contextual evidence that has supported our spending decisions.*
>
> *We are open to exploring further changes that could be made as part of the work of the Budget Improvement Plan."*

Quality of written evidence provided by the Welsh Government

Concerns were also expressed regarding the quality of the evidence provided by the Welsh Government, with some Chairs stating that ministerial submissions were not as comprehensive as previous years. Others also called on Welsh Government departments to respond fully and in detail to each Committee's written request for evidence.

Responding to recommendations ahead of the Final Budget debate

Finally, a number of Committees were disappointed that the Welsh Government was not able to respond to Draft Budget recommendations sufficiently in advance of the Final Budget debate. Some Committees also felt that the Welsh Government could do more to explain the differences between the Draft and Final Budget ahead of the Final Budget debate.

We welcome your willingness to engage with the Committee on these issues and that you are open to exploring changes to the way that information is presented alongside the Draft Budget.

We therefore ask that these concerns are taken into account ahead of the 2024-25 budget round.

I am copying this letter to the Chairs of the aforementioned Senedd Committees.

Yours sincerely,

Peredur Owen Griffiths MS
Chair of the Finance Committee

Croesewir gohebiaeth yn Gymraeg neu Saesneg.

We welcome correspondence in Welsh or English.

Julie James AS/MS
Y Gweinidog Newid Hinsawdd
Minister for Climate Change

Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref: MA/JJ/1498/23

Llyr Gruffydd MS
Chair
Climate Change, Environment and Infrastructure Committee
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26 June 2023

Dear Llyr

I am writing to inform you that The Environmental Permitting (England and Wales) (Amendment) Regulations 2023 which will shortly be laid before the Senedd fall under the scope of the Resources and Waste Common Framework.

These regulations amend The Environmental Permitting (England and Wales) Regulations 2016, Schedule 9, Part 2, which set specific permit conditions for sampling and reporting that operators of Material Facilities (MFs) receiving 1,000 tonnes or more of mixed waste must comply with. The 2023 regulations will increase the scope of MFs that are required to sample and report their waste, extend the types of materials to be identified and measured and require MFs to report more information on suppliers and destinations of waste. This information will support the delivery of Extended Producer Responsibility for Packaging scheme (pEPR).

Yours sincerely,

Julie James AS/MS
Y Gweinidog Newid Hinsawdd
Minister for Climate Change

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Julie James AS/MS
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Ein cyf/Our ref: JJ/PO/220/2023

Heledd Fychan MS
Interim Chair
Climate Change, Environment, and Infrastructure Committee
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26 June 2023

Dear Heledd,

Thank you for your letter of 16 May 2023 requesting further information and/or clarification on a number of matters relating to provisional Common Framework for the UK Emissions Trading Scheme (UK ETS).

Responses to the questions posed by the Committee are set out below. I would also like to highlight the unique nature of this Common Framework in that it sets out how the four Governments of the UK will work together to deliver and develop the UK ETS as a joint scheme. The Framework therefore not only considers how policy decisions will be reached and agreed, but also how the four governments will work together to maintain an effective market.

This Framework is the first iteration of a living document, which the UK ETS Authority expect to develop as both the scheme and our ways of working evolve.

Competence

How might the ongoing competence dispute between the UK and Welsh governments impact future legislation and policy decisions within the UK ETS framework?

While there are differing views on the use of the Finance Act in certain policy elements of the UK ETS, this is not currently an issue as all members of the Authority are working toward a common purpose. This was evidenced in the legislative consent granted for the Finance Bill 2020. I am clear that if, in the future, we believe decisions to be made are within the competence of the Senedd and the UK Government are required to legislate on our behalf, we will bring a Legislative Consent Motion.

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Can you elaborate on the specific provisions in the framework that set out how disagreements on competence will be managed, and how the legislatures will be consulted on competence disputes?

As set out in page 38 of the Framework, where exclusive competence is disputed, the Four National Authorities shall consider this, and where appropriate seek legal advice and the view of the devolved legislatures. All attempts will be made to resolve disputes at every level of the UK ETS Authority governance structure. However, where a competency dispute cannot be resolved, it becomes a formal dispute, and shall be subject to the formal dispute resolution process. As set out above, where we believe decisions to be made are within the competence of the Senedd and the UK government are required to legislate on our behalf, we will bring a Legislative Consent Motion.

Monitoring Effectiveness

How does the Welsh Government plan to monitor and evaluate the effectiveness of the UK ETS in achieving its objectives, particularly in terms of reducing greenhouse gas emissions?

The Authority produces an annual report titled “Report on the Functioning of the UK Carbon Market “which is aimed at providing transparency on the performance of the scheme. This includes information on compliance and enforcement under the scheme. This report by providing a snapshot of the scheme’s function in the previous year, helps the Welsh Government monitor progress of the scheme.

In addition, the UK ETS Authority has committed to a two-phase study that will evaluate the effectiveness of the scheme in driving emission abatement, as well as understanding the impact it has on participants and the wider economy.

The first phase, which is due to be completed in 2023, will focus on the process of establishing the scheme and what the outcomes have been in its initial years. The second phase of the evaluation is due to be carried out between 2025-2026 and will be focussed on the impacts of the scheme within its first four years, such as understanding the effect the scheme has had on the emissions intensity of participant processes or in being attributable to carbon leakage. This phase will not just focus on what impacts have been felt because of the scheme but also how these impacts have been delivered, as well as wider spill over effects**.**

Are there any provisions in the UK ETS framework to address potential regional disparities in the implementation and outcomes of the scheme across the four UK nations?

There is provision within the framework under the non-legislative approaches, to ensure that the Framework fulfils the objectives agreed at the Joint Ministerial Committee in October 2017, namely, to maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as was afforded by EU rules. These considerations are taken into account both in the policy development and the implementation of the scheme, so that a level playing field is afforded across the UK.

Intergovernmental Relations Review (IGRR)

How does the UK ETS framework align with the Intergovernmental Relations Review, and how will the outcomes of the review be integrated into the framework's governance and dispute resolution processes?

The ETS Framework reflects the principles and mechanisms outlined in the Intergovernmental Relations Review (IGRR), as confirmed in 'The Joint Governance Process' section of the concordat (*footnote* - ETS Provisional Common Framework, p.14). The Framework is integrated with the IGRR insofar as if an issue or disagreement cannot be resolved under the UK ETS Authority governance structure, it becomes a dispute and may be raised with the intergovernmental relations secretariat. The dispute will accordingly be escalated to the Interministerial Standing Committee (IMSC) (*footnote* - ETS Provisional Common Framework, p.106). If the dispute remains unresolved, it may be further escalated to the Intergovernmental Relations Council.

Resource Pool, Ways of working and Decision Making

Can you provide more clarity on the role of the 'resources pool' of officials and explain how it relates to other groups established by this framework?

The UK ETS scheme is managed on a day-to-day basis by officials representing the four governments. Together these officials constitute "the Resource Pool", supporting the Authority to take decisions relating to the UK ETS, in addition to providing technical and operational support. The Resource Pool which is accountable to the Authority and only able to act on behalf of the Authority. The roles needed to support each Authority function can be grouped into Leadership and Governance, Operations, Policy, Analysis, Stakeholder Support, and Enablers. Requests for support are channelled through the resource pool leadership and governance support. While the Resource Pool is currently comprised of officials from DESNZ (previously BEIS) due to them being the most resourced partner, all Governments are able to provide resources and expertise is drawn from the Devolved Governments on an ad-hoc basis, particularly in the realms of Operational Policy and Analysis.

How does the framework ensure that the 'resources pool' of officials effectively supports the coordination and implementation of the UK ETS across the four UK governments?

The Framework requires a contact list of officials, and further detail on the roles, responsibilities, and operational procedures of the Resource Pool to be maintained within the UK Emissions Trading Scheme Authority Terms of Reference and Operating Procedures. The Resource Pool is vested with responsibilities for the overall management and coordination of the Authority and Resource Pool Work Plan. The Work Plan is then developed and agreed by all Authority members and is underpinned by the UK ETS Authority Delegation and Oversight Framework. This framework sets out the criteria against which Authority functions can be delegated, and the level of Authority oversight and reporting required. All delegated functions explicitly have appropriate oversight from and engagement with the Authority, and the detail of this is included in the Authority and Resource Pool Work Plan. In all cases where a decision is delegated to the Resource Pool, confirmation of decision and reporting on the delivery of functions is required. Officials from any Government can request work from the Resource Pool to help the Authority as a whole develop policy and deliver the UK ETS.

What specific responsibilities will be assigned to the senior officials board, and how will their decision-making process interact with other governance structures?

The responsibilities of the Senior Officials Board are as set out in the Framework and detailed in the UK ETS Authority Terms of Reference. How the board interacts with the other governance structures depends on the subject matter on hand. Working Group Level Officials are responsible for identifying areas where opportunities or tensions may arise with governance structures outside of the UK ETS and facilitating joint working with the Senior Officials Board as required.

Can you elaborate on the principles outlined in the framework for decision-making processes, particularly regarding the internal clearing processes and expedited processes for the four governments?

The Authority decision making process is highly collaborative, with a minimum 2-week time period built in to ensure all members have the time and opportunity to work through decisions both as an Authority, but also for internal clearances – which vary across the different Governments. For a decision or activity to be expedited, this must be unanimously agreed to be suitable for an expedited process.

What measures are in place within the UK ETS framework to ensure transparency and accountability in decision-making processes across the four UK governments?

The Portfolio Ministers, who represent each of the Governments in the UK ETS Authority, are answerable to the decisions to each of their legislatures. Therefore, transparency is afforded across the government through the normal parliamentary processes for example thorough the debates of draft legislation on the UK ETS.

Regulators, FCA, and CCC

Can you provide a copy of the Memorandum of Understanding between the Environment Agency and devolved environmental regulators, and the Welsh Government's view on how its arrangements will impact the operation of the UK ETS?

I have attached a copy of the Memorandum of Understanding between the Environment Agency and the devolved environmental regulators. The Environment Agency as the Registry Administrator is beneficial as it allows the Authority to use much valued expertise and experience from the time when they performed the same function under the EU ETS. However, it is important to note that the Environment Agency's function is brought to scrutiny through a variety of Joint Working Groups in the Authority, including the Operations Joint Working Group which is attended by Authority officials across the four governments and devolved government regulators.

How does the UK ETS framework address potential discrepancies in the implementation and enforcement of the scheme across the four UK nations, particularly in terms of environmental regulators and compliance?

The Framework provides for structures in which decisions are made jointly and hierarchically depending on the importance of the decision. Decisions on enforcement and compliance are taken by regulators in accordance with legislation that has been made jointly and therefore discrepancies are unlikely to occur. However, if novel and minor issues emerge, these are discussed, and solutions jointly agreed through Working Groups with the four regulators in attendance. For novel and more critical issues, these are signposted and

escalated for decision and implementation via legislative procedures with sign off by Ministers.

What role will the Climate Change Committee play in the operation and oversight of the UK ETS framework, and how will its recommendations be integrated into policy decisions?

The Climate Change Committee (CCC) advises the Portfolio Ministers of the Authority, as required under CCA 2008. This advice is taken into consideration when arriving at decisions on the UK ETS. The CCC will also be engaged to secure advice and evidence at the planned review points in 2023 and 2028. The CCC does not have a role in the operation or oversight of the Framework.

Stakeholder engagement

What strategies are in place to ensure meaningful and inclusive stakeholder engagement in the development, implementation, and review of the UK ETS?

The UK ETS is a technical and complex scheme which is heavily reliant on a wide evidence base including economic analysis, market data, and the views of stakeholders. Public consultation forms the basis of our engagement, with various key consultations such as the 2019 'Future of UK Carbon Pricing' and the more recent 2022 'Developing the UK ETS'. To ensure stakeholders not only fully understand the issues being consulted on but are also able to engage in more depth, the Authority also carries out open workshops during consultation periods. These enable stakeholders to feed into the development of the various policies and how they should be delivered. The Authority also maintains ongoing stakeholder engagement outside of these consultation periods, with a UK ETS stakeholder group which meets on a monthly basis, and individual stakeholder engagement on an ad hoc basis as appropriate.

Can you provide more information on the stakeholder input process in the dispute avoidance section of the framework?

As set out above, the UK ETS is a technical and complex scheme which draws upon evidence and advice from experts. Given the regulated market nature of the scheme, whilst we engage stakeholders on an ongoing basis, our consultation processes seek evidence from stakeholders to inform how the scheme develops going forward. All of this helps to ensure that decisions are evidence based, which helps avoid disputes as much as possible. Of course, some evidence can be contradictory. This is where the role of the UK ETS analytical function, governance and Inter-Ministerial Group is critical to help resolve these tensions.

International

What strategies are in place to ensure that the UK ETS framework supports the UK's international policy formulation and implementation of international obligations, such as the Kyoto Protocol, Paris Agreement, and CORSIA?

While the UK ETS is a distinct scheme of its own, the elements of the UK ETS Scheme established and governed under the framework such as the UK Registry fulfils the obligations under the Kyoto Protocol by providing accounts for international emissions units. Further work is in progress to explore policy developments to support the implementation of Article 6.2 and 6.4 of the Paris Agreement. Similarly collaborative work is being undertaken

under the auspices of the ETS Framework to further define the relationship between the UK ETS and CORSIA.

How will the four UK governments coordinate their efforts to assess the impact of international trade on managing UK policy divergence and consider any implications within the UK ETS framework?

Impacts of international trade and related policy divergence on ETS is regularly monitored using the engagement the Authority has across the 4 governments via the Resource Pool and working group officials. This engagement enables the Authority to develop policy positions with an understanding of the landscape of global trade and the UK's position within it.

The International Relations Concordat cited in the framework was not concluded as part of the Intergovernmental Relations Review discussed above. In the absence of this concordat, is it your view that intergovernmental cooperation on international relations continues to be governed by the 2001 MoU on devolution?

Yes. Intergovernmental cooperation on international relations is currently governed by the 2001 Memorandum of Understanding and Supplementary Agreements on devolution. However, parties to the Framework will automatically use any updated international relations concordat, and wider principles arising from the Joint Intergovernmental Review, as the basis for such international considerations.

In your view, does the Framework offer the Welsh Government more opportunities to inform and participate in UK foreign policy and international relations work?

Common Frameworks were not intended to provide enhanced engagement on matters relating to international relations work, and the governance structures within it.

However, in areas covered by Common Frameworks and through involvement in negotiations with the EU under the Trade and Cooperation Agreement (TCA), Welsh Government officials work closely with their counterparts in the other Governments of the UK and share information, including on relevant developments in EU law and the implications of the Windsor Framework.

Officials are engaging with the UK Government to ensure that our views on negotiations are clear and to try and avoid a situation where a trade deal places an obligation on us which we cannot, or do not wish to, implement. For example, Welsh Government officials and Ministers have been engaged in preparations for meetings of the TCA Partnership Council and were invited to observe at the Partnership Council meeting on 24 March.

<u>EU</u>

Can you provide more information on the potential implications of a linking agreement between the UK ETS and EU ETS, particularly in areas of devolved competence?

Any potential linking arrangements with the EU ETS are subject to future negotiations. The role of the Scottish Government, Welsh Government, and DAERA in negotiations would be subject to quadrilateral Ministerial dialogue. The role of the Scottish Government, Welsh Government, and DAERA (Officials and Ministers) in the next phase will therefore be subject to further guidance. The implementation of any linking agreement secured with the EU in devolved areas would fall within devolved competence. Therefore, these would need

to be assessed as part of any such negotiations and the relevant portfolio Ministers and legislatures would be engaged.

Does the Welsh Government support linking the UK and EU ETS?

Yes. Given the importance of international cooperation on carbon pricing and the important role international carbon markets can play in attaining not only our climate change goals, but those globally, linking would bring many benefits to Wales and the UK.

How does the framework address potential challenges arising from the phase-out of ozone depleting substances and the management of industrial and air emissions within the context of the UK-EU 'level playing field'?

The EU-UK Trade and Cooperation Agreement (TCA) has some policies that intersect with UK ETS policy, with Article 390 therein referencing the UK and EU carbon pricing systems in relation to greenhouse gas emissions. While TCA is a reserved policy area, the ETS Frameworks recognises the importance of UK Government engaging with the Devolved Governments where these intersects happen on policies within devolved competence, as is the case for the UK ETS. Further detail on the means of such engagement is set out in the response to the question below.

In the context of the Trade and Cooperation Agreement, how will the Welsh Government work with the other UK governments to monitor divergence and alignment to/from EU standards, including to avoid potential retaliation measures?

As mentioned above, UK ETS policy intersects with the TCA and therefore topics relevant to the framework may be considered from time to time by TCA Specialised Committees or the Partnership Council. The Framework therefore provides for where a UK-EU meeting agenda includes an item concerning an area of devolved competence, UKG to facilitate the Devolved Governments' attendance at a similar level to that of the UKG representative. UKG is also required to engage the Devolved Governments as fully as possible in preparation for these meetings regardless of attendance, and on all relevant implementation matters. These provisions help to ensure the Welsh Government's interests are represented and the UK overall would be well-prepared to negotiate in the case of potential retaliation measures.

<u>REUL</u>

Can you clarify the interaction of the UK ETS framework with the Retained EU Law Bill and identify REUL within competence that underpins the framework?

As the ETS operates as a 4-nation scheme, officials across the Authority were engaged in early discussions on which legislation needs to be preserved. Much of the retained EU law in this area was agreed to be inoperable and irrelevant since the creation of the UK ETS.

Following the UK Government's decision to move to preservation-by-default on the REUL Bill, further engagement has been had across the Authority at official level and with lawyers in Welsh government. Only provisions that are no longer relevant to the UK ETS are being revoked and these have no implications for Welsh competence. Any provisions that are required for the functioning of the UK ETS will be preserved. However, we understand that the Committee wishes to see this information made available. We will discuss this within the Authority and propose to annex these to the Common Framework or make the list of REUL available through the REUL process. The Committee will be notified accordingly when this is agreed.

It is also reassuring that the most recent Interministerial Standing Committee paper identified Common Frameworks as the correct mechanism to manage regulatory divergence arising from the REUL Bill. The UK Government's policy paper on 'smarter regulation to grow the economy', released on 10 May, similarly confirms that when using powers in the Bill, Common Frameworks will be used to engage with Devolved Governments on policy and legislative decision-making across the UK.

Could you provide the Welsh Government's assessment of the Retained EU Law Bill's impact on the framework?

There is no identified impact for the reasons set out above.

Monitoring and review

How does the Welsh Government plan to incorporate the recommendations from the Committee regarding the role of legislatures and stakeholders in the review and amendment of frameworks?

The UK Government and Devolved Governments jointly engaged with interested technical stakeholders in 2019 through 'The Future of UK Carbon Pricing' consultation. We are approaching future engagement post implementation on a case-by-case basis. The Welsh Government acknowledges the Committee's suggestions on engagement with legislatures and stakeholders in the review of the Framework. The ETS Framework has an undertaking to review the governance arrangements for the Framework after the 2023 initial review, and the points raised will be included in the Authority discussions in this.

Can you provide more information on how the UK ETS framework will be reviewed and amended, particularly in terms of stakeholder and legislature involvement?

The Authority will conduct an initial review of the Common Framework within 3 months of the conclusion of the first scheme review of the policy, which is due to be carried out in 2023.

The Framework review will look at the governance arrangements and the points raised will be included in the Authority discussions in this.

How does the framework address the Committee's call for the production of annual reports on the operation of the frameworks?

In February, the Interministerial Standing Committee (IMSC) reaffirmed the importance of reporting to legislatures on the operation of Common Frameworks. The IMSC signed off a template for annual reporting post finalisation. The template includes a specific section for policy teams to report on divergence and disputes raised during the course of the year.

More generally, the Welsh Government considers it essential that there is effective scrutiny and monitoring of the operation of Common Frameworks.

IMSC may wish to review some of the more significant crosscutting issues that may emerge from the scrutiny process.

What are the criteria for triggering ad-hoc reviews of the UK ETS framework?

There are no set criteria at this point for triggering ad-hoc reviews of the Framework. However, since the Framework is still in the early days of implementation the Authority will continue to monitor how any developments impact the Framework and instances where these need to be accompanied by ad hoc reviews. This can then inform the review of the Framework mentioned in the response above.

Yours sincerely,

Julie James AS/MS
Y Gweinidog Newid Hinsawdd
Minister for Climate Change

Rebecca Evans AS/MS
Y Gweinidog Cyllid a Llywodraeth Leol
Minister for Finance and Local Government

Llywodraeth Cymru
Welsh Government

Eich cyf/Your ref
Ein cyf/Our ref: RE/221/2023

Llyr Gruffydd MS
Chair
Climate Change, Environment and Infrastructure
Senedd Cymru

SeneddClimate@senedd.wales

26 June 2023

Dear Llyr,

Outcome of the Interministerial Group meeting for Housing, Communities & Local Government

In accordance with the inter-institutional relations agreement, the second meeting of the Interministerial Group (IMG) for Housing, Communites and Local Government was held on 10 May 2023. As lead Minister for this IMG, I asked the Minister for Climate Change to chair the meeting, as the agenda items fell within her portfolio. This meeting had originally been planned for 10 October 2022, but was postponed at the request of the UK Government.

The Minister for Climate Change, Julie James MS was unable to attend on the day and sent her apologies. The Welsh Government was represented by: Emma Williams, Director of Housing and Regeneration; Sarah Rhodes, Head of Homelessness Prevention; Andrea Street, Deputy Director, Housing Safety Regulations & Standards; and Jo Larner, Head of Building Safety Programme.

The Minister for Housing, Paul McLennan MSP attended for the Scottish Government and stepped in to chair the meeting in the Minister Climate Change's absence. Mark O'Donnell, Deputy Secretary of Housing, Urban Regeneration and Local Government; Paul Price, Director of Social Housing Policy and Kieran Devlin, Deputy Director of Housing Supply Policy represented the Northern Ireland Executive. From the UK Government, Parliamentary Under-Secretary of State for Housing and Rough Sleeping and for the Union and Constitution: Felicity Buchan MP, who was not present for the building safety item given her constituency link to Grenfell, and the Parliamentary Under-Secretary of State for Local Government and Building Safety: Lee Rowley MP.

Homelessness was the substantive item on the agenda and the group discussed the common priorities and challenges each government faces around tackling homelessness.

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Making the Private Rented Sector work to prevent homelessness and prioritising targeted prevention were key focus areas, while the impact of cost-of-living, the war in Ukraine and other humanitarian crises were shared concerns in the context of homelessness. There are also common challenges around LHA rates, workforce resilience and the number of people in temporary accommodation. The group also discussed progress made on building safety matters since the inaugural IMG meeting. They acknowledged the positive working relationship between officials in the areas of building safety and homelessness and agreed for this official level engagement to continue.

The group agreed the Scottish Government would host the next meeting, likely to take place in the autumn. Officials will now work together to identify a specific date and suitable agenda items.

Yours sincerely,

Rebecca Evans AS/MS
Minister for Finance and Local Government

Julie James AS/MS
Y Gweinidog Newid Hinsawdd
Minister for Climate Change

Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref PO/JJ/222/2023

Llyr Gruffydd MS
Chair
Climate Change, Environment and Infrastructure Committee
Welsh Parliament
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26 June 2023

Dear Llyr,

During my appearance at Committee on 24 May 2023, where I gave evidence on the Environment (Air Quality and Soundscapes) (Wales) Bill, a number of commitments were made to provide further technical information to aid scrutiny of the Bill. The attached technical document provides this information.

Yours sincerely,

Julie James AS/MS
Y Gweinidog Newid Hinsawdd
Minister for Climate Change

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Written Technical Briefing on the Environment Protection (Air Quality and Soundscapes) (Wales) Bill

Contents

Air Quality Targets

Existing Targets and Compliance Assessment

Overview

The air quality legislative framework in Wales and the UK is currently derived from a mixture of domestic and international legislation and consists of three main strands:

1. ***Legislation regulating concentrations of pollutants in ambient air – The Air Quality Standards (Wales) Regulations 2010***. Welsh Ministers are responsible for reporting on and complying with a range of pollutant target types. For example, pollutants with targets include nitrogen dioxide, particulate matter, sulphur dioxide, ground level ozone and heavy metals. The targets were based on analysis and negotiation at an EU level, and economic analysis of the costs and benefits in the UK was undertaken by UK Government.

2. ***Legislation regulating total national emissions of five air pollutants (nitrogen oxides, sulphur dioxide, non-methane volatile organic compounds, fine particulate matter and ammonia) – The National Emission Ceilings Regulations 2018 and the Gothenburg Protocol to the UNECE Convention on Long-range Transboundary Air Pollution***. The Secretary of State is responsible for reporting and compliance on targets agreed at a UK wide level; and

3. ***Legislation regulating emissions from specific sources, such as industrial emissions to air and domestic burning*** – This includes the Environmental Permitting (England and Wales) Regulations 2016 and the Clean Air Act 1993.

Under the Environment Act 1995, which predated the EU Directives from which much of the above legislation stemmed, Welsh Ministers have broad powers in relation to air quality. Under the Act, local authorities are required to tackle air quality issues at a local scale through the Local Air Quality Management process (LAQM). LAQM requires local authorities to review and assess air quality, producing action plans where air quality is found to be poor and at risk of breaching air quality objectives. The standards (levels) were based on the work of the UK Government's Expert Panel of Air Quality Standards (EPAQS) and other expert groups.

Separate to this legislation, local authorities have duties to investigate nuisance smoke, fumes, odours and dust complaints made by members of the public under the Environmental Protection Act 1990.

Compliance Summary

Welsh Ministers are responsible for compliance with the air quality targets set by the Air Quality Standards (Wales) Regulations 2010, which stemmed from legislation transposed into domestic law across the EU.

Wales, similar to the rest of the UK, is divided into zones for the purposes of compliance assessment, spanning the North and South Wales zones, and the Cardiff and Swansea urban agglomeration zones. Compliance assessment is reported online annually. In 2021, we were compliant with targets for carbon monoxide, benzene, lead, arsenic, cadmium, sulphur dioxide and particulate matter (PM10 and PM2.5).

The annual mean target for nitrogen dioxide exceeded limits in the South Wales zone, largely due to emissions from transport. Levels of nickel and benzo[a]pyrene exceeded target levels in the South Wales and Swansea zones in the vicinity of heavy industry. There are different targets and objectives for levels of ground level ozone for the protection of health and vegetation. All target values were met and the long-term objective for the protection of vegetation. The long-term objective for the protection of health exceeded in all zones. However, ozone concentrations vary from year to year as ozone is a transboundary pollutant and its formation is influenced by meteorological factors.

Compliance Assessment: Air Quality Monitoring and Modelling

Compliance is assessed for each pollutant using a combination of air quality monitoring and modelling.

The range of pollutant-specific targets results in different monitoring objectives, scope and coverage, and therefore several networks of monitors exist across Wales and the rest of the UK. Monitors are sited in areas representative of the exposure levels the measurements are intended to represent as it's impossible to monitor everywhere. The monitoring networks are used to ensure regulatory requirements are met and to provide information for air quality researchers, the medical community and members of the public. The main networks are described below.

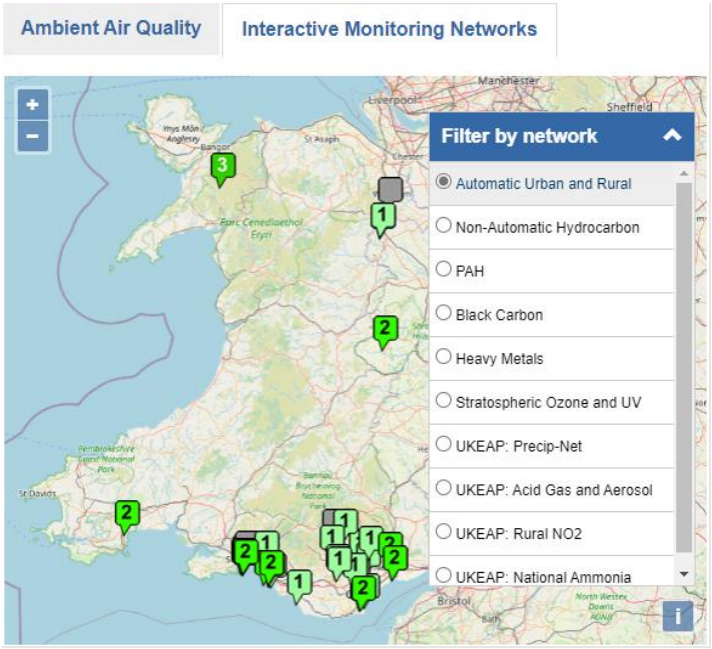

Figure 1: Monitoring network maps and data available on the Air Quality in Wales website[1]

The **Automatic Urban and Rural Network** (AURN) is currently the largest automatic monitoring network in Wales and the UK and forms a large part of the statutory compliance monitoring evidence base. There are currently 11 sites in Wales which measure gaseous pollutants and particulates, using international reference methods as defined in legislation.

Sites are in different representative locations e.g., urban background, rural background, roadside for different reasons. Pollutants measured include oxides of nitrogen (NO and NO2), sulphur dioxide, carbon monoxide, particulate matter (PM2.5 and PM10) and ground level ozone. The AURN measurements are supplemented by the **UK Urban NO2 Network** (UUNN), an air quality monitoring network that provides measurements of nitrogen dioxide concentrations at urban traffic sites. There are currently 3 monitoring sites in Wales.

[1] https://airquality.gov.wales/maps-data/maps

There are six monitoring sites in Wales which measure levels of heavy metals, belonging to the **UK Heavy Metals Network**. Wales has four monitoring sites in the **Polyaromatic Hydrocarbon Network** which measure progress in complying with a target for benzo[a]pyrene (emissions caused by the incomplete combustion of organic materials such as wood or coal). There is one site in Wales belonging to the **Black Carbon Network**, which measures levels of carbonaceous particulate matter arising from incomplete combustion.

The **UK Eutrophying and Acidifying Atmospheric Pollutants (UKEAP) Network** provides information on deposition of eutrophying and acidifying compounds and assessment of their potential impacts on ecosystems. The UKEAP network is an 'umbrella' project covering four groups of sites, including the **National Ammonia Monitoring Network** (NAMN) which characterises ammonia and ammonium concentrations at five sites across Wales.

Air quality monitoring is supplemented by **air quality modelling**. The use of modelling to complement monitoring provides several benefits, including:

- provision of spatial coverage across Wales, enabling levels across a region to be estimated, rather than solely relying on measurements taken at the discrete monitoring network locations;
- the apportionment of sources contributing to the measured or modelled levels, supporting the development and implementation of policies; and
- projections of air quality over future years, supporting the development and implementation of air quality policy scenarios.

Air Quality Target Development Under the Bill

Overview

The Clean Air Plan for Wales and Programme for Government provide ambitious commitments to introduce a Clean Air Act for Wales, consistent with World Health Organisation guidance and to extend the provision of air quality monitoring.

The Environment (Air Quality and Soundscapes) (Wales) Bill will give effect to commitments for a power to set legally binding air quality targets for the protection of public health and the environment in Wales. New targets are important to achieve sustained clean air in Wales over the long-term. We want new targets to encourage actions that are coherent with other cross-government ambitions and achieve mutual benefits, for example for decarbonisation, water quality, noise and biodiversity.

The Welsh Government is working with expert advisory groups to explore and advise on proposals for the new targets to continuously improve air quality locally, regionally and nationally. Any new targets for air quality will support the government's actions to address the acute and chronic environmental and climate challenges.

It is a major new step to set air quality targets specifically for Wales, beyond climate change mitigation, in a way that legally binds this government and future governments, and we want to get it right. We believe that the best way to deliver targets is through a robust, evidence-led process that seeks independent expert advice, provides a role for stakeholders and the public, as well as scrutiny from the Senedd.

Below we describe how we intend to develop and bring forward targets as required by the Bill. We are not yet able to commit to the specific targets we will set or the metrics we will use beyond $PM_{2.5}$, as this is the pollutant of greatest harm to public health. It would be premature to do so without further evidence gathering and public consultation that will take place in later target setting steps. We are, however, assessing the case for revised or new targets for all the pollutants considered by the World Health Organisation in its recent update of air quality guidelines[2] and ammonia, due to their impacts on public and environmental health.

The target-setting framework

The Bill requires Welsh Ministers to set a target for fine particulate matter ($PM_{2.5}$) which may be either short or long term, and provides powers to set long term targets for any other air pollutant. Long-term is defined as 10 years or greater from the date on which they are laid. The $PM_{2.5}$ target must be brought forward within 3 years of the Act receiving Royal Assent. Long-term targets may be supported by interim targets, depending on Welsh Ministers' consideration following the receipt of expert advice following the setting of targets. These may be either statutory or non-statutory, depending on the advice received in relation to the specific target to be set.

[2] The 2021 WHO air quality guidelines include levels for particulate matter (PM2.5 and PM10), ozone, nitrogen dioxide, carbon monoxide and sulphur dioxide

Welsh Ministers are also required to review targets on a 5 yearly basis and publish a statement. It is envisaged the progress towards targets will form part of the review.

Reviewing targets periodically will ensure the effect of achieving the target and its underpinning evidence remains unchanged or the net benefits remain. The Bill allows for additional long-term targets to be set in the future. We expect any future long-term targets to be set in a similar way to the first suite. This is through expert advice, stakeholder engagement, and public consultation as part of the robust, evidence-led target-setting process.

The natural environment is complex, and we see target-setting as an iterative process, built upon over time as our evidence base and understanding develops. We want to use targets to meaningfully drive the environmental outcomes that we need.

Principles for developing targets

We will develop targets that are driven by taking action in areas that matter the most, rather than limiting our targets to areas that are easy to measure and improve. The targets should drive environmental outcomes that benefit future generations and respect nature's intrinsic value, independent of human use.

Targets should help to meet the key goals and outcomes within the Clean Air Plan for Wales as well as wider Welsh Government environmental policy ambitions. Where possible, targets will be based on environmental outcomes. For instance, the intended final results or benefits to public health and the environment. An example of this is the carbon budgets that set the pathway to making progress to our net-zero emissions targets, without describing how to get there. This approach allows flexibility and innovative ways of meeting targets.

Targets should be considered collectively and alongside other government policy and take account of their interdependencies with the wider environment. We want to pursue targets that have mutual benefits, for example, setting air quality targets that also help deliver biodiversity and/or decarbonisation objectives.

When developing targets, we will consider any relevant international best practice, such as the recently update World Health Organisation's air quality guidelines.

The Target Setting Process

This section provides a summary of the target setting process being taken for the first suite of target setting. As our evidence base and understanding continues to improve over time, we will consider if further suites of targets will strengthen action needed to improve air quality.

Our process will be informed by a number of sources of evidence including scientific data and models, historical datasets, and assessment of what is feasible from a socio-economic perspective. It will be an iterative process and rely on input, expertise and scrutiny from others.

There are four main steps being taken to develop this evidence and meet the criteria and principles (as considered in the previous section) so we can set strong and meaningful targets. Input from experts, stakeholders, the public and the Senedd will all play a role in making sure we have robust targets that drive environmental outcomes. The steps are as follows:

- ***Step 1: Setting the scope of the targets***

This step will set the overall direction and focus for target setting. We want to develop targets that are driven by taking action in areas that matter the most, rather than limiting our targets to areas that are easy to measure and improve. The targets should drive environmental outcomes that benefit future generations. Targets should help to meet the key goals and outcomes within the Clean Air Plan for Wales as well as wider Welsh Government environmental policy ambitions. When developing targets, we will consider any relevant international best practice, such as the recently updated World Health Organisation air quality guidelines. This step is a starting point from which target proposals will be developed to meet these criteria and principles.

- ***Step 2: Developing fully evidenced targets***

This step is focused on developing the detail of the targets. For example, an achievable level of improvement to the environment, over a given time period and how this will be measured. It will involve detailed analysis of scientific evidence. Welsh Government and its advisors (such as Natural Resources Wales and Public Health Wales), as well as other evidence partners, will provide evidence to inform the development of target proposals.

During this step, we will consider potential cross-sector emission reduction measures that could drive action and help achieve environmental outcomes for relevant pollutants over 5 yearly intervals up to 2040. The measures will be grouped into scenarios reflective of their ambition and feasibility. This will provide a range from a baseline scenario with emissions unlikely to be above this, to a more speculative scenario with emissions unlikely to be below this. The scenarios would set the boundaries of what is considered as potentially feasible future emissions. Socio-economic analysis will assess the costs, benefits and distributional impacts of any such measures on businesses and wider society. These considerations will help ensure that proposed targets are achievable and affordable whilst still driving the

ambitious changes needed to reduce the pressures of air quality on public health and the environment.

The principles in developing targets above will guide target development so that they are robust and meaningful, and support wider environmental aims across government, such as reaching net zero climate change targets. Target development will be supported and scrutinised by independent experts for each priority area. This will include assessment of the evidence and scrutiny of the analysis on the deliverability and impacts of proposed targets. Experts will be asked to publish their views at appropriate points during this step of the target development process.

The Bill requires Welsh Ministers to assess progress towards meeting targets set under section 1 or 2 and ensure the data are published. Assessment of compliance will be pollutant and target-specific and is likely to be based on either air quality monitoring or modelling data, or a combination of both. The key challenge will be to monitor at locations representative of where concentrations would be expected to be elevated and where there is relevant public exposure across Wales. Decisions on monitoring technologies and siting will be evidence-based and directed by independent expert advice to ensure the data best represents progress towards the targets set.

By the end of this step, we will have developed objectively measurable metrics as well as proposals for target standards and dates to be achieved.

- ***Step 3: Public consultation on target proposals***

Alongside iterative engagement with key umbrella organisations throughout the target setting process, we will consult stakeholders and ask for written responses on the proposed targets within each priority area. This will provide an opportunity to hear a range of views on the ambition, evidence and achievability of target proposals. An Impact Assessment will accompany the consultation and consider the environmental and socio-economic considerations associated with each target. This step will provide time for written contributions to be made. We anticipate Committee scrutiny of target proposals at this time.

- **Step 4: Drafting target legislation**

Responses to the public consultation will be collated, summarised and published in a Welsh Government summary of response document. Feedback to the consultation will further inform the target legislation and following this Welsh Ministers will decide on targets to be set. We expect the Statutory Instrument setting out the PM2.5 targets to be laid in the Senedd by December 2026. These will come into force when approved by the Senedd.

Air Quality Target Development Timelines

There are two phases for the work, the first is for PM2.5. The second phase, which will overlap with phase one and has already started, will look at particulate matter (PM10), ozone, nitrogen dioxide, carbon monoxide, sulphur dioxide and ammonia.

Phase 1

Figure 2 below shows the PM2.5 target setting steps and timelines. Under step 2 highlighted above, we expect to have developed evidenced target options by July 2025 for consideration by Ministers. Following this, under step 3, we expect to develop and hold a public consultation between October 2025 and January 2026 on regulation options to enable air quality targets for Wales. Responses to the consultation and expert advice will inform final drafting of regulations, which we intend to lay in the Senedd by December 2026.

Developing air quality target proposals within this timeline is complex and is challenging to deliver within the proposed statutory deadline. The development of target options involves the gathering of cross-sector data and significant amounts of complex and multi-disciplined modelling of future scenarios, socio-economic assessment of the impacts of each scenario and the commissioning of and accounting for expert advice and key stakeholder feedback.

We have appointed technical consultants, Ricardo, to undertake data collection and scenario analysis. They are also supporting the development of impact assessments which will inform whether we update existing targets or introduce new targets. This would be in addition to a target for PM2.5. Ricardo has extensive experience in undertaking similar work. For example, supporting the European Commission's current revision of the Ambient Air Quality Directive which sets air quality standards for European Union Member States.

Ricardo have advised Welsh Government officials that step 2 has '*a very challenging timescale due to the huge quantity of data processing that will be required in Lot 2. To give an idea of the scale of data processing required, in the previous project, that only looked at 4 pollutants over 2 years, we generated 20TB of data. It is worth noting Defra have just completed a similar piece of work for setting a PM2.5 target for England which took 3 years to complete, and this was for only one pollutant.'*

Phase 2

The second phase described in figure 3 below, is currently being worked on alongside the work on PM2.5 target development. The work to scope and develop cases for change and potential target options for air pollutants (referred to above) is expected to be completed for Ministerial consideration by July 2025. It is likely Ministers will consider the advice and determine next steps during summer 2025.

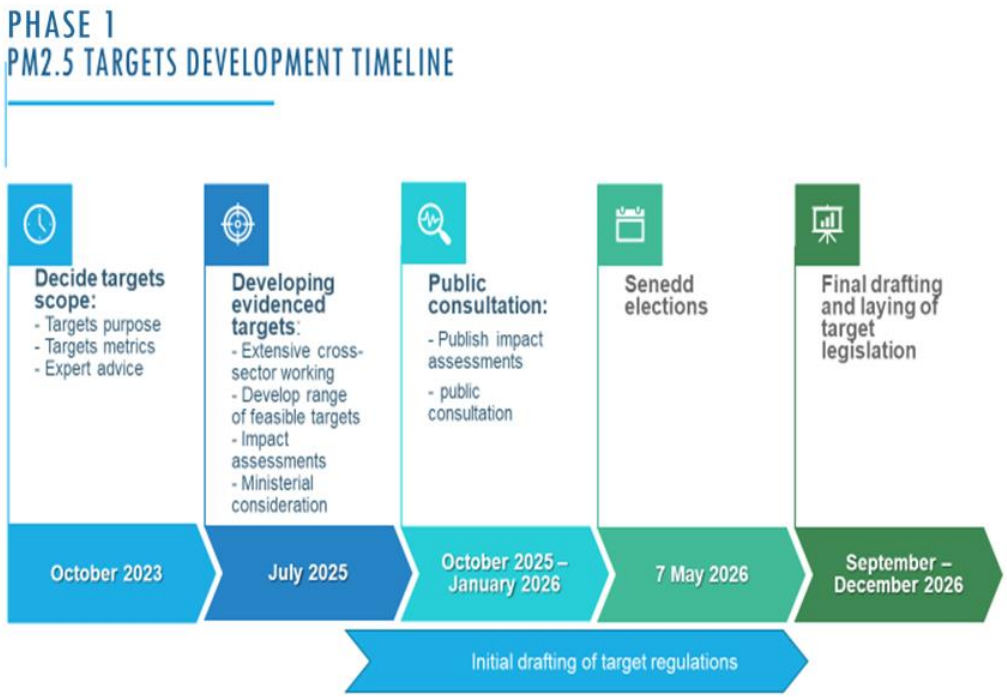

Figure 2: PM2.5 targets development timeline

Figure 3: Additional air quality target options development timeline

Domestic burning

The Committee asked if we could outline our planned work in relation to domestic burning.

We consulted on proposals for reducing emissions from domestic burning of solid fuels in parallel to the White Paper on a Clean Air (Wales) Bill. A focus was placed on the most polluting solid fuels, namely traditional/bituminous house coal, wet wood and manufactured solid fuel with a high sulphur content.

When we develop proposals to address domestic burning, we will seek to use our existing legislative powers. Any future regulations will be subject to consultation, so interested parties will have the opportunity to input into the process.

An initial response to the domestic burning consultation is due to be published by the summer.

List of prosecutions

A question was raised in Committee in relation to the number of prosecutions that are carried out annually by Natural Resources Wales in their capacity as regulator.

A summary of the data for 2020 and 2021 which has been extracted/adapted from the National Resources Wales Regulation Reports which are publicly available at Natural Resources Wales / How we are performing is set out in the Annex.

Information on the 2022 cases will be available when the 2022-23 report is published by Natural Resources Wales, which is anticipated to be in the autumn.

Local Air Quality Management

During the course of the Committee session, the Minister for Climate Change was asked when the results of piloting work with local authorities would become available.

Through our Local Air Quality Management Support Fund we have supported two local authorities to undertake modelling to develop a projected compliance date for their air quality management areas. The work will be completed by the end of this year. We will publish the outcomes in our Air Quality in Wales annual report.

Annex

Summary of Natural Resources Wales (NRW) enforcement for Environmental offences 2020-2021

NB: The following data has been extracted/adapted from the National Resources Wales Regulation Reports which are publicly available at Natural Resources Wales / How we are performing.

Information on 2022 cases will be available when the 2022-23 report is published. We expect this to take place this autumn.

2020 Data

Summary

- In 2020, NRW created 604 new cases, comprising of 620 offenders, with 936 separate enforcement charges.
- NRW took enforcement action against 241 companies and 379 individuals. At the end of 2020, 278 cases were still listed as “legal in progress”.
- The total number of enforcement outcomes was broadly comparable to 2019.

Year	Cases	Offenders	Charges	Companies	Individuals
2020	604	620	936	241	379
2019	638	623	941	258	365

- There were 39 cases where NRW took no further action, 3 cases where NRW had insufficient evidence to proceed, and 3 cases that were dealt with by the police.
- NRW provided formal advice and guidance in 153 cases. NRW issued 324 warnings, served 19 enforcement notices that were complied with and issued 7 fixed penalty notices.
- NRW issued 30 formal cautions and prosecuted 68 separate charges, 10 of which were proved in the absence of the defendants.
- As a result of NRW’s successful prosecutions the court fines totalled £25,097 and NRW were awarded £33,784 in costs. Both amounts were significantly less than the fines and costs awarded in 2019 caused mainly by the impact of Covid restrictions on the Courts in Wales.

The Code for Crown Prosecutors

The Code for Crown Prosecutors requires NRW to apply for compensation and ancillary orders, such as anti-social behaviour orders and confiscation orders, in all appropriate cases. Listed below are the ancillary orders that a court may make following a conviction:

Disqualification of directors

No orders have been made by the court.

Confiscation of assets - Proceeds of Crime Act 2002 (Asset Recovery Incentivisation Scheme-ARIS)

Tax Year 19-20

Offender name	Criminal Benefit Figure	Amount available	Paid	Type
Kenneth Davies	£402,937.00	£341.26	Yes	Confiscation
Jeanette Davies	£402,937.00	£402,937.00	Yes	Confiscation
Raymond and Ian Murray	£72,637.57	£30,413.67	Yes	Compensation
Raymond and Ian Murray	£72,637.57	£37,153.71	Yes	Compensation

Anti-social behaviour orders

No orders have been made by the court.

Forfeiture of equipment used to commit the offence

No orders have been made by the court.

Disqualification from driving

0

Compensation other than PoCA

3

Vehicle seizure

None.

Remediation – under the Environmental Permitting Regulations

0

Unpaid work

3

Community orders

2

Curfew

0

Restoration Order under Wildlife and Countryside Act 1980

0

Conditional Discharge

2

2021 Data

Summary

- In 2021, NRW created 1,002 new cases, comprising of 936 offenders, with 1,373 separate enforcement charges.
- Enforcement action was taken against 355 companies and 601 individuals.
- At the end of 2021, 306 cases were still listed as “legal in progress”.
- The total number of enforcement cases dealt with increased by 40% from 2020.

Year	Cases	Offenders	Charges	Companies	Individuals
2021	1,002	956	1,373	355	601
2020	604	620	936	241	379
2019	638	623	941	258	365

- There were four cases where NRW took no further action, and three cases where they offered no evidence.
- NRW provided formal advice and guidance in 348 cases.
- NRW issued 479 warnings, served 38 enforcement notices that were complied with and issued one fixed penalty notice.
- NRW issued 41 formal cautions and prosecuted 54 separate charges, ten of which were proved in the absence of the defendants.
- In 2021 court fines from NRW’s successful prosecutions increased tenfold from £25,437 in 2020 to £262,414. This can be accounted for by one large court fine of £180,000 and several fines in the £20k range.
- NRW received £131,027 in costs awarded by the courts however the amount of court time available for was still reduced due to delays caused by Covid.

2021 prosecutions

These are the cases that resulted in a prosecution in 2021. Many of these cases started in previous years, and in some cases, NRW prosecute more than one charge.

Date	Offender Name	Company	Offence	Charge	Fines	Costs
26-Jan-21	Lee Wyn Roberts	No	Waste	Environmental Permitting (England and Wales) Regulations 2016	£500	£2,000
17-Mar-21	Andrew Paul Thomas	No	Waste	Environmental Protection Act 1990	None Suspended Sentence	
08-Apr-21	Daniel McNeil	No	Waste	Control of Pollution (amendment) Act 1989	None Suspended Sentence	£1,500
20-Apr-21	Philip Stephen Downsby Garratt	No	Waste	Environmental Permitting (England and Wales) Regulations 2016	£1,000	£1,650
19-May-21	Tower Regeneration Ltd	Yes	Water Quality	Environmental Permitting (England and Wales) Regulations 2016	£3,000	£12,849
17-Jun-21	Johnny Doran	No	Fly Tipping	Environmental Protection Act 1990	£1,400	£300

18-Jun-21	Andrew Janes	No	Waste	Environmental Protection Act 1990	£1,110	£950
23-Jun-21	DCWW	Yes	Water Quality	Environmental Permitting (England and Wales) Regulations 2016	£180,000	£25,701
02-Jul-21	Carlos Davies	No	Rod and Line	Salmon and Freshwater Fisheries Act 1975	£100	£100
25-Jun -21	DBC Site Services Ltd	Yes	Waste	Environmental Permitting (England and Wales) Regulations 2016	POCA	
25-Jun -21	Eurid Huw Leyshon	Yes	Waste	Environmental Permitting (England and Wales) Regulations 2016	POCA	
21-Jul-21	David Kevin Owen	No	Waste	Environmental Permitting (England and Wales) Regulations 2016	£150	£ 2,500
21-Jul-21	Tower Regeneration Ltd	Yes	Water Quality	Environmental Permitting (England and Wales) Regulations 2010	£13,330	£26,791

26-Aug-21	TE and M Francis and Son Ltd	Yes	Water Quality	Environmental Permitting (England and Wales) Regulations 2016	£2,500	£350
17-Sep-21	Christian Craig Astill	No	Waste	Environmental Protection Act 1990	£200	£3,000
22-Sep-21	V J Thomas & Sons Partnership (Edward Thomas)	Yes	Water Quality	Water Resources (Control of Pollution) (Silage, Slurry and Agricultural Fuel Oil) (Wales) Regulations 2010	£2,100	£3,847
19-Oct-21	Damian Burchall	No	Rod and Line	Salmon and Freshwater Fisheries Act 1975	£220	£98
19-Oct-21	Keiran Price	No	Rod and Line	Salmon and Freshwater Fisheries Act 1975	£220	£98
19-Oct-21	Nicky Dan Lee Edwards	No	Rod and Line	Salmon and Freshwater Fisheries Act 1975	£220	£9
17-Nov-21	Par Contractors Ltd	Yes	Waste	Environmental Permitting (England and Wales) Regulations 2016	£8,000.	£9,987

19-Nov-21	Dennis Connor	Yes	Waste	Environmental Permitting (England and Wales) Regulations 2016	POCA	n/a
23-Nov-21	Philip Johns	No	Waste	Environmental Protection Act 1990	£2,160	£6,872
24-Nov-21	Aaron Hern	No	Rod and Line	Salmon and Freshwater Fisheries Act 1975	£40	£127
24-Nov-21	Mathew Stephen Guilliford	No	Rod and Line	Salmon and Freshwater Fisheries Act 1975	£80	£127
07-Dec-21	Rasa Knabikiene	No	Fly Tipping	Environment Act 1995	£440	£558
10-Dec-21	Daniel Richard Tamplin	No	Waste	Environmental Protection Act 1990	Suspended Sentence	£2,677
14-Dec-21	David Williams	No	Waste	Environmental Protection Act 1990	£250	£2,500
14-Dec-21	Dewi Jones	No	Water Quality	Environmental Permitting (England and Wales) Regulations 2016	£666	£12,467

16-Dec-21	Jack Mason Raymon	No	Rod and Line	Salmon and Freshwater Fisheries Act 1975	£440	£127
16-Dec-21	Jeremy McKenny	No	Rod and Line	Salmon and Freshwater Fisheries Act 1975	£80	£127
16-Dec-21	Maurice Loaring	No	Rod and Line	Salmon and Freshwater Fisheries Act 1975	£240	£127
16-Dec-21	Wayne Jenkins	No	Rod and Line	Salmon and Freshwater Fisheries Act 1975	£440	£127

The Code for Crown Prosecutors

The Code for Crown Prosecutors requires NRW to apply for compensation and ancillary orders, such as anti-social behaviour orders and confiscation orders, in all appropriate cases. Listed below are the ancillary orders that a court may make following a conviction:

Disqualification of directors

No orders have been made by the court.

Confiscation of assets - Proceeds of Crime Act 2002 (Asset Recovery Incentivisation Scheme-ARIS)

NRW is what is known as a Proceeds of Crime Act (PoCA) enabled body, this means that they are a public body directly involved as an investigator, prosecutor and enforcement authority and as such we are allowed to make an application at the crown court for a confiscation order. The expression ‘confiscation order’ is a misnomer as the order itself does not confiscate any property but,

instead, requires the defendant to pay over a sum of money. This sum is termed the ‘recoverable amount’. This will be either (a) the full amount of what the court has found to be his benefit from his criminal conduct or (b) the value of the defendant’s remaining assets called the ‘available amount’. Confiscation is only available upon conviction of the defendant after plea or trial.

All NRW’s asset recovery confiscation receipts are remitted directly from the courts to the Home Office which pays them back up to 37.5% of the recovered sum. The Government immediately retain 50%. The payment is made in the financial quarter following the date of the receipt of the recovered funds. E.g., money paid into court funds during January, February, March of 2015 (being quarter four of the financial year) are not in fact received by the designated body, NRW, until the end of quarter one of the following financial year, i.e., June 2015.The remaining 12.5% share is received by the courts service for enforcement purposes.

NRW are encouraged to re-invest incentive monies in asset recovery activity or increasing financial investigation capacity. The Home Office requires agencies to account for their spending in this area. Any monies not spent are required to be returned to the Home Office

Tax Year 20-21

	Offender Name	Criminal benefit figure	Amount available	Paid	Type
1	Gaughan	£609,4340	£114,686	No	Compensation
2	Rees	£1,405,933	£66,841	Yes	Confiscation
3	Leyshon	£1,296,197	£108,313	No	Confiscation
4	Connor	£1,121,554	£177,908	No	Confiscation
5	DBC Site Services 2005	£1,121,554	£65,411	No	Confiscation

Anti-social behaviour orders

- No orders have been made by the court.

Forfeiture of equipment used to commit the offence

- No orders have been made by the court.

Disqualification from driving

- 0

Compensation other than PoCA

- 0

Vehicle seizure

- None

Remediation – under the Environmental Permitting Regulations

- 0

Unpaid work

- Three cases totalling 400 hours.

Community orders and curfews

- Two cases with a 12-month community order.
- One case with a 14-week community order.
- One case with a 14-week curfew order.

Restoration Order under Wildlife and Countryside Act 1980

- 0

Conditional discharge

- 0

Julie James AS/MS
Y Gweinidog Newid Hinsawdd
Minister for Climate Change

Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref MA/JJ/1166/23

Llyr Gruffydd MS
Climate Change, Environment, and Infrastructure Committee
Senedd Cymru
Cardiff Bay
Cardiff
CF99 1SN
SeneddClimate@senedd.wales

28 June 2023

Dear Llyr,

It has been brought to my attention that there is currently a discrepancy between the Explanatory Memorandum and provisions in the Environment (Air Quality and Soundscapes) (Wales) Bill relating to smoke control.

The Bill introduces civil monetary penalties to replace current criminal sanctions for the emission of smoke in a smoke control area. The Explanatory Memorandum states that we propose to remove the statutory defence of using of an exempt fireplace in a smoke control area. However, the Bill retains provisions giving the Welsh Ministers the power to exempt certain fireplaces from the new civil sanctions for the emission of smoke in a smoke control area.

Under a system of civil penalties, enforcement of smoke control should be easier for local authorities, but officials have considered other barriers to enforcement. The exemption for certain kinds of fuel in relation to the civil penalty has not been recreated in the Bill, but the exemption for certain appliances has. In this context, I now consider it inappropriate to maintain the power of the Welsh Ministers to exempt a class of fireplace from the civil penalty regime.

I will be proposing an amendment to the Bill at Stage 2 to clarify the position, alongside my rationale for removing this power. Overall, I want to ensure we have the appropriate mechanisms in place to enable local authorities to effectively enforce civil sanctions when needed. I will share a copy of the amendment in due course.

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I am copying this letter to the Chair of the Legislation, Justice and Constitution Committee and Chair of the Finance Committee.

Yours sincerely

Julie James AS/MS
Y Gweinidog Newid Hinsawdd
Minister for Climate Change

cc. SeneddLJC@senedd.wales
SeneddFinance@senedd.wales

Julie James AS/MS
Y Gweinidog Newid Hinsawdd
Minister for Climate Change

Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref: MA/JJ/0994/23

Llyr Gruffydd MS
Chair
Climate Change, Environment and Infrastructure Committee
Senedd Cymru
Cardiff Bay
CF99 1SN

27 June 2023

Dear Llyr,

The Infrastructure (Wales) Bill, introduced into the Senedd on 12 June, contains provisions which require the consent of the appropriate Minister under Schedule 7B to the Government of Wales Act 2006. Further provisions require consultation with the appropriate Minister. To assist consideration of the Bill by the CCEI Committee I attach my letter of 12 May 2023 to the Secretary of State for Levelling Up, Housing and Communities seeking these consents (Doc 1). Discussions between officials are currently ongoing on this matter.

I have also sought the transfer of legislative competence to Senedd Cymru for the consenting of energy generating stations offshore between the edge of the territorial sea and the edge of the Welsh zone (an area roughly between 12 and 200 nautical miles (“nm”) off the shoreline) and to clarify the Senedd’s ability to legislate in respect of energy storage. I attach my letters of 7 January 2022 (Doc 2) and 11 January 2023 (Doc 3) to the Secretary of State for Levelling Up, Housing and Communities, for your information. I have not yet received a response to either letter.

I will keep the Committee informed of our progress on these matters during scrutiny of the Bill. I am copying this letter to the Chair of the Legislation, Justice and Constitution Committee.

Yours sincerely,

Julie James AS/MS
Y Gweinidog Newid Hinsawdd
Minister for Climate Change

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Julie James AS/MS
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Minister for Climate Change

Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref: MA/JJ/1182/23

The Rt. Hon. Michael Gove MP
Secretary of State for Levelling Up, Housing and Communities
Department for Levelling Up, Housing & Communities
2 Marsham Street
London
SW1P 4DF

12 May 2023

Dear Michael,

I am writing about the Infrastructure (Wales) Bill ("the Bill") I intend to introduce into the Senedd in June 2023.

The Bill will reform the law governing the development of significant infrastructure in Wales. The consenting process in the Bill and any subsequent legislation will:

- be a transparent, consistent and simple, yet rigorous, process which enables local communities to better understand how decisions affect them;

- be able to meet future challenges by being sufficiently flexible to capture the consenting arrangements for developing technologies and any further powers which may be devolved;

- streamline and unify the decision-making process, through enabling the developer to access a one-stop shop whereby as full a range as possible of existing consents, authorisations and licences are integrated into the process which is reflective of the consenting regime currently operational in England;

- improve current standards of service, by way of timescales and the integration of advanced case management technology into the decision-making process; and

- provide certainty in decision-making in being underpinned by a clear policy.

The Bill aims to address difficulties that have arisen for the developers in the existing consenting framework. It will take advantage of the full range of consenting functions within the Senedd's competence following the devolution of further responsibility for consenting of energy projects, overhead electric lines as well as ports and harbours by the Wales Act 2017. This will progress our shared ambitions in relation to decarbonisation and growing the green economy.

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The Bill and the consents being sought through this letter also provides a system which will address some of the issues raised by the Secretary of State for Wales in a letter to the First Minister of Wales dated 23 December 2022 (Ref 225MISC22) regarding the consenting for Floating Offshore Wind Projects, at least in so far as the Welsh territorial waters. As you may recall, I sought the cooperation of UK Government in transferring legislative competence to the Senedd for the consenting of energy generating stations offshore between the edge of the territorial sea and the edge of the Welsh zone in two letters (MA-JJ-3582 -22 & MA-JJ-2523-22) in 2022.Transferance of the requested legislative competence would clearly optimise our proposed new consenting arrangements.

The proposals for the Bill have been assessed against the legislative competence criteria in section 108A of the Government of Wales Act 2006 ("GoWA"). Some provisions within the Bill have been identified which require the consent of the appropriate Minister under the terms of Schedule 7B to GoWA. Details of the intended purpose and effect of these provisions are set out in the Annex to this letter. Further provisions require consultation with the appropriate Minister. Details are also included in the Annex 1.

I am drawing your attention to the narrowness of the powers we are seeking to help us legislate and consent projects effectively and to the fact the proposed provisions will allow recovery of costs for the bodies involved. This is explained in detail in the Annex 1.

My officials will be happy to discuss the details and share the provisions with your officials. The key contact is Neil Hemington at neil.hemington@gov.wales.

As I will be bringing forward the legislation shortly, I would welcome your support in obtaining the relevant consents at the earliest opportunity, with a view to having this agreed prior to introduction of the Bill. I am copying this letter to the Secretary State for Wales.

Yours sincerely,

Julie James AS/MS
Y Gweinidog Newid Hinsawdd
Minister for Climate Change

Annex

Proposal subject to consent of the appropriate Minister of the Crown under Schedule 7B to the Government of Wales Act 2006

1. Access to evidence at a local inquiry

1.1. The Bill provides that evidence at a local inquiry must be heard in public and documentary evidence must be open to the public for inspection. The Bill takes the same approach as in existing planning legislation by allowing exceptions where evidence may pose a risk for reasons of national security. These provisions are based on sections 321 and 321A of the TCPA 1990, as modified by section 321B. The provisions in the Bill are sections 45 and 46.

1.2. The Bill allows a ministerial authority to direct the examining authority conducting an inquiry under the Bill that evidence of a kind specified in the direction is to be heard or open to inspector at that inquiry only by persons who are specified in the direction or of a kind specified in it. The conditions are that giving evidence of a particular description in public or making it available for public inspection would be likely to result in the disclosure of information about either national security or measures taken or to be taken to ensure the security of any land or other property, and that the public disclosure of the information would be against the national interest. “Ministerial authority” is defined as either the Welsh Ministers or the Secretary of State.

1.3. If a ministerial authority is considering giving a direction, the Counsel General may appoint a person (an appointed person) to represent the interests of any person who will be prevented from hearing or inspecting evidence. The Welsh Ministers may make regulations about the procedure to be followed by a ministerial authority before it gives a direction and about the functions of an appointed person.

1.4. The Bill also confers a direction making power on a ministerial authority to direct a responsible person to pay the fees and expenses of the appointed representative. If there is a dispute as to the amount of the fees and expenses, the amount must be decided by the ministerial authority that gave the direction, and any agreed amount must be certified by the ministerial authority and is then recoverable as a debt.

1.5. These provisions therefore confer a function on the Secretary of State. Consequently, Minister of the Crown consent is sought under paragraph 8(1)(a) and (c) of Schedule 7B to the Government of Wales Act 2006 (GoWA) to include these provisions in the Bill. In order to amend or revoke any procedural regulations made which confer or impose functions on the Secretary of State under these powers, paragraphs 10 and 11 of Schedule 7B are also engaged and consent under these provisions is also sought. The Minister of the Crown is also consulted under paragraph 11(2) of Schedule 7B to GoWA for the inclusion of these provisions in the Bill.

2. Function to respond to consultation and notification

2.1. The Bill includes a function to consult and to respond to consultation in sections 30 and 126.

2.2. Section 30 makes provision for pre-application and publicity and sets out that a person who proposes to make an application for infrastructure consent must carry out consultation on the proposed application. Regulations may make provision for, or in connection with the consultation required including the persons or public authorities required to be consulted, , how those consulted must respond and the timescales in which consultation responses must be provided.. Regulations may also require a person consulted to prepare and publish a report about that person's compliance with these requirements.

2.3. Section 126 provides that the Welsh Ministers or an examining authority may consult a public authority specified in regulations about a valid application for infrastructure consent. The public authority must give a substantive response within specified timescales, which will be set out in regulations. Regulations may also require a person consulted to prepare and publish a report about that person's compliance with these requirements.

2.4. The Bill also makes provision in section 33 (2) requiring the Welsh Ministers to give notice of a valid application to parties including any persons or descriptions of person specified in regulations. Section 33(9) also provides that the Welsh Ministers may direct the applicant to notify a person or description of person of the application once it has been accepted as a valid application.

2.5. The public bodies to be consulted or notified may include bodies which are reserved authorities within the meaning of paragraph 8(3) of Schedule 7B to GoWA. It is likely the bodies to be included in regulations will be limited to those wanting to protect their interests in the context of developments to be consented through the new regime proposed in the Bill. They are likely to be similar to those listed in the Developments of National Significance (Procedure) (Wales) Order 2016, and in the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009. As such, examples of such bodies include regulations include the Coal Authority, the Canal and River Trust, the Maritime and Coastguard Agency, the Civil Aviation Authority, and the Gas and Electric Markets Authority.

2.6. It is vital that decisions on infrastructure projects are based on a sound and thorough evidence base, which includes receiving technical and specialist advice. If the regulations were unable to specify reserved authorities, this could be detrimental to the quality and breadth of evidence received and to ensure consistency in matters that span beyond the Welsh boundaries. This can include important matters of safety, for example in respect of navigational routes in the sea or air and any protection requirements associated with them.

2.7. It is of benefit to the bodies being consulted and notified to be able to engage effectively in the consenting process as they have specific interests that they will be keen to ensure are protected from any interference caused by infrastructure projects consented through this Bill. As set out in paragraphs 3.1 to 3.4 below, consent is also sought to enable the charging of fees to recover the costs of a reserved authority's engagement in the process, should this be a concern.

2.8. Receiving a substantive response to consultations in a timely manner from all bodies that need to be engaged in the consenting process is a very important part of the process in dealing with applications efficiently. It also reflects similar requirements for both existing consenting regimes of Development of National Significance (DNS) in Wales and Nationally Significant Infrastructure Projects (NSIP) in both England and Wales.

2.9. These provisions therefore confer power by subordinate legislation to confer or impose a function on a reserved authority within paragraph 8(1)(a), and confer power by subordinate legislation to confer or impose a function specifically exercisable in relation to a reserved authority within the meaning of paragraph 8(1)(c) of Schedule 7B to GoWA and therefore Minister of the Crown consent is required. In order to amend or revoke any regulations made which confer or impose functions on a reserved authority under these powers, paragraphs 10 and 11 of Schedule 7B are also engaged. Consequently, Minister of the Crown consent is sought under paragraph 8(1)(a) and (c), 10 and 11, and the Minister of the Crown is consulted under paragraph 11(2) of Schedule 7B to GoWA for the inclusion of these provisions in the Bill.

3. Fees

3.1. The Bill includes at section 121(1) a regulation making power which may make provision for the charging of fees by a specified public authority for performing an infrastructure consent function or for an infrastructure consent service. An ‘infrastructure consent function’ means a function conferred by, under or by virtue of the Act, and an ‘infrastructure consent service’ means any advice, information or other assistance provided in connection with an application or other specified matter. This specifically includes a response to a consultation or participating in the examination of an application, for example by making a written submission or attending or giving evidence at an inquiry.

3.2. Such public authorities may include bodies which are reserved authorities within the meaning of paragraph 8(3) of Schedule 7B to GoWA. Examples of such bodies are the Civil Aviation Authority, the Coal Authority, the Marine Management Organisation and the Water Services Regulation Authority.

3.3. As reserved authorities could have a duty to respond to a consultation, and may participate in proceedings, we do not wish to disadvantage reserved authorities from potentially being able to charge a fee to recoup costs on the sole basis that they are reserved authorities. If the regulations were not able to include reserved authorities, it may also dissuade them from fully participating in the examination process which would be detrimental to the quality of evidence received and undermine the process.

3.4. As the regulations could be used to confer a function on a reserved authority to be able to charge a fee for certain services, we consider this to amount to conferring a function on a reserved authority and therefore seek the consent of the Minister of the Crown in accordance with paragraph 8(1)(a) and (c) of Schedule 7B. As above, in order to be able to amend or revoke any regulations in the future, consent is also sought under paragraphs 10 and 11 of Schedule 7B and the Minister of the Crown is

consulted under paragraph 11(2) of Schedule 7B to GoWA for the inclusion of these provisions in the Bill.

4. Functions relating to Infrastructure Consent.

4.1. Section 60 of the Bill, along with Schedule 1 provides for the matters that can be provided for in an infrastructure consent order. Section 87 provides for the changing or revoking of such an order. This is similar in nature to a Development Consent Order (DCO) for NSIP under the Planning Act 2008.

4.2. The matters listed are comprehensive and may include conferring functions on bodies, for example to remove or relocate apparatus in relation to their undertaking or to approve plans or schemes as part of the development. Some of the bodies on which functions may be conferred are likely to be reserved authorities. For example, article 23 of the Swansea Bay Tidal Generating Station Order 2015 provides that no marine works comprised in the authorised development are to be commenced until a scheme to secure safety of navigation has been submitted to, and approved in writing, by the harbour authority for the Port of Swansea in consultation with Trinity House, the Maritime and Coastguard Agency, and others. The Maritime and Coastguard Agency is a reserved authority within the meaning of paragraph 8(3) of Schedule 7B to GoWA.

4.3. In the delivery of large-scale infrastructure projects, it is important that effective and appropriate functions linked to the infrastructure project can be included in the infrastructure consent order. Given the emphasis on offshore energy projects and the need for efficiency in providing consent in a timely manner we wish to avoid any potential delays in the process. It is also likely that any function conferred on, or in relation to a reserved authority will ensure they are able to use their expertise effectively and their interests are fully protected within the new infrastructure consenting process. There will be an opportunity to participate in the process resulting in the infrastructure consent order and therefore any functions can be influenced by the body affected.

4.4. We therefore seek the consent of the Minister of the Crown under paragraphs 8(1)(a) and (c) to enable the Bill to confer power by subordinate legislation to confer functions on reserved authorities and to modify or remove those functions in this context. In order to remove or modify any functions, if, for example, the infrastructure consent was amended, we also seek consent under paragraphs 10 and 11 and the Minister of the Crown is consulted under paragraph 11(2) of Schedule 7B to GoWA for the inclusion of these provisions in the Bill.

5. Regulations and Orders: Restrictions

5.1. It is intended that the Bill will contain provision in section 137 which sets out the restrictions on the exercise of the regulation and order making powers in the Bill as set out above. My officials will share the drafting of this provision.

Proposal Requiring Consultation with the Appropriate Minister of the Crown

6. Transport and Works Act 1992

6.1. The Bill provides that, to the extent that infrastructure consent is required for development, the development may not be authorised by an order under section 1 or 3 of the Transport and Works Act 1992 (section 20(2)(b)). The Bill also provides that, to the extent that provision for or relating to a matter may be included in an infrastructure consent order, an order under section 1 or 3 of the Transport and Works Act 1992 may not include provision of the same kind (section 60(8)(b)). Sections 1 and 3 of the Transport and Works Act 1992 deal with orders as to railways, tramways, inland waterways etc.

6.2. The Secretary of State retains the power to make Orders in relation to Wales, where a Transport for Works Act Order applies in England and Wales (e.g. cross border), under section 1 of the Transport for Works Act 1992 by virtue of the National Assembly for Wales Transfer of Functions Order 1999/672 ("TFO 1990"). Schedule 1 to the TFO 1990 transfers the powers to the then Assembly in relation to the Transport and Works Order 1992, except "the order-making function under sections 1 and 3 where any order made thereunder would have effect both in Wales and England…". Schedule 2 to the TFO 1990 states "The order, rule and regulation-making functions of the Secretary of State under sections 1, 3, 6, 7(4), 8, 10 and 15 shall be exercisable only with the agreement of the Assembly".

6.3. The Secretary of State will retain this power, it is only where the project meets the criteria of a significant infrastructure project under the Bill that infrastructure consent must be sought, rather than applicants being able to use the Transport and Works Act.

6.4. These provisions engage paragraph 11(2) of Schedule 7B to GoWA and so we are consulting the appropriate Minister about the provisions.

Julie James AS/MS
Y Gweinidog Newid Hinsawdd
Minister for Climate Change

Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref MA-JJ-3582-JJ

Rt Hon Michael Gove MP
Secretary of State for Levelling up, Housing and Communities

By email: correspondence@communities.gov.uk

7 January 2022

Dear Michael

I am writing to you regarding two matters which have come to my attention relating to the consenting of energy generating stations. I am writing to seek your cooperation in transferring legislative competence for certain matters to Senedd Cymru ("the Senedd"), which would aid in the establishment of an effective and modern consenting regime which operates alongside those handled by the UK Government.

Specifically, I am requesting that the Senedd is transferred legislative competence:

(a) For the consenting of energy generating stations offshore between the edge of the territorial sea and the edge of the Welsh zone (an area roughly between 12 and 200 nautical miles ("nm") off the shoreline); and

(b) Which clarifies the Senedd's ability to legislate in respect of energy storage.

In relation to point (a), where it concerns the consenting of generating stations offshore, the Senedd currently has legislative competence in relation to Wales, up to the limits of the territorial sea, which is an area roughly 12nm from the shoreline. Beyond that (12-200nm), the Welsh Ministers have executive competence to consent such schemes, and are tied to consenting such schemes under section 36 of the Electricity Act 1989. This is an outdated process which has been superseded for the majority of offshore schemes in English waters.

The Welsh Government is seeking to deliver a unified infrastructure consenting process to place it on similar terms with those schemes in English waters consented under the Planning Act 2008, which extends to the edge of the English zone (0-200nm). At present, the Welsh Ministers cannot deliver a similar process as the Senedd is confined to legislating in relation to the territorial sea (0-12nm), which may cause operational difficulties for developers.

A similar issue has recently arisen in respect of the Senedd's legislative competence relating to fishing and amendments have been made by section 45 of the Fisheries Act

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2020 to section 108A, Schedule 7A and a range of other provisions in the Government of Wales Act 2006 to extend legislative competence where it relates to fishing, fisheries or fish health to the Welsh zone beyond the seaward limit of the territorial sea (0-200nm). This provides a useful precedent, where I would suggest similar amendments would also be appropriate in the context of the consenting of offshore energy generating stations by the Welsh Government.

In relation to point (b), as part of the agenda to remove barriers in relation to energy storage, a change was made in 2019 by the Welsh Ministers to remove energy storage (excluding pumped hydroelectric) from the calculation of the generating capacity of generating stations where the Welsh Ministers were the onshore consenting authority. A similar change was made in 2020 in respect of generating stations where the Secretary of State was the consenting authority under the Planning Act 2008 by way of the Infrastructure Planning (Electricity Storage Facilities) Order 2020 and the Electricity Storage Facilities (Exemption) (England and Wales) Order 2020 ("the Orders").

The Orders made by the Secretary of State to disregard energy storage (excluding pumped hydroelectric storage) from the calculation of generating capacity combined with changes made by the Wales Act 2017 to devolve further legislative competence has resulted in an anomaly between the operation of the two regimes which would benefit from alignment.

Currently the Senedd's legislative competence where it concerns the consenting of energy is capped at 350MW (excluding onshore wind). Therefore, the Senedd may only legislate for schemes up to 350MW. Were a scheme which either solely or mainly generates electricity from storage to exceed 350MW, it is not clear whether the Senedd would have power to legislate how such schemes are consented. However, as a consequence of the Orders made by the Secretary of State in 2020, the Welsh Ministers, through Local Planning Authorities, would retain executive competence to consider such schemes under the Town and Country Planning Act 1990 onshore, which may not be appropriate for all such schemes.

It is essential the legislative competence set out in (a) and (b) is transferred to the Senedd to at least provide one point of contact and a more streamlined approach for developers of energy projects in Wales, particularly renewable energy. This administrative efficiency would be of benefit to the development industry.

I believe the transfer of competence for these matters will reduce regional disparities within the United Kingdom, and allow Wales to compete on the same footing as England where it concerns having an appropriate consenting process for on and offshore renewables, while also supporting the journey towards 'net zero'.

I welcome further cooperation between our Governments on these matters to ensure this beneficial solution for all parties can be realised. I note provision could be contained in the upcoming Planning Bill, which was contained in the Queen's speech in May 2021.

Yours sincerely

Julie James AS/MS
Y Gweinidog Newid Hinsawdd
Minister for Climate Change

CC –

Secretary of State for Wales (correspondence@ukgovwales.gov.uk)
Secretary of State for Business, Energy and Industrial Strategy (enquiries@beis.gov.uk)

Julie James AS/MS
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Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref MA-JJ-2523-22

Rt Hon Michael Gove MP
Secretary of State for Levelling up, Housing and Communities

correspondence@levellingup.gov.uk

11 January 2023

Dear Mr Gove

I am writing to you to request an urgent response to my previous correspondence to your predecessor dated 7 January 2022 regarding two matters relating to the consenting of energy generating stations. I am also writing further to correspondence dated 23 December 2022 from the Secretary of State for Wales to me regarding the need to progress floating offshore wind projects in the Celtic Sea. Both are attached for your information.

I seek your cooperation in transferring legislative competence for certain matters to Senedd Cymru ("the Senedd"), which would aid in the establishment of an effective and modern consenting regime which operates alongside those handled by the UK Government, which may consent, among other things, offshore renewables.

Specifically, I am asking for a response to my previous request that the Senedd is transferred legislative competence:

(a) For the consenting of devolved energy generating stations offshore between the edge of the territorial sea and the edge of the Welsh zone (an area roughly between 12 and 200 nautical miles off the shoreline); and

(b) Which clarifies the Senedd's ability to legislate in respect of energy storage.

The Welsh Government is currently drafting legislation which introduces a unified infrastructure consenting process and it is essential the legislative competence set out in (a) and (b) is transferred to the Senedd to enable the scope of that process to be defined. Hence, this request has become urgent.

I believe the transfer of competence for these matters will reduce disparities within the United Kingdom, and allow Wales to compete on the same footing as England where it concerns having an appropriate consenting process for on and offshore renewables, while also supporting the journey towards 'net zero'. Furthermore, it would provide the development industry and the Welsh Government the administrative efficiency of having

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one point of contact and a more streamlined approach for the consenting of infrastructure in Wales, particularly renewable energy. It will also help achieve the aims set out by the Secretary of State for Wales to make timely decisions on the anticipated pipeline of applications to deliver the planned 4GW of capacity in the Celtic Sea by 2035.

I welcome further cooperation between our Governments on this matter to ensure this beneficial solution for all parties can be realised urgently.

Yours sincerely

Julie James AS/MS
Y Gweinidog Newid Hinsawdd
Minister for Climate Change

CC –

Secretary of State for Wales (correspondence@ukgovwales.gov.uk)
Secretary of State for Business, Energy and Industrial Strategy (enquiries@beis.gov.uk)

IN THE MATTER OF FFOS-Y-FRAN COAL MINE

AND IN THE MATTER OF THE TOWN AND COUNTRY PLANNING ACT 1990

OPINION

INTRODUCTION AND SUMMARY

1. We are asked by Coal Action Network for our opinion on the ongoing situation at Ffos-y-Fran coal mine, Merthyr Tydfil ('**the Site**'). In particular, we are asked for our opinion on the past and future exercise of statutory enforcement powers by Merthyr Tydfil County Borough Council ('**the Council**') and the Welsh Ministers.

2. In summary, the site has been used as a coal mine since 2005. On 6 September 2022, planning permission for the extraction of coal from the Site expired. Merthyr (South Wales) Limited ('**MSWL**') did not, however, bring its coaling operations to an end and continued to extract coal from the Site in breach of planning control. No enforcement action was taken by the Council or the Welsh Ministers in relation to this breach for eight-and-a-half months. An enforcement notice ('**the EN**') was finally served on 24 May 2023 with compliance required by 22 July 2023. No stop notice has been served. If MSWL appeals against the EN, the EN will not take effect until the determination of that appeal which, on current timescales, may take around 12 months. Consequently, in the absence of a stop notice, the Council and the Welsh Ministers may have enabled MSWL to extract coal, without permission but without consequence, for more than 18 months.

3. Coal Authority data shows that MSWL extracted 168,862 tonnes of coal, without permission, in the six-month period from 1 October 2022 – 31 March 2023. If extraction continues at the same rate, MSWL may extract around half a million

tonnes of coal in the 18 months from 6 September 2022 until the EN might take effect. The total emissions attributable to 18-months of unlawful coaling at this single mine are in the region of 2 million tonnes CO2eq, the equivalent of the emissions of 155,000 people in Wales over the same period.[1]

4. The extraction of the coal and the associated emissions are the result of a mining company choosing to act unilaterally and unlawfully. The activity has not been approved by any democratically elected bodies or persons.[2] It is not subject to any mitigations imposed by planning condition or obligation. It is wholly unauthorised and unconstrained. But on the approach adopted to date by the Council and the Welsh Ministers there will be no consequence for that unauthorised and unconstrained activity and no deterrent effect to dissuade future operators from acting in the same way.

5. Planning Policy Wales and the Welsh Ministers' Coal Policy Statement acknowledge a climate emergency and impose a strong presumption against permission for coal extraction. The Council has determined that the ongoing activity at the Site is not acceptable in planning terms. But the Council and the Welsh Ministers have failed to take action to bring the unauthorised activity to an end urgently and decisively. Instead, they have treated a breach of planning control related to the extraction of coal in the same way they would treat a breach of planning control related to the erection of an unauthorised building. These are, however, fundamentally different things. The planning harm caused by an unauthorised building can be remedied by the building's ultimate removal. In contrast the planning harm caused by the unauthorised extraction of coal cannot:

[1] For the references and calculations behind these figures, see fns 7 – 11 below.

[2] See *R. (Holding & Barnes Plc) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 A.C. 29569 per Lord Hoffmann at [69] *"[i]n a democratic country, decisions as to what the general interest requires are made by democratically elected bodies or persons accountable to them … sometimes one cannot formulate general rules and the question of what the general interest requires has to be determined on a case by case basis. Town and country planning or road construction, in which every decision is in some respects different, are archetypal examples. In such cases Parliament may delegate the decision-making power to local democratically elected bodies or to ministers of the Crown responsible to Parliament. In that way the democratic principle is preserved."*

the coal cannot be put back in the ground; the carbon emissions from burning the coal cannot be removed from the atmosphere.

6. In the circumstances, it is arguable that the Council's and Welsh Ministers' eight-and-a-half month delay in taking enforcement action was unlawful. Further, it is strongly arguable that it would be unlawful for the Council and/or Welsh Ministers to fail to serve a stop notice by 27 June 2023, the date on which the EN is due to take effect.

7. Irrespective of the lawfulness of the Council's and Welsh Minister's past and future exercise of their enforcement functions, it is clear to us that their failure to take urgent and decisive enforcement action against the breach of planning control in this case constitutes maladministration and sets a terrible precedent. It sends a message to all mine operators in Wales that there is no need to bring operations to an end when planning permission expires because the planning system can be 'gamed' to enable continued operations for an extended period beyond that date with no consequence.

THE FACTS

8. MSWL extracts coal from the Site for use in industrial and non-industrial uses.

9. Planning permission for the extraction of coal on the Site was first granted on 11 April 2005 by way of appeal decision APP 152-07-014. That permission was varied pursuant to a further appeal decision dated 6 May 2011 (**"the Planning Permission"**). Conditions 3 and 4 of the Planning Permission required extraction from the Site to cease no later than 6 September 2022 and site restoration to be completed by 6 December 2024.

10. On 1 September 2022, five days short of the date by which all extraction was to cease, MSWL sought permission under section 73 of the Town and Country Planning Act to extend the date by which extraction from the Site must cease to

6 June 2023 and the date by which site restoration must be completed to 6 September 2025 ("**the Planning Application**").[3]

11. The Planning Application was accompanied by an addendum to the environmental statement prepared in 2005 ('**the ES Addendum**'), but not by a full environmental statement. The 2005 environmental statement did not address the climate change impacts of the development and nor did the ES Addendum: there is no assessment of the likely greenhouse gas emissions attributable to the proposed extension of the life of the development.

12. Extraction of coal from the Site continued beyond 6 September 2022 in breach of planning control. As early as 12 September 2022, the Council began to receive reports of continued coaling on the Site in breach of planning control. On 27 September 2022, local residents were supplied with a statement from the Council via their Assembly Member stating:

> "If coal mining operations continue on site, this would result in a breach of the planning conditions and may be subject to enforcement action. At this stage because a planning application has been submitted, which seeks to amend to the current permission and enable operations to continue on site, it would not normally be expedient to take enforcement action until that application has been determined…"

13. The Council's position, therefore, was that it would consider the expediency of enforcement action only after considering the acceptability, in planning terms, of the proposed development.

14. On 18 October 2022, the Welsh Ministers issued a holding direction under Article 18(1) of the Town and Country Planning (Development Management Procedure) (Wales) Order 2012. The effect of the direction was to restrict the ability of the Council to grant planning permission until the Welsh Ministers had considered whether to exercise their call-in powers to determine the Planning Application themselves.

[3] Application P/22/0237

15. On 21 December 2022, the Council issued a screening opinion ('**the First Screening Opinion**'). On the basis that the proposal was to extend for nine months development that had previously been assessed as acceptable (subject to mitigation), it concluded that the proposed extension was not EIA development. It said:

> In conclusion, the Authority is of the opinion that the proposed development, either alone or in combination, is unlikely to have a significant adverse effect on the environment. The extension of 9 months to complete the development previously approved will extend the impacts of the development. However, these impacts have previously been assessed as being at an acceptable level subject to mitigation and limitations provided by planning conditions. There is no proposed change to the method of working and therefore no environmental impacts are envisaged over and above those experienced as part of the 2005 planning permission. As such, the likely effect of the development is unlikely to be significant enough to warrant an EIA.

The First Screening Opinion did not address the climate change impacts of, or greenhouse gas emissions attributable to, the proposed extended life of the development.

16. On 12 January 2023, Coal Action Network wrote to the Council to seek confirmation of whether active coal mining had continued at the Site beyond 6 September 2022. On 20 January 2023, David Cross, Principal Planning Officer at the Council, replied, confirming that the Council understood – apparently on the basis of information provided by MSWL – that coal mining had ceased on the Site, pending the outcome of the Planning Application. That understanding was wrong. Active mining had taken place regularly since 6 September 2022. The Coal Authority's production data demonstrates that MSWL extracted 102,505 tonnes of coal from the Site between 1 October and 31 December 2022, without planning permission.

17. On 30 January 2023, Coal Action Network drew the Council's attention to the Coal Authority evidence. On 2 February 2023, David Cross replied to say that he would review the information provided and would consider whether to escalate the matter with the Council's enforcement team.

18. On 3 March 2023, Richard Buxton solicitors (**"RBS"**) wrote to the Town Planning Division of the Council on behalf of Coal Action Network to request urgent enforcement action in relation to the ongoing breach of planning control. The letter set out why planning policy demanded enforcement action in this case and why any delay would render enforcement action nugatory. Noting that the Planning Application sought an extension of coaling to 6 June 2023, and noting that MSWL has already, by default, enjoyed six of those nine months of coaling, it said: "*the development will soon effectively have been carried out without permission and the harm identified in Welsh Policy irrevocably caused, regardless of the decision that may eventually be made on the extension application.*"

19. The letter was copied to Welsh Ministers and noted that if the Council delayed in taking, or declined to take, enforcement action, Welsh Ministers would be asked to exercise their own enforcement powers.

20. On 9 March 2023, solicitor to the Council, Geraint Morgan, replied to RBS, informing them that "*the Council does not consider it would be a productive use of its officers' time to provide a detailed response at present to the matters raised in the [RBS] letter.*" It continued to note that the Council's planning committee would consider the section 73 application on 26 April 2023 and "*any issues pertinent to enforcement will be taken in light of the decision that is made by committee*".

21. On 13 March 2023, RBS wrote to the Welsh Ministers drawing their attention to the ongoing breach of planning control, copying the correspondence between RBS and the Council and seeking the exercise of enforcement powers by Welsh Ministers. No response was received to that letter.

22. On 31 March 2023, David Cross wrote to Coal Action Network confirming the following: "*Whilst we were under the impression that the majority of the works being undertaken on site sought to address the slippages, and in part, works associated with*

the restoration of the site, it now appears that coal extraction has also continued alongside these activities."

23. Indeed, the Coal Authority's production data shows that, in addition to the 102,505 tonnes of coal extracted from the Site between 1 October and 31 December 2022, MSWL had extracted a further 66,357 tonnes of coal, without permission, between 1 January and 31 March 2023. Notwithstanding this, Mr Cross confirmed the position as set out in the Council's 9 March letter to RBS, namely that "*any issues pertinent to enforcement*" would only be considered after 26 April 2023, once the Council had resolved whether it would grant the Planning Application.

24. On 3 April 2023, RBS wrote a pre-action letter to the Council and the Welsh Ministers alleging that the Council had acted unlawfully by: i) failing to consider enforcement action as a prior and separate question to whether to grant planning permission; and/or ii) failing to take enforcement action against the ongoing breach of planning control. The letter also alleged that the Welsh Ministers had acted unlawfully by failing to take any steps in relation to the ongoing breach of planning control.

25. On 11 April 2023 and 22 April 2023 respectively the Council and the Welsh Ministers provided responses to RBS's pre-action letter and denied they had acted unlawfully. The Welsh Ministers maintained it was reasonable to wait for the Council to take a decision on the Planning Application before consideration of enforcement and asserted that the scheme of the legislation "*makes it clear that the local planning authority is the principal decision maker in relation to [enforcement] functions*".

26. On 11 April 2023, the Council gave notification that MSWL had varied the Planning Application and now sought permission for an extension of coaling to 31 March 2024. No update to the ES Addendum was provided, notwithstanding

the additional nine months of coaling proposed. On 18 April 2023, the Council issued a further screening opinion ('**the Second Screening Opinion**') concluding that the further proposed extension was not EIA development because:

> "The extension of extraction operations until 31 March 2024 and a delay in the completion of final restoration until 30 June 2026 in order to complete the development previously approved will extend the impacts of the development. However, these impacts have previously been assessed as being at an acceptable level subject to mitigation and limitations provided by planning conditions. There is no proposed change to the method of working and therefore no environmental impacts are envisaged over and above those experienced as part of the 2005 planning permission. As such, the likely effect of the development is unlikely to be significant enough to warrant an EIA."

The Second Screening Opinion did not address the climate change impacts of the proposed extended life of the development.

27. On 17 April 2023, the Council's Planning Officer, Judith Jones, prepared a report for the Planning Committee, recommending the Committee refuse permission for the Planning Application, as varied. On 25 April 2023, the Planning Committee unanimously voted to refuse permission for the Planning Application, as varied. The reasons for refusal were set out in a decision notice dated 27 April 2023, which stated:

> "1. The proposed development fails to clearly demonstrate that the extraction of coal is required to support industrial non-energy generating uses; that extraction is required in the context of decarbonisation and climate change emission reduction; to ensure the safe winding-down of mining operations or site remediation; or that the extraction contributes to Welsh prosperity and a globally responsible Wales. The proposed development therefore, fails to meet the test of 'wholly exceptional circumstances,' contrary to Planning Policy Wales 11, the Coal Policy Statement and Policy EcW11 of the Merthyr Tydfil County Borough Council Replacement Local Development Plan 2016-2031.
>
> 2. The proposed development fails to provide an adequate contribution towards the restoration, aftercare and after-use of the site, to the detriment of the surrounding environment, contrary to the requirements of Policies EnW5 and EcW11 of the Merthyr Tydfil County Borough Council Replacement Local Development Plan 2016-2031. Therefore, no local or community benefits would be provided that clearly outweigh the disbenefits of the lasting environmental harm of the development."

28. On 27 April 2023, RBS wrote to the Council and Welsh Ministers seeking urgent enforcement action, involving the service of a temporary stop notice to ensure the unconsented activity was brought to an end immediately, followed by the service of an enforcement notice as soon as the expediency of such a course was determined.

29. On 28 April 2023, the Welsh Ministers indicated that it was for the Council to decide whether to take enforcement action and only once it had taken a decision would the Welsh Ministers consider enforcement action.

30. On 2 May 2023, the Council replied indicating that it had commenced an enforcement investigation and would not comment further until the conclusion of that investigation. There is no evidence that the Council had taken any significant steps to investigate enforcement prior to the refusal of planning permission.

31. In May 2023, the Coal Authority inspected the Site and found the operator working coal, without planning permission and beyond the agreed licence boundary.

32. On 24 May 2023, the Council served the EN requiring MSWL and any other person with an interest in the Site to cease the extraction of coal from the Site and cease carrying out development at the Site other than wholly in accordance with the approved restoration and management strategy. The EN, as drafted, takes effect on 27 June 2023 with compliance required within a further 28 days. That means that it will be a criminal offence to continue coaling beyond 25 July, unless an appeal is made against the EN.

33. We have been provided with drone footage which appears to show the continuation of active coaling on the site as late as 15 June 2023. [4] Despite requests to do so the Council has failed to serve a stop notice requiring the cessation of the unauthorised activity pending the date for compliance set by the EN.

THE LEGAL CONTEXT

[4] See https://shorturl.at/pAN19.

Wellbeing of Future Generations

34. Pursuant to section 3 of the Well-being of Future Generations (Wales) Act 2015 ("the 2015 Act") the Council and the Welsh Ministers are under a duty in the exercise of their functions to take all reasonable steps towards achieving the well-being objectives.

35. In relation to the Welsh Ministers' well-being objectives, the seventh is to "*Build a stronger, greener economy as we make maximum progress towards decarbonisation*." Well-being objective nine is to: "*Embed our response to the climate and nature emergency in everything we do*."

Planning permission and EIA

36. Planning permission is required for the carrying out of any development of land, including mining operations: section 57(1) Town and Country Planning Act 1990 ('**the 1990 Act**').

37. A planning authority must not grant planning permission or subsequent consent for EIA development unless an EIA has been carried out in respect of that development: Town and Country (Environmental Impact Assessment) Regulations 2017 ('**the 2017 Regulations**'). EIA development includes Schedule 1 development and Schedule 2 development that is likely to have significant effects on the environment. Schedule 1 development includes open-cast mining where the surface area of the site exceeds 25 hectares. Schedule 2 development includes any change to or extension of development of a description listed in Schedule 1.

38. Where it appears to a relevant planning authority that proposed development is Schedule 2 development, it must provide a written statement expressing the planning authority's opinion as to whether the development "*is likely to have significant effects on the environment*" and is thus EIA development: regs 2 and 8 of the 2017 Regulations. In reaching that opinion, the characteristics of the

development must be considered with particular regard to certain factors set out in Schedule 3 of the 2017 Regulations, including pollution.

Enforcement powers

39. Part VII of the 1990 Act addresses enforcement of planning control. Section 171A(1) provides that a "*breach of planning control*" is constituted by:

> "(a) carrying out development without the required planning permission; or
> (b) failing to comply with any condition or limitation subject to which planning permission has been granted…".

40. Section 171A(2) provides, amongst other things, that the issue of an enforcement notice and the service of a breach of condition notice constitute "*enforcement action*".

41. Section 172 provides:

> "(1) The local planning authority may issue a notice (in this Act referred to as an "enforcement notice") where it appears to them
> (a) that there has been a breach of planning control; and
> (b) that it is expedient to issue the notice, having regard to the provisions of the development plan and any other material considerations."

42. Section 182 (as applied to the Welsh Ministers by article 2 and schedule 1 of the National Assembly for Wales (Transfer of Functions) Order 1999) provides:

> "(1) If it appears to the Secretary of State to be expedient that an enforcement notice should be issued in respect of any land, he may issue such a notice.
> (2)The Secretary of State shall not issue such a notice without consulting the local planning authority.
> (3)An enforcement notice issued by the Secretary of State shall have the same effect as a notice issued by the local planning authority."

43. The Planning Encyclopaedia at 182.01 notes that

> "[s]trictly, and in contrast to s.172, there are no express tests of it having to appear to the Secretary of State that there has been a breach of planning control and having to have regard to the provisions of the development plan and to any other material considerations. However, there is no good reason to infer that the Secretary of State could lawfully issue an enforcement notice without first applying these tests. They are of course very likely to arise in consultation with the local planning authority in any event."

44. An enforcement notice must give 28 days notice before it takes effect (section 172(3)) and must specify the period at the end of which activities are required to

have ceased (section 173(9)). If an appeal is made against the enforcement notice, the notice has no effect until the final determination or withdrawal of the appeal (section 175(4)).

45. Where there is non-compliance with an enforcement notice, then: i) the owner of the land is guilty of an offence, as is any person who has control of or an interest in the land who carries on or permits an activity required by the notice to cease (section 179); and ii) the local planning authority may enter the land and take the steps required to be taken by the notice, and recover the reasonable costs of so doing from the person who is owner of the land (section 178(1)).

46. Section 171E of the 1990 Act provides for the issue of a temporary stop notice in circumstances where the local planning authority thinks (a) that there has been a breach of planning control in relation to any land, and (b) that it is expedient that the activity (or any part of the activity) which amounts to the breach is stopped immediately. As explained in the explanatory memorandum to the Planning and Compulsory Purchase Act 2004, temporary stop notices are intended to give local planning authorities the means to prevent unauthorised development at an early stage without first having had to issue an enforcement notice. It allows them up to 28 days to decide whether further enforcement action is appropriate and what that action should be, without the breach intensifying by being allowed to continue.

47. Section 183 of the 1990 Act provides a planning authority with power to serve a stop notice where it considers it expedient that any activity specified in an enforcement notice should cease before the expiry of the period for compliance with an enforcement notice. The effect of a stop notice is to prohibit the carrying out of the activity. Section 184 of the 1990 Act provides that the notice must specify the date on which it will take effect and that date must not be earlier than three days after the date when the notice is served unless the planning authority considers there are special reasons for specifying an earlier date.

48. Section 185 of the 1990 Act (as applied to the Welsh Ministers by article 2 and schedule 1 of the National Assembly for Wales (Transfer of Functions) Order 1999) provides that a stop notice may be served by the Welsh Ministers, after consultation with the local planning authority.

49. Section 186 provides that, in certain circumstances, compensation may be payable for loss and damage directly attributable to the prohibition in the notice. However, compensation is not payable, *inter alia*:

    a. solely because an appeal against the underlying enforcement notice succeeds on ground (a) in s 174(2) of the 1990 Act e.g. solely because on appeal planning permission is granted; or

    b. in respect of the prohibition in a stop notice of any activity which, at any time when the notice is in force, constitutes or contributes to a breach of planning control.

50. In *Huddlestone v Bassetlaw District Council* [2019] PTSR at [26] Lindblom LJ highlighted that this provision reflects the thinking of Robert Carnwath QC, in his report of February 1989 '*Enforcing Planning Control*' that:

> "if the Act made clear that compensation will not in any circumstances be payable for a use or operation which is in breach of planning control, there would be less concern at the risks of a notice failing on a technicality, and the use of stop notices in appropriate cases would be encouraged": para 9.5."

Relevant case law

Discretion over enforcement

51. As a general rule, enforcement authorities enjoy a wide discretion as to the use or non-use of enforcement powers: see *R (Easter) v Mid Suffolk DC* [2019] EWHC 1574. In *R (Community Against Dean Super Quarry Limited) v Cornwall Council* [2017] EWHC 74 (Admin), Hickinbottom J. summarised the position as follows:

> "25. Where a developer is acting in breach of planning control, the statutory scheme assigns the primary responsibility for deciding whether to take enforcement steps – and, if so, what steps

should be taken and when – to the relevant local authority. The statutory language used makes it clear that the authority's discretion in relation to matters of enforcement – if, what and when – is wide. That is particularly the case in respect of enforcement notices, the power to issue a notice arising only "where it appears to them… that it is expedient to issue the notice". That is language denoting an especially wide margin of discretion. Any enforcement decision is only challengeable on public law grounds. Because of the wide margin of discretion afforded to authorities, where the assertion is that the decision made is unreasonable or disproportionate, the court will be particularly cautious about intervening. Intervention is likely to be rare. However, circumstances may make it appropriate. In Ardagh Glass, because the four-year period for enforcement was imminently to expire, a failure on the part of the planning authority to take prompt enforcement steps would have meant that the development would achieve immunity. In that case, the court ordered immediate enforcement action to be taken."

52. In *Ipswich BC v Fairview Hotels* [2022] EWHC 2868 (KB), Holgate J. endorsed the statement of HHJ Mole QC in *Ardagh Glass Ltd v Chester City Council* [2009] EWHC 745 (Admin) that "expedience" indicates the balancing of the advantages and disadvantages of taking a particular course of action and said the following:

> "So, even though the authority may be satisfied that a breach of planning control has occurred, they may consider it not expedient to issue an enforcement notice because on balance the use causes no planning harm at all, or is beneficial, or may cause insufficient harm to justify the taking of any enforcement action. Alternatively, the authority's conclusions on expediency may determine the nature and extent of any enforcement action they decide to take."

53. As such, a decision on the expediency of enforcement action requires an active weighing of the advantages and disadvantages of enforcement. While the enforcement authority will have a wide margin of discretion in that exercise, it must address its mind to the question properly, and must reach a decision that is reasoned and lawful in public law terms.

54. In determining whether it is expedient to take enforcement action, an enforcement authority must take into account the development plan and other material considerations. However, there may be circumstances in which it is not only expedient but necessary to take enforcement action prior to a final determination of the planning merits of the unauthorised development. In *Ardagh Glass*, HHJ David Mole QC quashed the defendant council's decision that it was not expedient to serve an enforcement notice prior to a decision on planning permission and made a mandatory order requiring the council to issue an enforcement notice requiring the removal of unauthorised buildings. In that

case, the developer had built and operated a glass factory without planning permission and without having carried out an EIA. It subsequently made a retrospective application for planning permission accompanied by an EIA to the local planning authority. The claimant and the local planning authority disagreed about the relevant date on which the development would become immune from enforcement action. In any case, the local planning authority was unwilling to issue an enforcement notice while it was considering whether to grant planning permission and said it was "*for them to decide whether and when it is expedient to take enforcement action*".

55. The judge held at [46] that "*it would be a betrayal by the planning authorities of their responsibilities and a disgrace upon the proper planning of this country*" for the development to become immune from enforcement action while the local planning authority was considering whether to grant planning permission. He found at [64] that the local planning authority had erred in concluding it was not expedient to issue an enforcement notice. Separately, the judge concluded at [110] that to permit the development to achieve immunity would amount to a breach of the UK's obligations under the EIA Directive.

56. On appeal in the Court of Appeal [2011] PTSR, Sullivan LJ at [22] rejected the submission that the Court should also have made a mandatory order for the service of a stop notice. An enforcement notice was, he concluded, sufficient to ensure the removal of the unauthorised EIA development if retrospective planning permission was not granted.

57. In *An Application by Friends of the Earth Limited for Judicial Review* [2017] NICA 41, the courts of Northern Ireland addressed a different situation where the service of a stop notice was arguably required. The case related to unauthorised extraction of sand from a freshwater lough which was considered likely to have significant effects on the environment. Under the applicable regime in Northern Ireland, the Department of the Environment served an enforcement notice on the

landowner and those responsible for the extraction to cease the dredging of the lough. The enforcement notice identified specific concerns relating to compliance with the EIA Directive and the Habitats Directive. The landowner and those responsible for the extraction appealed against the enforcement notice, with the effect that it had no effect pending the final determination or withdrawal of the appeal, and the sand extraction continued. The Minister decided not to issue a stop notice because he considered it disproportionate "*where there is no evidence that dredging… is having any impact on the environmental features of the lough*". Friends of the Earth challenged that decision by way of judicial review, alleging that the failure to issue a stop notice was an unlawful exercise of the Minister's discretion.

58. At first instance, Maguire J. dismissed the claim, relying on the judgment of Sullivan LJ in *Ardagh Glass.* On appeal from the first instance judgment of Maguire J, the Court of Appeal in Northern Ireland distinguished *Ardagh Glass* as follows:

> "[30] Maguire J referred to paragraph [22] of Ardagh Glass Ltd as being in point in the present cases. There was an Enforcement Notice already in existence, the issue was whether a Stop Notice had to be served and there was also an appeal against the Enforcement Notice. It was stated that Sullivan LJ plainly viewed his conclusion on the point as not inconsistent with EU law and Maguire J stated that he was inclined to follow that view.
> [31] Maguire J rejected the proposed distinction of the decision in Ardagh Glass Ltd based on the possibility of rectifying the damage in Ardagh by requiring the building to be removed if planning permission was not granted, whereas in the present case it was not possible to return extracted sand.
> [32] This Court is of the opinion that there is a distinction to be made between Ardagh Glass Ltd and the present case and that it bears on the application of the principles to be applied. In Ardagh Glass Ltd it was found that the issue of an Enforcement Notice was sufficient to ensure the removal of the unauthorised development if retrospective planning permission was not granted. While the workings might continue in the meantime, it was recognised that ultimately, if necessary, the unauthorised development, in the form of the factory structure, could be removed. However the present case is different in character. There is no such structure to be removed in the event that planning permission is ultimately refused. The unauthorised development is the excavation which cannot be reinstated. Of course, as in Ardagh Glass Ltd, there will also be the ongoing operations at the site but the focus is on the structure rather than the workings. In the present case the issue of the Enforcement Notice will not be sufficient to ensure the removal of the unauthorised development in the form of the excavation between now and the refusal of planning permission. The material extracted is irreplaceable. Therefore the basis on which no Stop Notice was issued in Ardagh Glass Ltd does not apply in the present case."

59. The Court reasoned that the precautionary principle applied to the question of whether to issue the stop notice and operated on the basis that there should be no planning permission until it was established that there was no unacceptable impact on the environment: at [34] "*[t]he proper approach is to proceed on the basis that there is an absence of evidence that the operations are not having an unacceptable impact on the environment*" (emphasis in the original). Accordingly, the Court held that the decision to issue a stop notice was one over which the decision maker had discretion but – in the circumstances of that case – concluded that the discretion had been exercised unlawfully and quashed the decision.

THE POLICY CONTEXT

Development Management Policy

60. Paragraph 14.2.2 of the Development Management Manual provides that the carrying out of development without first obtaining permission should be discouraged, and that "*wilful disregard for the need for planning permission is not to be condoned.*" Paragraph 14.7.1 provides:

> "Where an LPA considers that an unauthorised development is causing unacceptable harm to public amenity, and there is little likelihood of the matter being resolved through negotiations or voluntarily, they should take vigorous enforcement action to remedy the breach urgently, or prevent further serious harm to public amenity."

61. In a letter dated 17 October 2018, the Chief Planner, Planning Directorate, Welsh Government emphasised the importance of timely use of enforcement powers ('**the Chief Planner's 2018 Letter**') and highlighted the serious risks posed to trust and confidence in the planning system of failures to take timely enforcement action. It notes:

> "An effective development management system requires proportionate and timely enforcement action to maintain public confidence in the planning system but also to prevent development that would undermine the delivery of development plan objectives.
>
> The Welsh Government enforcement review concluded, whilst the system is fundamentally sound, it can struggle to secure prompt, meaningful action against breaches of planning control. The system can also be confusing and frustrating for complainants, particularly as

informed offenders can intentionally delay enforcement action by exploiting loopholes in the existing process…

Section 3.6 of Planning Policy Wales is clear; enforcement action needs to be effective and timely. This means that Local Planning Authorities should look at all means available to them to achieve the desired result. In all cases there should be dialogue with the owner or occupier of land, which could result in an accommodation which means enforcement action is unnecessary.

…Section 14.2 of the Development Management Manual… deals with how this policy should be implemented. Paragraph 14.2.5 is particularly useful in that it explains how the dialogue with the owner or occupier is one aspect of dealing with an enforcement case but it should not be a source of delay or indecision."

Coal policy in Wales

62. Welsh Government Policy on the extraction and use of coal is clear: "*the presumption will always be against coal extraction*." This includes the extension of existing coaling operations. The Coal Policy Statement provides:

"The opening of new coal mines or the extension of existing coaling operations in Wales would add to the global supply of coal having a significant effect on Wales' and the UK's legally binding carbon budgets as well as international efforts to limit the impact of climate change. Therefore, Welsh Ministers do not intend to authorise new Coal Authority mining operation licences or variations to existing licences. Coal licences may be needed in wholly exceptional circumstances and each application will be decided on its own merits, but the presumption will always be against coal extraction.

Whilst coal will continue to be used in some industrial processes and non-energy uses in the short to medium term, adding to the global supply of coal will prolong our dependency on coal and make achieving our decarbonisation targets increasingly difficult. For this reason, there is no clear case for expanding the supply of coal from within the UK. In the context of the climate emergency, and in accordance with our Low Carbon Delivery Plan, our challenge to the industries reliant on coal is to work with the Welsh Government to reduce their reliance on fossil fuels and make a positive contribution to decarbonisation.

…

Planning Policy Wales (PPW 11) already provides a strong presumption against coaling, with the exception of wholly exceptional circumstances, and Local Planning Authorities are required to consider this policy in the decisions they make."

63. Planning Policy Wales (**"PPW"**) provides that proposals for opencast mines should not be permitted:

"5.10.14 Proposals for opencast, deep-mine development or colliery spoil disposal should not be permitted. Should, in wholly exceptional circumstances, proposals be put forward they would clearly need to demonstrate why they are needed in the context of climate change emissions reductions targets and for reasons of national energy security."

64. PPW acknowledges that exceptionally proposals for industrial uses for coal might come forward and would need to be considered individually against, *inter alia*, the policies in MTAN 2: Coal.

ANALYSIS

65. Planning permission for the extraction of coal on the Site expired on 6 September 2022. Any coaling beyond that date is in breach of planning control. The Council's refusal of the s 73 application on 26 April 2023 demonstrates that the unauthorised development is unacceptable in planning terms.

66. Notwithstanding the absence of planning permission and the service of the EN, there is compelling evidence that coaling continues on the Site. It seems likely that coaling will continue for the duration of any appeal against the EN. Accordingly, in the absence of a stop notice, it is likely that MSWL will have enjoyed the full benefits of the 18 month extension to the Planning Permission it sought, with none of the attendant mitigations or obligations that might have been imposed through a s 73 permission.[5]

67. It appears to us that MSWL has demonstrated a "*wilful disregard for the need for planning permission*" which the Development Management Manual says should not be condoned. MSWL has adopted a deliberate strategy to use the planning system to its advantage to ensure it can continue to extract coal for as long as possible, notwithstanding the breach of planning control. The Council and the Welsh Ministers have enabled that strategy by failing to discharge their enforcement functions effectively. This is exactly the situation the Chief Planner sought to discourage through his 2018 letter and the exact opposite of the "*vigorous enforcement action to remedy the breach urgently*" encouraged by the Development Management Manual.

[5] If the Council had concluded that "wholly exceptional circumstances" had been made out, it might reasonably have been expected to require the mitigation of the climate change effects of the extension by, for example, requiring the developer to offset its emissions.

68. If the breach in this case related to the erection of an unauthorised structure that could be removed at the conclusion of a prolonged enforcement process, that would be one thing. But this case relates to the ongoing extraction of coal. As in the *Friends of the Earth* case, the ongoing breach of planning control can never be remedied: the coal cannot be put back into the ground; the greenhouse gas emissions attributable to the development can never be un-emitted.

69. We consider that the factors in favour of urgent enforcement action in this case are even more compelling than in *Friends of the Earth*. By contrast to that case, planning permission has now been refused and the planning harm of the unauthorised development confirmed. The effect of the Council's and Welsh Ministers' current enforcement approach is to allow an extensive period of coaling, without permission and without the constraints of planning conditions or obligations, when the activity is contrary to national and local planning policy and causes demonstrable planning harm. That approach undermines public confidence and brings the planning system into disrepute.

70. In the 1989 Report that formed the basis for the enforcement regime introduced in Part VII of the 1990 Act, Robert Carnwath QC suggested three primary objectives for an effective enforcement system:[6]

    a. bringing an offending activity within planning control;
    b. remedying or mitigating its undesirable effects; and
    c. punishment or deterrence.

71. The approach of the Council and Welsh Ministers in this case has failed to achieve any of those objectives.

The unauthorised development is likely to be EIA development

[6] Robert Carnwath QC, Enforcing Planning Control, HMSO February 1989.

72. We consider the unauthorised development is likely to be EIA development because it is Schedule 2 development which is likely to have significant effects on the environment. It has not, however, been subjected to proper scrutiny under the EIA Regulations.

73. Although the Council's First and Second Screening Opinions concluded the proposed nine- and 18-month extensions were not EIA development, we consider those screening opinions were legally flawed. Both concluded that all the impacts of the proposed extensions to the Planning Permission had been assessed in 2005 when it was first granted. That was wrong. In particular, none of the climate change effects of the development had ever been assessed. That is because the requirements of EIA, and the policy context, have evolved since 2005.

74. It is not mandatory, in all cases, to assess the climate change effects of development as part of a screening opinion. However, in the context of national planning policy that imposes a strong presumption against coal development on account of its contribution to climate change, we consider that local planning authorities in Wales are required to address the climate change effects of proposed coal development at the screening stage. Those effects would necessarily have included the ongoing operational emissions of the mine, including methane emissions. They may also have included the downstream emissions of burning more than half a million tonnes of extracted coal. As the Court of Appeal confirmed in *Finch v Surrey County Council* [2022] EWCA Civ 187 at [63], whether the downstream impacts of scope 3 greenhouse gas emissions were "*indirect effects*" of the development that needed to be assessed was a matter of fact and judgement for the local planning authority. In the context of national planning policy that includes a strong presumption against coal development *on account of its downstream effects* on climate change, it is arguable that, in Wales, those effects must be assessed in the EIA process as a matter of policy; but it is clear that a local planning authority must at least

consider whether to include those downstream effects in its consideration of the likely significant effects of coal development.

75. In this case, the Council failed to address the climate change effects of the development at all in its Screening Opinions because it erroneously thought that all the effects of development had been considered and approved prior to granting the Planning Permission.

76. Operational emissions caused by an 18-month extension are likely to be in the region of 870,000 tonnes CO2e.[7] The downstream emissions from burning more than half a million tonnes of coal are in the region of 1.2 million tonnes CO2.[8] 2 million tonnes CO2e (a conservative estimate given the figures 870,000 + 1.2 million tonnes CO2) is the greenhouse gas equivalent of burning over 850 million litres of petrol.[9] Put another way, 18 months of mining at this one mine would generate the equivalent of the GHG emissions attributable to 155,000 people in Wales over the same period.[10]

[7] MSWL reported its 2021 emissions as 930,533 tonnes CO2e, excluding methane emissions. (2021 Annual Accounts p 4, Companies House) Coal Authority quarterly reports indicate that total production in 2021 was 602,128; operational (non-methane) emissions were thus reported to be 1.55 tonnes CO2e per tonne of coal mined. Assuming a rate of 1.5 tonnes CO2e per tonne of coal for the 500,000 tonnes coal estimated to be mined during an 18-month period leads to an estimate of approximately 750,000 tonnes CO2e. Methane emissions from the Ffos-y-fran mine has been estimated to be 2,077 tonnes over a 9-month extension by Global Energy Monitor using methodology from Kholod et al, 256 Journal of Cleaner Production (2020), https://doi.org/10.1016/j.jclepro.2020.120489. This equates to 4,154 tonnes over 18 months. Using a conservative estimate of 30 for the global warming potential of methane to convert to carbon dioxide equivalent (see https://www.iea.org/reports/methane-tracker-2021/methane-and-climate-change) this equates to a further 124,620 tonnes CO2e. Or, in all, roughly 870,000 tonnes CO2e.

[8] The 2023 BEIS conversion factor for industrial coal is used (this being a conservative assumption, as the domestic coal conversion factor would produce a higher figure). 500,000 tonnes of coal x 2.39648 BEIS figure for tonnes of CO2e = 1.198 million tonnes CO2 equivalent.

[9] 2023 BEIS conversion factor for Petrol is 2.35 Kg CO2e per Litre. 851M Litres x 2.35 = 2 billion Kg or 2 Million tonnes.

[10] Per capita annual GHG emissions in Wales are 8.6 tonnes CO2e per person. See https://www.gov.uk/government/statistics/uk-local-authority-and-regional-greenhouse-gas-emissions-national-statistics-2005-to-2020, statistical summary (30 June 2022). Over an 18-month period this equates to 12.9 tonnes CO2e per person in Wales (8.6x1.5). 2 million/12.9 = 155,000.

77. While significance for the purposes of EIA is a matter of judgement, and there is no strict algorithm for assessing the significance of greenhouse gas emissions,[11] we consider it likely that the Council would have concluded that that scale of greenhouse gas emissions was likely to have significant effects on the environment.

78. In any case, the First and Second Screening Opinions were premised on the Council's 2005 conclusion that the impacts of development were acceptable "subject to mitigation and limitations provided by planning conditions". The *unauthorised* development that is currently taking place on the Site is not subject to any mitigation or limitation provided by planning conditions or otherwise. It is wholly unauthorised and therefore wholly unconstrained. As a result, the First and Second Screening Opinions do not answer the question of whether the *unauthorised* development is EIA development. For all these reasons, we consider that the unauthorised development is likely to be, or at least arguably is, EIA development.

The Council's failure to consider enforcement action prior to its decision on planning permission was arguably unlawful

79. Between 6 September 2022 and January 2023, the Council appears to have been under the misapprehension – apparently in reliance on information provided by MSWL – that there was no breach of planning control at the Site because active coaling had ceased on 6 September 2022. Whether that misapprehension was reasonable is unclear: local residents had informed the Council as early as 12 September 2023 that unauthorised coaling continued on the Site. In any case, since 30 January 2023 at the latest, the Council knew or ought to have known that:

[11] See the Institute of Environmental Management & Assessment (IEMA) Guide: *Assessing Greenhouse Gas Emissions and Evaluating their Significance*, Second Edition, February 2022.

a. There had been a persistent breach of planning control at the Site because active coaling had continued without any significant pause since 6 September 2022.

b. That breach of planning control was serious because it involved an activity that is *prima facie* contrary to the Welsh Government's strong presumption against coal development.

c. That strong presumption existed because of the significant effect of new or extended coal development on Wales's and the UK's legally binding carbon budgets as well as international efforts to limit the impact of climate change.

80. Notwithstanding this knowledge, the Council adopted the inflexible position that – because a planning application was pending for the activity – it would first consider whether it would grant planning permission before considering enforcement. It identified 26 April 2023 as the date on which the Planning Application would be considered and determined that enforcement action would only be considered after that date. We consider that approach was arguably unlawful because it amounted to the fettering of a statutory discretion and/or because it was irrational in the circumstances.

81. A local planning authority's enforcement powers are separate from its powers to grant or refuse planning permission. It is an unlawful fettering of discretion to adopt an inflexible approach always to defer a decision on enforcement until after an extant planning permission is determined: see *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 at 625D *per* Lord Reid.

82. Where a planning application is pending for development that is clearly in breach of planning control, it may not *normally* be expedient to take enforcement action until that application has been determined. However, there will be

circumstances, such as those in the *Ardagh Glass* and *Friends of the Earth* cases where enforcement action is *required* pending the determination of a planning application.

83. We consider that the underlying rationale in the *Ardagh Glass* and *Friends of the Earth* cases is that enforcement authorities must not, through their inaction pending the determination of a planning application for unauthorised development or an appeal against an enforcement notice, deprive themselves of the ability to take effective enforcement action should the development be found to be unacceptable in planning terms. In *Ardagh Glass*, this required the service of an enforcement notice before the date on which the development arguably became immune from enforcement. In *Friends of the Earth*, this required consideration of a stop notice to "hold the ring" and prevent irremediable harm to the environment pending the outcome of an appeal against an enforcement notice. Where the development at issue is likely EIA development, this principle takes on greater force.

84. In this case, the Council's failure to consider exercising its enforcement function prior to determining the Planning Application was arguably an unlawful fettering of discretion and/or irrational on account of the fact that the following circumstances demanded that enforcement be considered prior to the end of April 2023:

    a. The unauthorised activity was likely EIA development that had not been subject to EIA.

    b. The unauthorised activity was *prima facie* contrary to an important element of Welsh Government policy, namely the strong presumption against coal extraction.

c. Delay in considering enforcement until after 26 April 2023 would have the *de facto* effect of granting (essentially) all the benefits of the Planning Application, with none of the mitigations that might ordinarily be imposed through planning conditions or obligations. Even if an enforcement notice were served on 27 April 2023, it could not take effect until 25 May 2023, some 12 days short of the end of the nine-month period for which planning permission was initially sought.

d. As in the *Friends of the Earth* case, the breach of planning control could not be remedied: the coal could not be put back in the ground, the operational and downstream emissions could not be un-emitted.

e. The situation was of MSWL's making. It was open to MSWL to make an application for an extension to its existing Planning Permission well in advance of its expiry but instead MSWL chose to submit the application only 5 days short of expiry in an apparent attempt to "game the system". Moreover, MSWL appears not to have been candid with the Council about its intention and subsequent action to continue active coaling in breach of planning control.

f. Without prompt service of an enforcement notice, there would be no consequence for MSWL's unauthorised development and no deterrent effect for other operators considering similar breaches of planning control:

    i. because the Council could not, at a future date, reasonably require it to "put back" the coal extracted without permission, there was no risk of significant future expenditure for MSWL in returning the land to its former state (beyond what is already required by the restoration plan which forms part of the Planning Permission);

ii. without service of an enforcement notice, MSWL could enjoy the profits of its unauthorised coaling without the risk of having the gross receipts confiscated under the Proceeds of Crime Act 2002 (see *R v Luigi del Basso* [2011] 1 Cr. App. R. (S.) 41).

g. For these reasons, a delay in consideration of enforcement until after 26 April 2023 would clearly undermine public confidence, bring the planning system into disrepute, and set a harmful precedent that would fail to deter, and might encourage, other developers of land to act in a similar manner.

85. In suggesting that the approach adopted by the Council was arguably irrational we do not say there was only one rational approach available to the Council. There were a range of options available to the Council to enable it to address the breach of planning control pending the determination of the Planning Application. It could have:

a. investigated reports of a breach of planning control when first drawn to its attention in September 2022;

b. engaged in dialogue with MSWL to seek its agreement to stop coaling without the need for enforcement action;

c. issued a temporary stop notice to give time to consider appropriate enforcement action and/or to expedite determination of the Planning Application;

d. served an enforcement notice;

e. expedited the consideration of the Planning Application.

86. To have done none of these things but instead simply deferred consideration of all enforcement matters until after the Committee's consideration of the Planning Application on 26 April 2023 – almost eight months into the nine-month period for which planning permission was initially sought – was arguably an unlawful fettering of discretion and/or *Wednesbury* unreasonable.

The Council's failure to serve a stop notice is arguably unlawful

87. MSWL has demonstrated a willingness to game the planning system and operate in breach of planning control where there are no consequences for doing so. Should the EN take effect on 27 June 2023, there will be criminal consequences for non-compliance from 25 July 2023. However, if MSWL appeals the EN (which seems likely), there will be no consequences for that continuing breach of planning control until the final determination of the appeal.

88. In the circumstances, the clear and obvious solution is for the Council to serve a stop notice before 27 June 2023 or as soon as possible after MSWL appeals the EN.[12] We consider it so clear and obvious that a decision not to do so would arguably be unlawful.

89. The parallels between this case and the *Friends of the Earth* case are clear. Each day of dredging in that case / coaling in this case causes irremediable harm. As the Court of Appeal in Northern Ireland noted:

> "the unauthorised development is the excavation which cannot be reinstated… the issue of the Enforcement Notice will not be sufficient to ensure the removal of the unauthorised development in the form of the excavation between now and the refusal of planning permission. The material extracted is irreplaceable."

[12] Section 183(3) of the 1990 Act provides that a stop notice may not be served where the related enforcement notice has taken effect. However, where an appeal against the enforcement notice is made (which must be done before the enforcement notice takes effect), section 175(4) suspends the effect of the enforcement notice until the appeal is finally determined or withdrawn. Accordingly, if there is an appeal against the EN, the Council may serve a stop notice at any time during the currency of the enforcement appeal. For reasons we have explained, however, we consider that a stop notice should be served urgently without waiting for an appeal to be made.

90. In circumstances where MSWL appeals the EN, the failure to serve a stop notice will have the *de facto* effect of granting MSWL all the benefits of the planning permission it was refused, with none of the mitigations that would otherwise have been imposed on that permission, and permitting the harm which underpinned the Council's decision to refuse planning permission.

91. In the exercise of its statutory functions, the Council must address the question of whether it is expedient to serve a stop notice. In doing so it must balance the advantages and disadvantages of doing so. In the circumstances as set out above, it is very difficult to see how, rationally, the Council could conclude that the disadvantages of serving a notice outweigh the advantages. Indeed, it is not clear to us that there are any disadvantages to weigh in the balance.[13]

92. There is no realistic prospect of MSWL recovering compensation in respect of the stop notice. As the Court of Appeal highlighted in *Huddlestone*, section 186 of the 1990 Act does not permit compensation in respect of any activity which constitutes a breach of planning control. It is drafted in this way precisely to encourage enforcement authorities to serve stop notices in appropriate cases, like this one.

The Welsh Ministers failure to consider issuing an enforcement notice before the Council took its own decision was arguably unlawful

93. Under section 182 of the 1990 Act, the Welsh Ministers have a power to issue an enforcement notice if, after consultation with the local planning authority, they consider it expedient to do so. The position of the Welsh Ministers in correspondence in this case was that they would only consider exercising their discretion to issue a notice if and after the Council had decided not to do so.

[13] We have considered whether the Council might judge that permitting the continued operation in breach of planning control might be desirable to enable the operator to make profits to plug a shortfall in its available capital for site restoration. We consider this would be an irrelevant consideration in the context of a decision on expediency.

94. That position was arguably unlawful because it amounted to a fettering of an independent statutory discretion. While the Welsh Ministers must consult with the Council before issuing an enforcement notice, their discretion is not constrained by the Council's consideration of enforcement. In *R. (Hammerton) v London Underground Ltd* [2003] J.P.L. 984 Ouseley J. said at [139]:

> "[a] lawful positive decision to the effect that it would not be expedient for the purposes of section 172 to issue an enforcement notice would eventually lead to the development in breach becoming lawful with the passage of time but of itself would not stop the permission lapsing. A lawful positive decision by a local authority cannot without more preclude the exercise by the Secretary of State of his default powers under section 182".

95. Thus, it should be noted that: (i) a decision by the local planning authority that enforcement action is not expedient cannot preclude the Secretary of State taking a different view and exercising the powers available under section 182; and (ii) the powers conferred by section 182 are referred to as "*default powers*". In relation to this in *R. v Hereford and Worcester CC Ex p. Smith (Tommy)* [1993] 4 WLUK 79 [1994] C.O.D. 129 it is referred to as a "*reserve power*".

96. These phrases ("*default powers*" and "*reserve power*") indicate that while it may be a lawful approach for the Welsh Ministers normally to defer to a local planning authority in the first instance on enforcement matters, the Welsh Ministers must not close their mind to the possibility, in an appropriate case, of taking enforcement action where a local planning authority is failing to "*secure prompt, meaningful action against breaches of planning control*" as required by policy. We consider this to be exactly such a case. In that regard, we refer to the factors at paragraph 84(a) and (c)-(g) above and note in addition that:

    a. On 18 October 2023, the Welsh Ministers issued a holding direction in relation to the Planning Application. That holding direction was the exercise of a statutory function by the Welsh Ministers to ensure they would have meaningful control over whether a nine-month extension of coaling at the Site should be permitted.

b. The Council's indication that it would not consider enforcement action until after 26 April 2023 had the *de facto* effect of depriving the Welsh Ministers of any meaningful call-in function and any meaningful enforcement function. If the Welsh Ministers were to call in the application only after the Council resolved that it *would* grant planning permission, that call-in would be a pantomime: MSWL would already have enjoyed the nine months of coaling for which it sought permission. Similarly, if the Welsh Ministers were to consider enforcement only after the Council had done so, it would be doing so after the nine month period for which planning permission was sought.

c. Welsh Ministers must, when exercising their functions, take all reasonable steps towards, *inter alia*, making maximum progress towards decarbonisation and embedding their response to the climate and nature emergency in everything they do.

97. In those circumstances, the Welsh Ministers were arguably required to at least *consider* issuing an enforcement notice prior to the Council's decision on enforcement. Their failure to do so was arguably an unlawful fettering of discretion and/or irrational and/or a breach of s 3 of the 2015 Act. It had the effect of denuding the Welsh Ministers of any effective power of call-in and any effective power of enforcement in relation to a clear and serious breach of planning control which was, as a matter of policy, causing harm to decarbonisation efforts.

The Welsh Ministers must urgently consult with the Council and consider, independently, whether to serve a stop notice.

98. Under section 185 of the 1990 Act, the Welsh Ministers have an independent statutory power to serve a stop notice if, after consultation with the local planning authority, they consider it expedient to do so. It is not a condition for the exercise of that power that the local planning authority has already considered and rejected the expediency of serving a stop notice.

99. As set out above, the failure to serve a stop notice may have the *de facto* effect of granting MSWL all the benefits of the 18-month extension to the Planning Permission it was refused, with none of the mitigations that would otherwise have been imposed on that permission, and permitting the harm which underpinned the Council's decision to refuse planning permission.

100. The ongoing serious breach of planning control at the Site, and the Council's ongoing failure to take prompt and effective enforcement action, is squarely before the Welsh Ministers. As a result, we consider their statutory enforcement powers are engaged and they are under a legal obligation to consult with the Council as a matter of urgency to consider what steps will be taken, and by whom, to ensure that coaling is not permitted to continue for an extended period in breach of planning control for the duration of any appeal against the EN.

101. Unless the Council indicates, through consultation, an intention to serve a stop notice itself, the Welsh Ministers must consider whether it is expedient to do so themselves. They must balance the advantages and disadvantages of serving a stop notice. In the circumstances as set out above, it is very difficult to see how, rationally, the Welsh Ministers could conclude that the disadvantages of serving a notice outweigh the advantages. Indeed, it is not clear to us that there are any disadvantages to weigh.

NEXT STEPS

102. We advise Coal Action Network to press the Council and the Welsh Ministers to serve a stop notice as a matter of urgency and/or to explain what other mechanism they intend to use to ensure that unauthorised coaling is brought to an end immediately. Should the Council and Welsh Ministers refuse to do so, we will advise on the merits of judicial review, including interim injunctive relief. In the abstract, and without knowledge of any special circumstances that might be revealed in correspondence, we consider that such a claim would have reasonable prospects of success.

103. As for the Council's and Welsh Ministers' eight-and-a-half month delay in issuing an enforcement notice, we doubt there is much to be gained through litigation at this stage. However, we advise Coal Action Network to consider referring the matter to the Public Services Ombudsman for Wales. In our opinion, the collective failure to take prompt, meaningful action against the breach of planning control constitutes maladministration for the purposes of the Public Services Ombudsman (Wales) Act 2019. The Ombudsman has previously investigated complaints relating to failures to take effective enforcement action and has made recommendations for compensation.

21 June 2023

JAMES MAURICI KC
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Agenda Item 7

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