

Cynulliad Cenedlaethol Cymru Pwyllgor Amgylchedd a Chynaliadwyedd	National Assembly for Wales Environment and Sustainability Committee
Egwyddorion cyffredinol Bil yr Amgylchedd (Cymru)	General principals of the Environment (Wales) Bill
Llinos Price	Llinos Price
EB 53	EB 53



Evidence to the Environment and Sustainability Committee of the National Assembly for Wales

The General Principles of the Environment Wales Bill

General Comment – Good Environmental Governance under the framework of Sustainable Development (Well-Being of Future Generations)

1. The proposal to legislate in order to develop a more integrated approach to managing the environment and natural resources of Wales, underpinned by the **ecosystem approach** within the context of sustainable development, is welcome and necessary. The Explanatory Memorandum¹ accompanying the bill (paragraphs 12 and 13), explains that the Welsh Government's intention and justification for the creation of Natural Resources Wales² and for legislating for the environment is the need to develop a framework for better management of natural resources underpinned by the **ecosystem approach** and the **United Nations' Convention on Biological Diversity (CBD) principles**³. As stated in paragraph 17 of the EM, 'the application of an ecosystem approach to the management of natural resources is crucial for sustainable development'. This intent is supported.
2. Biodiversity underpins all ecosystem services and there is a danger that the provisions in the bill within Part 1 as currently drafted, particularly in relation to the definitions of 'sustainable natural resource management' and the purpose of Natural Resources Wales are not adequate to ensure the right balance between environmental protection and exploitation. The precautionary principle should be incorporated into the legislation
3. Chapter 1 of the Environment Bill White Paper (and previously the Living Wales consultations) set the context for a more integrated approach to the sustainable management of our natural resources in referring to the 2011 National Ecosystem Assessment on the state of UK Ecosystems⁴, and the State of Nature Report (May 2013)⁵, which indicated that around a third of the services provided by our natural environment are degraded or in decline. It also refers to the National Assembly for Wales' Sustainability Committee Inquiry into Biodiversity in Wales (January 2011)⁶, which recommended that the Welsh Government should adopt a strategic ecosystems approach to the management of biodiversity in the wider countryside through the Natural Environment Framework and that this ecosystems approach should be central to the Government's efforts to achieve the 2020 targets. The Welsh Government accepted this recommendation in its response to the report (March 2011)⁷.

¹ Environment (Wales) Bill – Explanatory Memorandum: <http://www.assembly.wales/laid%20documents/pri-ld10201-em/pri-ld10201-em-e.pdf>

² Welsh Government Living Wales Consultation pages: <http://gov.wales/topics/environmentcountryside/consmanagement/nef/?lang=en>

³ The 12 principles of the ecosystem approach (CBD): <https://www.cbd.int/ecosystem/principles.shtml>

⁴ <http://uknea.unep-wcmc.org/>

⁵ http://www.rspb.org.uk/Images/stateofnature_tcm9-345839.pdf

⁶ <http://www.assemblywales.org/cr-ld8384-e.pdf>

⁷ <http://www.assemblywales.org/gen-ld8491-e.pdf>

4. The EM states in paragraphs 10, 11 and 12 that 'The 2011 Welsh Government's 'Programme for Government' built on the 2010 'A Living Wales: a new framework for our environment, countryside and seas' consultation in setting out a number of commitments in relation to natural resource management, including the introduction of an Environment Bill.' And 'In 2012, the 'Sustaining a Living Wales' Green Paper set out proposals on the scope and opportunities for simplifying how we manage and regulate the environment to deliver better outcomes for the people of Wales. The central proposal in the Green Paper was to move towards an **ecosystem approach**', and 'In 2013, the Welsh Government published a White Paper for an Environment (Wales) Bill. The White Paper set out a framework for better management of resources, focusing on Wales' natural resources and waste. In doing so, it included specific proposals for a new area-based approach to integrate natural resource management at a local level, underpinned by the ecosystem approach and the **United Nations' Convention on Biological Diversity (CBD) principles**'
5. The case for legislative change as expressed in the EM, the statement of policy intent and other relevant documentation such as the environment bill white paper and living Wales consultations is misleading and contradictory. The narrative set out the context of environmental degradation and the need for a more integrated ecosystem approach as the driver for change, which would represent the need for stronger environmental governance. In contrast, the proposals in Part 1 of the bill such as the proposal to change the statutory purpose of Natural Resources Wales (see below), and the terminology and definitions in the bill – 'sustainable natural resource management' – may not properly reflect the ecosystem approach model, but rather a more utilitarian methodology and approach focussed on ecosystem services and ecosystem resilience without adequate reference to biodiversity and/ or ecological limits (environmental protection). These definitions should be amended to reflect the ecosystem approach and to incorporate the precautionary principle.
6. The Henry VIII proposals that appeared in the draft white paper have reappeared in the Environment Wales Bill in relation to NRW's experimental powers and schemes. Concerns regarding the use of such framework provisions to amend primary legislation through secondary legislation were raised by stakeholders and the Assembly's Constitutional Affairs Committee during the Assembly's consideration of the environment bill white paper. This proposal has no evidence base and remains a broad framework power to amend primary legislation through secondary legislation. These provisions also appear to be potentially in conflict with the European environmental legal framework and wider international obligations (See further detail in reference to 22(1) below.)
7. The documents accompanying the bill and the preceding white paper etc include several references to current environmental legislation - and in particular that which relates to the remit of NRW - acting as a barrier and creating conflicts. Chapter 1 of the Environment Bill White Paper (Paragraphs 1.13 -1.14 -1.15 and 1.25-1.26) stated that 'the current legislative framework of environmental statutory duties and regulatory functions does not consist of a regulatory framework that allows for consideration of the dynamic interface between the natural environment, the economy and society to enable decisions that consider the

connection between all three spheres, because it has evolved over many decades and mostly in response to specific environmental problems'. These sections also claim that 'the current environmental legislation is narrow in focus, reactive and often viewed in isolation of economic and social policy; and that NRW operates under a narrow, reactive legislative framework designed for three separate bodies'. Paragraph 13 of the EM states that Natural Resources Wales 'remains bound by the weaknesses in the existing legislative framework, consisting of more than 230 pieces of statute.'

8. No comprehensive analysis of the legal framework within which Natural Resources Wales operates has been undertaken and therefore it is not clear what evidence sources have informed this view.

9. A thorough review of the legislation should be undertaken to inform any proposal for fundamental changes to existing legislation, involving consultation with practitioners and about the efficacy or otherwise of legal provisions in terms of their intended outcomes, in keeping with the Aarhus convention⁸.

⁸ The Aarhus Convention: <http://ec.europa.eu/environment/aarhus/>

Part 1 – The Sustainable Management of Natural Resources

Providing Natural Resources Wales with a general purpose linked to statutory ‘principles of sustainable management of natural resources’ defined within the Bill – A significant change to Wales’ only statutory ‘environmental body’

1. This proposal is a significant amendment and represents a fundamental change to the remit of Wales’ only statutory **environment** body.
2. Chapter 1 of the EM (Paragraph 2) states that the Bill ‘provides Natural Resources Wales (NRW) with a general duty that **aligns fully** with the statutory **principles for the sustainable management of natural resources.**’ NRW already has a purpose, which was introduced under the body’s establishing order⁹.
3. The proposal in the bill is to replace the current purpose in its entirety, including Part 2, section 4 (5) which states that the ‘purpose does not give the body the power to exercise any of its functions in a manner contrary to the provisions of any other enactment of any EU obligation’. This redrafting changes the body’s current legal remit as it stands under the Natural Resources Body Establishment Order¹⁰ and Natural Resources Body for Wales Functions Order¹¹. It is proposed that the current purpose of NRW and the clauses attached to it are completely replaced with new wording. This includes a proposal to remove the word ‘**environment**’ from the statutory purpose of Natural Resources Wales. This is a significant amendment and represents a fundamental change to the remit of Wales’ only statutory **environment** body. The definitions of ‘sustainable natural resource management’ and the need to strengthen environmental governance in Wales will need to be considered in reference to the purpose of NRW.
4. In creating NRW the Welsh Government was limited to effectively amalgamating the existing statutory functions of the legacy bodies and some functions of the Welsh government e.g. marine licensing (as it was done through secondary/ subordinate legislation with powers delegated to it under the Public Bodies Act 2011 (UK Bill)). In drafting the two legal orders, whilst the remit of the body did not fundamentally change from that of the legacy bodies, a new statutory ‘purpose’ was created, which requires NRW to ensure that: “the environment (which includes without limitation living organisms and ecosystems) and natural resources of Wales are sustainably maintained, enhanced and used for the benefit of the people,

⁹ The Natural Resources Body for Wales (Establishment) Order 2012:
<http://www.legislation.gov.uk/wsi/2012/1903/made>

¹⁰ The Natural Resources Body for Wales (Establishment) Order 2012:
<http://www.legislation.gov.uk/wsi/2012/1903/made>

¹¹ The Natural Resources Body for Wales (Functions) Order 2013:
[http://www.assembly.wales/Laid%20Documents/SUB-LD9223%20-%20The%20Natural%20Resources%20Body%20for%20Wales%20\(Functions\)%20Order%202013-26022013-243490/sub-ld9223-e-English.pdf](http://www.assembly.wales/Laid%20Documents/SUB-LD9223%20-%20The%20Natural%20Resources%20Body%20for%20Wales%20(Functions)%20Order%202013-26022013-243490/sub-ld9223-e-English.pdf)

environment and economy of Wales in the present and in the future". **The Establishment Order makes clear that the purpose does not give the body power to (a) do anything that it would not otherwise have the power to do, or (b) exercise any of its functions in a manner contrary to the provisions of any other enactment or any EU obligation. In simple terms, this indicates that the purpose does not override the core statutory duties and functions that the body must fulfil under UK and EU law (and implementing regulations).**

5. Replacing the purpose as currently drafted shifts the balance of power between NRW's purpose and its core statutory duties in determining the delivery of NRW's functions, including its role as a statutory advisor and consultee. The proposal to change NRW's purpose in the bill will also change the balance between its purpose (as introduced in the body's creation) and its core statutory duties (from existing environmental legislation). This issue was referred to in the white paper, which stated "There is a need to ensure that the primary legislation for which NRW has responsibility to deliver sufficiently takes account of its **high level purpose**." The drafting and definitions will again be critical in terms of NRW's core role as an environment body.
6. It is implied that there is a change to the core role of NRW as an 'environment' body, which advises on environmental impacts and contributes to sustainable development through the delivery of its environmental remit; to a model where the body is required to give **equal** consideration to social, economic and environmental factors in the delivery of its remit.
7. Whilst requirements of NRW under European law (e.g. the Water Framework Directive, the Environmental impact assessment directive, the strategic environmental assessment directive and the habitats and birds directive) remain, the new purpose will be a determining factor in the body's planning advice as a statutory consultee in the town and country planning system.

Enhancing the powers available to Natural Resources Wales (NRW) to undertake land management agreements and experimental schemes – Framework legislation - The “Henry VIII” power – Section 22(1)

1. The Environment Bill White Paper¹² included within it a proposal (NRM11) to give “Welsh Minister/s the power to make specific changes to primary legislation where it can be demonstrated that the current law is contrary to the definition, purpose and objectives of integrated natural resource management.” The white paper did not provide a definition of integrated natural resource management and also stated that it was not known at the time how these powers would be used (paragraph 3.50).
2. Stakeholders raised concerns regarding these Henry VIII provisions in the environment bill white paper with the Environment and Sustainability Committee in its evidence sessions held on the 4th and 12th of December 2013¹³ and the 15th January 2014.
3. The Constitutional and Legislative Affairs (CLA) committee wrote to the Welsh Government on this matter in February 2014, and the Welsh Government – the Minister for Natural Resources and Food Alun Davies - responded¹⁴. The correspondence was on the environment committee’s agenda on the 13th March 2014¹⁵ as a paper to note, but was not subject to discussion. The letter raised concerns regarding the proposed use of the Henry VIII powers in the environment bill white paper.
4. The Minister’s response states:
“In relation to the points you raise we are in the process of analysing the consultation responses and I would highlight that proposals for inclusion in the draft Bill are not yet finalised – the consultation on the white paper being a key part of the development of the Bill.”

“There are two possible powers outlined in the white power for Welsh ministers to amend acts of parliament and the Assembly by way of secondary legislation. NRM11 sets out a proposal for a power to effect changes to the primary legislative framework that governs the management of natural resources in certain circumstances. An additional proposal

¹² Welsh Government White paper - Towards the Sustainable Management of Wales’ Natural Resources Consultation on proposals for an Environment Bill (March 2014):

<http://gov.wales/docs/desh/consultation/131029environment-bill-white-paper-consultation-en.pdf>

¹³ 4th December 2013 E&SD cttee:

<http://www.senedd.assembly.wales/ieListDocuments.aspx?CId=225&MId=1903&Ver=4>

; 12th december 2013 E&Sd cttee:

<http://www.senedd.assembly.wales/ieListDocuments.aspx?CId=225&MId=1904&Ver=4;>

15th January 2014 E&SD cttee:

<http://www.senedd.assembly.wales/ieListDocuments.aspx?CId=225&MId=2010&Ver=4>

¹⁴ Letter from the CLA committee to the Welsh Government on the Henry VIII provisions in the environment bill white paper; and the welsh government’s response:

<http://www.senedd.assembly.wales/documents/s25008/Paper%203.pdf>

¹⁵ <http://www.senedd.assembly.wales/ieListDocuments.aspx?CId=225&MId=2020&Ver=4>

(SM4) would provide welsh ministers with the power to amend the water act by order in certain circumstances, including if they are satisfied that it will make it easier to consolidate one or more Water Acts”

If taken forward I would offer reassurance that the intention is for the powers to have limited and very specific scope to effect changes to the primary legislative framework that governs the management of natural resources. This would only apply in very specific circumstances and to specific legislation – that is where it can be demonstrated that the current law is contrary to the definition, purpose and objectives of the framework for integrated natural resource management and that all other means of addressing those issues have been actioned. Any such amendments would also have to ensure continued compliance with EU obligations. A misconception that was raised at the environment and sustainability committee on the 12th of December that this is a general power that will enable the consolidation of environmental legislation through secondary legislation – this is not the case and my officials will clarify the intention and limited scope of the power.

5. Whilst the Henry VIII power as referenced in the White Paper (referred to above) has not been included in the bill as indicated in the draft white paper, and has been linked with a specific provision in the Bill i.e. 22(1) on the experimental powers and schemes of Natural resources wales, **it remains broad in its scope to suspend provisions in primary legislation through secondary legislation.** It is also unclear how this proposal relates to European and UK law on habitats and designated sites.
6. According to the Statement of Policy Intent¹⁶, Section 22(1) of the Bill Provides the Welsh Ministers with the **power to suspend provision(s) in legislation**, in relation to an application from NRW of that provision on a specific person, for the purpose of undertaking an experimental scheme.
7. It is noted that certain consultation procedures have been attached to this proposal (see Annex 1 of the Statement of Policy Intent). The process as set out in the policy statement states that NRW will be responsible for identifying the appropriate provisions within legislation and why these provision blocks an experimental scheme. It states that Welsh Ministers must consult with any person to be affected by the suspension, assess whether the proposal is necessary to enable an experimental scheme and to contribute to sustainable management of natural resources. Welsh Ministers will also assess the implications in relation to compliance with EU legislation. Finally, it states that Welsh Ministers will then consider the proposed Order to temporarily suspend legislation through the **affirmative procedure. These provisions are inadequate in terms of consultation and scope for Assembly (and public) scrutiny. The proposal in its entirety will set an unacceptable precedent in environmental law, and is not supported.**

¹⁶ Environment (Wales) Bill - Statement of Policy Intent
<http://www.senedd.assembly.wales/documents/s40639/Policy%20Intent%20Statement.pdf>

8. The illustrative case studies attached to this proposal are included in the Annex of the Statement of Policy Intent (See Annex 1 of this document), in particular the example of suspending the balancing duty in the forestry act are of concern. No assessment of current environmental law, and in particular that which related to the statutory duties and functions of NRW as they currently stand has been undertaken.

9. Any perceived **conflict** about the existing legal framework is likely to be driven by the opinion that current environmental protection legislation is a **barrier** to economic development, a constant theme running through the bill's accompanying documents, as well as in the narrative around the purpose and statutory remit of Natural Resources Wales since its creation. This notion of conflicts and barriers has not been tested and has no supporting evidence base.

Llinos Price