Securing a Sustainable Future: Environmental principles, governance and biodiversity targets for a greener Wales

A Welsh Government consultation on a potential Nature Positive Bill

Closes 30 April 2024

1. What is the consultation about?

The consultation addresses Wales' lack of any law enshrining basic environmental principles.

Until Brexit, the UK and Wales were party to the developing body of European Union (EU) laws concerning the environment. Many of the UK's more notable environmental laws originated in the implementation of these EU laws into UK law, including the Habitats Directive, the Air Quality Directive, Water Framework Directive and others. After environmental laws had developed piecemeal for several decades, four key environmental principles were enshrined in the Treaty on the Functioning of the European Union, which is effectively the EU's constitution. This gave those principles very high importance in the framing of all other activities which the EU might choose to undertake.

With the repeal of EU-derived legislation post-Brexit, Wales no longer has the benefit of those governing principles. Meanwhile, with the sequence of global COP conferences under the aegis of the UN, a separate set of international guidelines has come into existence known as the Global Biodiversity Targets. These have no legal effect on any government but, by signing up to them, the Welsh Government has made a commitment to the UN to work towards them.

The 2023 State of Nature Report concluded that "Wales is now one of the most nature depleted countries on Earth". The White Paper acknowledges the problem of baseline shifting, where each generation takes the natural world as it finds it and consequently feels free to deplete it a little bit more, failing to appreciate the extensive losses which have already taken place. It also refers to the State of Natural Resources Report 2020 ("SoNaRR") and its assessment of the key pressures on biodiversity. Since 90% of Welsh land area is used for some form of agriculture, the management of agriculture is identified as the most significant factor driving species population change. The second largest factor is climate change.

Accordingly, the Welsh Government has launched a consultation over a proposal to introduce a set of overarching environmental principles, and biodiversity targets, into Welsh law. These would govern development of policies and legislation in any field by Welsh Ministers. Implicitly, the objective of the proposed legislation is to deliver "a healthy, sustainable environment that safeguards our essential natural resources".

To monitor and ensure compliance with environmental law, a new governance body may be set up.

2. What does it propose?

a. Principles

i. What are the principles?

The White Paper follows on from a 2019 consultation which led the then-Minister for Rural Affairs, Energy and the Environment to accept a recommendation to explore the extension of the *sustainable*

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management of natural resources duty to public bodies other than NRW. The new proposal recognises that the existing Environment Wales Act is not a framework for environmental governance but more of a blueprint for sustainable management of natural resources. Such a focus on nature as a *resource* frames the discussion in terms of what and how much humanity can appropriate for itself, including the use of 'services' from the functioning of ecosystems - rather than what nature may need in order for ecosystems to continue to function effectively and *sustain themselves.*

The White Paper proposes that Wales adopt the four core EU environmental principles:

- The **precautionary principle**: if it is suspected that a product, an action or a policy risks causing harm to the public or to the environment, protective action should be supported even before there is complete scientific proof of a risk;
- **Prevention**: requires preventive measures to be taken to anticipate and avoid environmental damage before it happens (rather than rectification after the event);
- **Rectification at source**: requires damage or pollution to be dealt with where it occurs. Its objective is to prevent pollution getting *out of sight* (even potentially across national boundaries) and so becoming a matter for society as a whole to deal with. This works alongside the
- **Polluter pays** principle, which requires polluters to bear the environmental and social cost of their actions rather than using the soil, air and water as 'sinks' into which to offload their waste products leaving the clean up to society at large.

In addition, the White Paper proposes that Wales should adopt the principle of integration, namely that environmental protection requirements should be integrated into the definition and implementation of all Wales' policies and activities. An overarching objective to ensure a high level of environmental protection and improving the quality of the environment, in particular to contribute to sustainable development, is also intended to be included.

Finally, the White Paper proposes that the Government of the day should publish guidance on the interpretation of the new principles, based upon current case law of the Court of Justice of the EU. It would potentially amend this guidance whenever significant developments occur. They have not presented any draft form of this key guidance with the consultation paper.

ii. When would the principles be considered?

The White Paper proposes that Welsh Ministers should be required to have due regard to the principles and guidance when developing policies and legislation. The idea of extending the duty to other public authorities (such as County Councils) was raised in the 2019 consultation and has been considered, but at present is not proposed. One of the consultation questions does, however, seek views as to whether other public authorities, and if so which, should also be subject to it.

b. What is actually going to be *done?*

i. *Framework*

Independently of the new legal principles, the Government intends to introduce a "strategic nature recovery framework" with the objects of protecting and restoring nature, providing increased accountability and transparency.

The strategic nature recovery framework is to consist of:

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- a “long term vision for a nature positive Wales” including a set of statutory biodiversity targets;
- a detailed (national) Nature Recovery Action Plan and Local Nature Recovery Plans; together with
- “effective” monitoring, reporting and scrutiny requirements for each.

ii. *Targets*

The headline nature positive target proposed is a restatement of the commitment made in the Well-being of Future Generations Act to

> Reverse the decline in biodiversity with an improvement in the status of species and ecosystems by 2030 and their clear recovery by 2050.

The paper acknowledges the need to rely on existing areas of high nature value as well as enabling recovery of ecosystems in areas where they are currently degraded. The specifics, however, are reserved to secondary legislation which has not yet been drafted and so is not part of the consultation. There is no indication as to what these may be beyond commitments to being ‘evidence-based’, through engagement and co-design with key stakeholders. (There is considerable hand-wringing about the need to take the time to get these right – notwithstanding the countervailing urgency if anything at all is to be achieved by 2030.)

The paper proposes that all Welsh public authorities:

- be put under a duty to contribute to the delivery of the statutory biodiversity targets,
- demonstrate that duty through the production of a Local Nature Recovery Action Plan (LNRAP)
- implement their LNRAP, and
- report on progress. (This may be essentially the same as public authorities current duty to report under the Environment (Wales) Act.

The White Paper does, however, ominously comment that despite the need for transformative change any targets can only be implemented insofar as there is budget to do so. This strongly suggests that the targets may amount to fine words to an unfortunate extent – or rather, that targets which can be interpreted ‘flexibly’ in accordance with budgetary fluctuation will be selected. Focussing on “value for money” and “addressing the most impactful issues” similarly accept that this will all be budget-constrained when it comes to implementation. The high-level areas within which targets will be stipulated are the predictable ones of species, habitats and ecosystem health.

Monitoring is to consist of the same monitoring which is needed for Wales’ international reporting obligations. This would therefore include monitoring:

- Trends in extent of selected biomes, ecosystems, and habitats;
- Trends in abundance and distribution of selected species;
- Coverage of protected areas;
- Change in status of threatened species;
- Trends in genetic diversity of domesticated animals, cultivated plants, and fish species of major socioeconomic importance.

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None of this can be done without re-instituting some form of coherent all-Wales surveys to identify the current state of the selected species etc and enable trends in their status to be rigorously identified. NRW and the listed public authorities will have to support the implementation of the targets, though there is no suggestion as to how – will NRW be entitled to change their forestry operations to continuous cover, for instance, to minimise the enormous impact of their forestry operations on biodiversity decline, despite the inevitable reduction in profitability (if there is any) this entails?

Reporting against these biodiversity targets will be part of future SoNaRR, depending upon the reporting timetable which is set for each particular target. (There does not appear to be much scope for very extended timetables, given the proximity of the first statutory assessment date of 2030.) The legislation will however set out what happens where the targets are *not* met, to include requiring the then-Welsh Ministers to take 'further reasonable action' to achieve the targets.

iii. *Action Plan*

This will consist of a Strategy, setting out how the various public authorities will contribute to reaching the Targets, and a Biodiversity Action plan or programme of work. The latter is to be reviewed and if necessary revised every 4 years.

This will effectively be an update of the existing Nature Recovery Action Plan (produced in 2015 and updated in 2020-21). The difference is that it will become a statutory project rather than as at present merely policy.

iv. *Monitoring*

c. Monitoring and compliance

The proposal suggests setting up an independent Environmental Governance Body for Wales, in the form of a Commission of experts. It would be responsible to monitoring and enforcing compliance with the new principles and targets. Notably, this new body is not suggested to be under or incorporated within Natural Resources Wales.

It's remit would be to

- deal with complaints (including from the public) on how a public body is/is not generally complying with environmental law. This excludes complaints about specific decisions, such as planning;
- monitor
    - implementation of environmental law by Welsh Government and a specified list of other public bodies; and
    - progress (or lack of) towards the biodiversity targets, and report on this in its annual report or (exceptionally) when required;
- advise government on policy and legislation; and
- 'enforce' (through investigations and compliance notices, failure to appeal *or* comply with which could result in court action). It will be responsible for working collaboratively with other bodies to ensure no duplication of effort.

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The list of public authorities proposed to be subject to the new duties is given in Annex 2; notably it does *not* including Planning and Environment Decisions Wales (PEDW) though the planning panels on compulsory purchase are included. This list is seemingly already considered perhaps too extensive; an alternative list is also put forward comprising only NRW, local authorities, the three National Parks, Welsh Water, Transport for Wales and Hafren Dyfrdwy[1].

The governance body will be responsible for developing its own strategy, through consultation with public partners (though not stakeholders more generally).

3. What issues do these proposals raise?

a. The EU's environmental principles

Although the EU's environmental principles were ground-breaking in their day, and have achieved a great deal, in some senses they are limited precisely *because* they were so radical. The precautionary principle, for instance, was for the first time asking companies and regulators to think about the environmental impact in advance and try not to do more environmental damage than could be helped. This was radical in a world where spoil heaps from metal mines were routinely placed in the cheapest place, whether liable to contaminate towns and rivers or not. What extent of environmental degradation that ecosystems could cope with and yet deliver the services upon which humanity relies, was not well understood – the limits which humanity has already breached or is now close breaching were not even contemplated. As a result, the rules were interpreted and applied in ways which continued to permit ongoing damage to be inflicted on the environment – just not so much as before. This might still have been adequate; but combined with the increased impact of more doubling the global population[2] and ever rising consumption of resources per head[3], these principles may no longer be sufficient to conserve such biodiversity as nature needs to remain capable of providing the essential services – such as clean water, clean air, carbon sequestration, manageable agriculture and silviculture – without which humans cannot comfortably live.

Consequently, although enormously better than what went before, and certainly better than Wales *not* adopting any environmental principles, it is questionable whether these principles *if adopted with intent to adopt the interpretation and implementation which has pertained to them in the EU* are fit for today's purposes: safeguarding a natural environment and climate system which totters on the brink of numerous, potentially irreversible, tipping points.

b. The Biodiversity Targets

SoNaRR was in some ways itself an example of baseline shifting affecting the assessment of a situation. The pressures which it identified as affecting biodiversity loss include the usual suspects: agricultural

[1] The Severn-Dee water company

[2] The Global population in 1972, when the first EU environmental laws were introduced, was 3.8 billion. In March 2024 it is over 8 billion.

[3] Consumption of raw materials in 1970 was some 30 billion tonnes; today it is 106.6 billion tonnes, forecast to rise to 160 billion tonnes by 2060. Source: UN Environment Programme *Global Resources Outlook 2024.* As the authors of that Report comment, "The pathway towards sustainability is increasingly steep and narrow, and the window of opportunity is closing".

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management; climate change; urbanisation; pollution; hydrological change; invasive non-native species; and woodland management. It does not acknowledge the overarching problem of over-consumption of natural resources as such, nor does it identify the spread of human infrastructure and industrialisation onto formerly agricultural or wild land *per se*[4] unless this is lined to urbanisation – which is not necessarily always the case.

Consequently, no matter how the Welsh biodiversity targets are framed, without a simultaneous push to reduce consumption (most pressingly, of energy but also of timber, minerals and other scarce resources) the proposed legislation is unlikely to succeed in slowing let alone reversing the decline of species, habitats and ecosystems within Wales. What is needed is the transformation of Welsh civic society from an operating model in which the environment is treated as a *resource* whose function is to be exploited for the benefit of citizens into a model where it is recognised instead as the fundamental safety net upon which humanity depends in multiple dimensions for delivering an inhabitable planet into the distant future. Looked at from this perspective, which the White Paper starts to do, the specifics of the EU or UN do not adequately capture the overall objective.

In view of the current catastrophically [depleted] state of nature in Wales, the ability of any act to cause further damage should be taken as a strong reason to reconsider taking that action at all. For too many centuries humanity has conducted itself in a profligate and destructive way towards the environment in the confident belief that there is more than enough nature out there, so the removal of a small piece here or there is not conclusive in the balance of decision-making. We continue to consider local, limited impacts acceptable. In the situation we face now, where so many familiar, once-common species are actually on the verge of dying out (in Wales, and in some cases world-wide), it is no longer possible to adopt that mindset. Although there may be peatlands elsewhere, these peatlands here today now represent an irreplaceable asset whose diminution, even temporarily, may tip some little-regarded species over the edge. Similarly, harvesting one mature oak was of no consequence when the landscape was thickly wooded. Today, a tree may have increased timber value precisely because it is so scarce, and so the commercial incentive to harvest it is greater than ever; but that tree might now be the sole local source of food for a raft of species[i] which, in turn, provide the food base for more visible, and more visibly threatened, wildlife. A sea-change in thinking is required, from seeing our immediate and present advantage as being the essential factor to seeing what is precarious here and now, and at risk from actions which have throughout humanity's long history been, and been seen as, normal, rational and cost-free. A baseline shift in the opposite direction is required.

c. Global thinking in a small country

That the Welsh Government perceives itself as part of the global community tackling biodiversity decline is excellent, particularly given that peer pressure is effectively the only driver of change at international level. Wales' ambition to play its part is therefore admirable.

[4] Section 3 of Annex 3 quotes the Intergovernmental Science Policy Platform on Biodiversity and Ecosystem Services Global Assessment Report which does identify "changes in land and sea use" without limitation as one of the drivers of change with the largest global impact.

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There is, however, a danger from seeking to justify radical measures at home by reliance on events and developments taking place globally. Wales covers a very small land area and a very small population. It is largely rural and although the current state of its own biodiversity is extremely poor it has very little impact *of any kind* on the state of biodiversity, or climate change, for the globe as a whole. No action here, not even nature recovery to 1900 levels by 2050, will solve the climate or nature emergency worldwide.

Wales needs its local environment to support the current and future populations of Wales, in accordance with the Well-Being of Future Generations Act. Accordingly, the proposed introduction of environmental considerations across the board in Welsh policy needs to be seen to be for the benefit of Wales itself far more than as a contribution to the global response to climate change or biodiversity loss. Particularly in view of the inevitable trade-offs which a limited budget will impose, the impact of actions within Wales *on the Welsh environment*, that is the balance of

Environmental cost to Wales vs environmental benefit to Wales

needs to be enshrined as the governing factor.

[i] Oaks are known to support up to 2,300 species of mosses, lichens, bryophytes, fungi, insects, invertebrates, birds and mammals. In contrast, the short rotation sitka spruce plantations so widespread in MidWales support a much smaller range of species.

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