

# Securing a Sustainable Future

## Friends of the Earth consultation response

### Who we are

Friends of the Earth England, Wales and Northern Ireland was established in 1971. We support over 200 local action groups and are part of an international network of more than 70 national groups, counting over 2 million members and supporters globally. Friends of the Earth supports strong environmental standards which put the needs of local communities and our environment at the forefront.

We welcome the opportunity to respond to this consultation, and hope that the Welsh Government will work with alacrity and tenacity to close the post-Brexit governance gap in Wales.

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

### Environmental Principles

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

Embedding the principles in policy mechanisms, systems and templates across government will be key to ensuring they translate to improved consideration of issues and better outcomes. It could helpfully include amendments to the Integrated Impact Assessment process, the guide to legislative drafting and business case templates, alongside resources around better interpreting and applying the principles in policymaking. However, guidance on interpretation is no substitute for the existence of a clear and strong requirement to apply the principles within the body of the bill.

Draft guidance itself should be subject to a requirement for public consultation, dialogue with the new environmental governance body, and scrutiny by the Senedd. Once approved, it must be provided, alongside training, to all bodies caught by the duty. The Welsh Government may find it helpful to discuss effective routes to cross-governmental implementation with the Defra environmental principles team, who have led on the development of training and resources across England.

**EP2: The Welsh Government proposes to place a duty on Welsh Ministers to have due regard to the environmental principles and accompanying guidance during the**

**development of their policies and legislation. To what extent do you agree or disagree with this approach.**

We strongly support proposals to embed environmental principles in Welsh law through a direct duty on Welsh Ministers. This reflects the approach taken in Scotland, which places a direct duty on Scottish Ministers to consider the principles when developing policies and proposals for legislation, and avoids potential pitfalls associated with the model set out under the Westminster Environment Act 2021, in which the principles themselves are relegated to a policy statement with a consequential detriment to their legal weight.

This approach, supported by an overarching objective to ensure a high level of environmental protection and underpinned by guidance to shape the way in which principles are applied, will provide a clear, transparent and solid framework for comprehending and utilising the environmental principles.

However, the approach suggested in the White Paper might be usefully revised in three ways:

- **Through the inclusion of a requirement to ‘apply’ the principles directly.** This would be clearer and stronger than a ‘due regard’ duty relating to guidance on these principles, and would offer the most similar approach to the European Union duty that Member States ‘apply’ the statute and act in accordance with the principles. A duty to apply would provide a stronger framework for legal accountability, by requiring serious, in-depth consideration of how the principles apply in context by the relevant public authority. This would ensure that their consideration improves practice and outcomes, and is not a tick-box exercise.
- **Through wider application of the requirement.** Given the key role played by a wide range of public authorities in policy creation, drafting and implementation, the duty to apply the principles must cover all public authorities and all stages of the policy development process to ensure consistent impact.
- **Through ruling out any potential exemptions.** During the passage of the Westminster Environment Act, the UK Government introduced a number of exclusions to the principles duty, covering policy making relating to the armed forces, defence, national security, taxation, spending and the allocation of resources within government. These exemptions are unnecessary, creating confusion and limiting the potential for positive application of the principles to drive environmental improvement.

**EP3: Do you have any views on whether a separate duty should be placed on Welsh public bodies (other than the Welsh Ministers) to apply the principles and accompanying guidance?**

The duty on principles should apply to Welsh public authorities as well as Welsh Ministers, and this should be clearly stated in the text of the bill. This duty should extend to all bodies that fall within an established definition of public authorities based upon the provision of public function, rather than be limited to an exhaustive list within the bill. This approach would allow for the definitions to flex to appropriately apply to the changing public authority landscape in the future without unnecessary administration or bureaucracy.

Section 31(3) of the UK Environment Act 2021 defines a “public authority” as a person carrying out “any function of a public nature...”. Applying a similar definition to this bill would allow for the duty to apply to private organisations when they are performing functions of a public nature, including water or waste management.

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

Given the lengthy delays in embedding the environmental principles into Welsh law to date, it would be immensely helpful for the Welsh Government to clarify in the Senedd that the environmental principles will continue to underpin public authority policy making in Wales until the new legal duty is in force (as referenced in paragraph 25 of the White Paper). We would suggest that given the degree of progress already achieved in this area, the government should look to enforce the principles duty as soon as the bill becomes law.

Finally, while environmental principles and environmental rights are distinct categories, access to environmental justice is clearly furthered through consistent application of the prevention, rectification and polluter pays principles. It may also be helpful to consider how other moves to improve the implementation of the right to a healthy environment in Wales might support application and amplify impact of the principles.

### Establishing an Environmental Governance body for Wales

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

We agree with the proposed primary purpose of the Governance Body, and hope this will be clearly defined within the text of the bill. This clear purpose, focused on the protection and improvement of the natural environment through oversight of implementation and compliance, will provide clarity on its role and act as a safeguard for its independence. The principal objective of the Office for Environmental Protection (OEP) offers a helpful comparator, and is defined (in the Environment Act 2021) as contributing to "(a) environmental protection, and (b) the improvement of the natural environment."

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

The Governance Body should be required to publicly consult upon, produce and publish a strategy and an enforcement policy. Both the OEP and Environmental Standards Scotland are subject to this requirement.

The Governance Body should have complete discretion to develop its strategy. This discretion should be embedded in the bill as is the case for other oversight bodies, such as the Office for Budget Responsibility which has complete discretion in the performance of its duty to examine and report on the sustainability of the public finances.

We also suggest that there should be an explicit duty on Welsh Ministers within the Bill, requiring respect for the independence of the Governance Body. Schedule 1 of the Environment Act 2021 phrases this requirement as: "In exercising functions in respect of the OEP, the Secretary of State must have regard to the need to protect its independence."

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

**GB3: We propose that the remit of the governance body should apply to the Welsh Ministers and the relevant Welsh public authorities exercising environmental functions Wales listed in Annex 2. To what extent do you agree or disagree with this? [and]**  
**GB4: Are there any other public authorities, or private bodies exercising functions of a public nature, that you think should be added to (or removed from) the list in Annex 2?**

While we agree that the remit of the Governance Body should apply to both Welsh Ministers and public authorities, we suggest that the most appropriate way to define this would be through a generic and established definition of public authorities, rather than a restricted schedule in the bill. This would be the most efficient approach, as it would not require legislative updates should the landscape of public authorities change in the future.

It is important that the chosen definition ensures that the Governance Body's remit extends to private organisations when they are performing functions of a public nature (for example companies that provide energy and water services) and bodies that undertake devolved public functions including UK Government departments and The Crown Estate.

Two potential models for such a provision are to be found within the Human Rights Act 1998 and the Environment Act 2021:

- Environment Act 31(3): "In this Part "public authority" means a person carrying out any function of a public nature that is not a devolved function, a parliamentary function or a function of any of the following persons [...]"
- Human Rights Act 1998 6(3): defines a "public authority" as: *...(b) any person certain of whose functions are functions of a public nature"*

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

We agree that monitoring of and reporting on the implementation of, and compliance with, environmental law by public authorities in Wales will be a key function of the Governance Body. This should be a proactive and independent role. The decision to carry out and report upon investigations, where not a statutory requirement, should be subject to the judgement and expertise of the Body, while monitoring reports should be published on timescales determined by the Governance Body itself rather than by Government. These reports should be separate from standard expressions of internal governance including financial or performance reporting. This means that the Annual Report is not a suitable place for the Welsh Body to situate impact and implementation reporting.

Welsh Ministers and public authorities must be required to respond to reports issued under the Body's monitoring environmental law functions within a specified timeframe. This is set at three months for most monitoring carried out by the OEP, but extends to a full year in the case of the OEP's annual Environmental Improvement Plan progress report, which has made it difficult for successive reports produced by the OEP to engage in a timely dialogue with government response or actions. The Welsh Government might usefully learn from this and require a more timely response in relation to annual reporting.

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

The White Paper sets out a range of sensible advisory functions in relation to the proposed Governance Body, which would allow it to contribute significantly to the delivery of domestic

and international environmental commitments. To do this, the Body should be able to advise Welsh Ministers on where new policies are needed, the content of potential policies, and how to improve the effectiveness of legislation.

We strongly recommend that the Governance Body should be able to provide advice on its own initiative, and not just when requested to do so by Welsh Ministers. The OEP has deployed its 'own initiative' advisory power (contained in section 30(3) of the Environment Act 2021) to good effect, including to provide advice to Defra Ministers on biodiversity net gain.<sup>1</sup>

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

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

The Governance Body should be able to receive and consider complaints (relating to specific breaches of environmental law), as well as representations (relating to other, more strategic matters).

OEP reporting suggests that a significant barrier to complaints being considered eligible is the failure to exhaust the relevant public authority's complaints procedure. This is often because there is no clear process, because it takes both time and effort to locate and navigate the process, or because the scope or endpoint of the provided process are ill-defined. In such cases, the Welsh Governance Body needs the flexibility to investigate complaints, especially on urgent issues. The bill should therefore not set a rigid requirement to exhaust a public authority's internal complaints procedure before making a complaint.

We do not agree with the proposal that the Governance Body should not deal with complaints relating to specific decisions taken by public bodies (for example, issuing of licenses or planning consent) unless it relates to a wider compliance issue. While the Governance Body must not be obliged to investigate every complaint it receives, it must have discretion to decide for itself, and must not be fettered by overly prescriptive legislation.

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

We strongly agree that the Governance Body must be able to carry out investigations on its own initiative as well as in response to complaints or representations, as the OEP can. We agree that the Governance Body should have discretion on when and what to investigate, and that it should be able to request relevant information from public authorities to support this function. The Body's approach to investigations should be included in its enforcement policy.

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

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

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<sup>1</sup> Office for Environmental Protection, 5 April 2022, [Advice](#) on the Consultation on Biodiversity Net Gain Regulations and Implementation.



The Tribunal system offers several advantages over the High Court, including access to environmental expertise, and meaningful and effective remedies. It allows for a more thorough approach to that generally adopted in judicial review cases, provides the opportunity for legally qualified judges to consider issues alongside non-legal technical expert members, and allows support to be sought from additional independent experts. This ability would be valuable where particularly specialist or complex matters require consideration.

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

Improvement Reports and Plans may be a helpful route to highlight issues and identify solutions in some cases. However, they must not operate as the default approach for managing potential compliance issues involving Welsh Ministers. Determination of the most appropriate formal or informal enforcement mechanism must be informed by the seriousness of the issue, as well as the effectiveness or otherwise of more informal approaches in avoiding harm (or further harm) to the environment. The Environment Act 2021 offers a strong model in allowing the OEP to take urgent and serious cases to Judicial Review, and providing some discretion in terms of process requirements.

The power to publish an Improvement Report should be included in the bill, along with a duty on Welsh Ministers to respond with an Improvement Plan within a specified period. Very few cases have reached ‘Improvement Report’ stage in Scotland so would encourage the Welsh Government to explore the reasons for this with ESS.

The availability of meaningful and effective remedies to correct unlawfulness is a crucial aspect of any successful enforcement mechanism. At the very least, binding notices compelling compliance with duties and requirements must be part of the Body’s powers. Additional more robust enforcement powers should also be considered including the ability to issue fines, stop orders or remediation notices - and to compel the rescinding of permissions, consents and licences, especially when there is the possibility of serious and irreversible harm to the environment.

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

The power to apply for Judicial Review should be expressly and clearly provided for within the bill, for use in exceptional cases where there is a suspected serious or urgent failure to comply with environmental law.

Including such a power in the bill would not require or direct the Governance Body to seek Judicial Review over the ‘standard’ enforcement options available, yet it provides a key enforcement lever. The OEP has only sought to use its power to apply for Judicial Review on a single occasion, relating to DAERA and NIEA activities around ammonia emissions, and was able to provoke required action at Pre-Action letter stage, without the matter reaching the courts.

A power to intervene in civil proceedings should also be expressly included in the bill. The OEP has only exercised its power to intervene on one occasion when it was granted permission by the Supreme Court to intervene in the appeal of R (Finch) v Surrey County

Council to highlight the importance of clarity in the law to promote good environmental decision making.<sup>2</sup>

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

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

Any system of financial penalties would need to be carefully designed to ensure that any funds levied remain in Wales and are invested in environmental protection and improvements. However, to dismiss them at this stage may be premature.

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

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

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

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

Co-operation between the UK's environmental governance bodies is fundamental to ensuring that cross border issues and matters that concern both devolved and reserved environmental law are dealt with effectively. Both the UK Government's Environment Act 2021 and the Scottish Government's UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 contain provisions which require consultation with other governance bodies when relevant. An equivalent provision should be included in the Welsh Government's bill.

The OEP has agreed memorandums of understanding with the Climate Change Committee, the Local Government and Social Care Ombudsman, Environmental Standards Scotland and the Interim Environmental Protection Assessor for Wales. The Welsh Body should be directed to do the same, and to outline in its strategy how it will work with other organisations with closely aligned objectives.

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<sup>2</sup> Office for Environmental Protection, 13 April 2024, [press release](#).

This bill must ensure that cooperation mechanisms are bilateral, by including a requirement that public authorities co-operate with the Governance Body, within specified time limits. This would support the efficient use of resources, facilitate swift investigations and ensure timely remedies on any breaches in environmental law. The Environmental Information Regulations 2004 provide a helpful model.

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

The Welsh Government has recently clarified that the preferred model for the Welsh Governance Body is a Non-Departmental Public Body (NDPB). As NDPBs are sponsored by government departments, it will be important to install firm safeguards in both the bill and the structures of the Governance Body to provide for long term independence.

The Welsh Government should therefore:

- Include clauses in the bill to clarify there is no power of direction for Welsh Ministers and to set a duty on Welsh Ministers to respect the Body’s independence (as in paragraph 17, schedule 1 of the Environment Act 2021).
- Stipulate that all Governance Body reports should be laid in the Senedd with opportunities for Senedd committees to discuss and hold evidence sessions on the Body’s work, resourcing and performance, including hearing directly from its Chair and Chief Executive.
- Ensure that the Governance Body has complete discretion to develop its strategy and enforcement policy.
- Provide a ring-fenced budget for the Governance Body in each Senedd term, agreed through a bespoke process.
- Introduce a requirement for the Governance Body to publish an annual Sufficiency Statement in relation to its resourcing.
- Include a strengthened role for the Senedd in the public appointment process for the Chair and other board members.
- Provide sufficient resourcing to allow the Governance Body to maintain an independent website and communications function, an in-house legal team and its own IT system.

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

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

The Senedd must play a strong role in the appointment process. This will safeguard the independence of the Body and provide a check on ministerial power over the individuals that will be providing oversight of government and other public authority activity.

**GB15: Are there any other views you would like to provide in relation to our proposals to set up a governance body?**

The Aarhus Convention, ratified by the UK Government in 2005, asserts a human right to a healthy environment, and puts ordinary people at the heart of and protecting and enhancing it.



Under Aarhus and other international human rights law, States must not - through their own actions - violate the right to a clean, healthy and sustainable environment or other human rights related to healthy ecosystems and biodiversity. They must also protect those rights from being violated by third parties by ensuring that they operate within lawful parameters; and they must establish, implement and enforce appropriate and effective laws, policies and programmes to fulfil these rights.

In these areas, the UK has historically been proactive on the international scene – often promoting strong protections within the EU and via relevant UN bodies. But these outward-facing commitments have not translated into consistent action domestically. The implementation of Aarhus across the UK has been piecemeal and incomplete. This matters because Aarhus gives ordinary people the right to hold public bodies properly to account for their environmental actions, the right to demand information from public bodies, and the right to have a say in decisions about their lives and neighbourhoods.

This bill must do all that it can to better implement the Aarhus Convention in Wales, learn from the experience and operation of the Aarhus Compliance Committee, and ensure that the resulting Governance Body considers the implementation of the Convention in both its strategic approach and ongoing activities.

### Targets for the Protections and Restoration of Biodiversity

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

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

- **Specificity:** Putting targets into law provides certainty and clarity and will drive long term investment in environmental improvements. As well as being legally binding, targets must also be ambitious, enforceable and complementary. We strongly welcome the proposal to include a headline target on the face of the bill, and to align this with the 'nature positive' goal. However, we suggest that the wording is more specific. A duty to meet the target must be placed on Welsh Ministers. The Welsh Ministers must be required to take all necessary steps to reverse the loss of biodiversity by 2030 and to restore biodiversity by 2050.
- **Introducing binding interim targets:** Successful implementation of long-term targets will depend on sustained and targeted progress in the short term. The bill should require Welsh Ministers to set both long term and interim targets in secondary legislation, and such legislation must be brought forward urgently once the Act has become law, to allow them to drive progress in the coming 5 years. The bill should also include a duty on Welsh Ministers to ensure that the targets are met, and that, where they are not, apply a 'comply or explain' model (similar to the Climate Change Act 2008). In setting the targets, Welsh Ministers should be required to have regard to the Global Biodiversity Framework.

- **Strengthening the link between aspiration and delivery:** Clear plans for delivery, with explicit and transparent links to desired impact and outcomes, are vital in ensuring targets and frameworks lead to practical change. The UK Government’s Environmental Improvement Plan lacks detailed delivery information and pathways and, as a result, the OEP found in its annual assessment of the UK Government’s progress on improving the natural environment in England that “Government remains largely off track to meets its environmental ambitions” and that “...overall progress and prospects are impeded by the lack of an effective and transparent delivery plan”<sup>3</sup>. The link between biodiversity targets and the Nature Recovery Action Plan should be clear from the outset. The Plan must include time bound, specific measures that are explicitly linked to the delivery of the targets.
- **Participation, expertise and transparency:** The bill should set out the requirements for the target setting process, including undertaking consultation and seeking independent expert advice, ensuring transparency, and ongoing review of targets. This could helpfully point to relevant Welsh bodies (for example, Natural Resources Wales) and the new Governance Body (once established) as statutory consultees. Including a reference within the text of the bill to the procedural rights set out under the Aarhus Convention (specifically, to adequate practical provisions for participation, reasonable and early time frames for consultation, and due account for outcomes of participation) would also help to embed public participation within the Welsh system.

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<sup>3</sup> Office for Environmental Protection, January 2024, [Progress in improving the natural environment in England 2022-23](#).