



Llywodraeth Cymru
Welsh Government

www.cymru.gov.uk

Welsh Government

Looking to the Future of Environmental Law in Wales

Prys Davies and Elisabeth Jones
Welsh Government

Aim of session

Overview of a number of key upcoming policy and legislative developments in Wales:

Potential new institutional arrangements

- Overarching SD duties
- New approaches to environmental management

Aim of session (2)

- Window onto emerging policy
- ... and also onto the process of translating policy into law

Role of EU Law

- Basis: much Welsh (and UK) environmental law derives from EU law
- Constraint: the Welsh Ministers have no power to do anything incompatible with EU law (s. 80 GOWA 2006), and a provision of a NAW Bill is not law if it is incompatible with EU law (s. 108(2) and (6)(c) GOWA 2006)

Forthcoming WG Legislation

Some key considerations:

- Increasing emphasis on policy integration
– sustainable development; ecosystems approach
- Rethinking environmental management
- Budgets – more for less
- Ongoing devolution



Llywodraeth Cymru
Welsh Government

www.cymru.gov.uk

The Single Environmental Body

Single Environmental Body [1]

Welsh Labour Manifesto:

- *“Look to bring the Environment Agency Wales, the Countryside Council for Wales and the Forestry Commission Wales together as one organisation to work closely on the development of ‘A Living Wales’, sharing services and operational resources to deliver it”. [2011]*

Single Environmental Body [2]

- Three important drivers for change :
 - **Improving outcomes for the environment, economy and people – including the ecosystems approach**
 - **Ensuring best value for money – simplification and reinvesting savings**
 - **Moving devolution forward**

Single Environmental Body [3]

- Draft Aim for a new body:
“Ensure that the people and economy of Wales benefit from an increasingly diverse and resilient environment”
- Main focus now on CCW, EAW and FCW
– but may include other functions such as drainage responsibilities

Single Environmental Body [4]

If a decision to proceed...

- Need to secure 2 divorces before arranging a marriage
- Establish as a WG Sponsored Body
- Preparation of Orders a significant undertaking
- Planned vesting date – April 2013

Single Environmental Body – Policy into Law

- Proposed powers for Welsh Ministers under the Public Bodies Bill to transfer, abolish or modify functions (cl 13 of version passed by the House of Lords)
- “Modifying” a function includes changing the purpose of the function (cl 5 *ibid*)

Examples of need for repurposing

Section 130(2) Environmental Protection Act 1990

The Countryside Council for Wales shall discharge [its countryside functions]—

(a) for the conservation and enhancement of natural beauty in Wales and of the natural beauty and amenity of the countryside in Wales ...,

(b) for encouraging ... facilities for the enjoyment [of the Welsh countryside] and for the enjoyment of ... open-air recreation and the study of nature afforded thereby;

and shall have regard to the social and economic interests of rural areas in Wales.

(3) The reference in subsection (2) above to the conservation of the natural beauty of the countryside includes the conservation of its flora, fauna and geological and physiographical features.

Examples of need for repurposing

Section 4 Environment Act 1995 - Principal aim and objectives of the Environment Agency

(1) It shall be the principal aim of the Agency ... in discharging its functions so to protect or enhance the environment, taken as a whole, as to make the contribution towards attaining the objective of achieving sustainable development mentioned in subsection (3) below.

... that is, in relation to Wales: "the contribution which, having regard to the Agency's responsibilities and resources, the [Welsh Ministers] consider it appropriate for the Agency to make, by the discharge of its functions, towards attaining the objective of achieving sustainable development".

"Sustainable development" is not defined.

Single Environmental Body – Policy into Law (2)

- Need to manage cross-border issues
- Public Bodies Bill: powers to ask other bodies to carry out functions on its behalf (e.g. across the border), and for bodies to provide services to each other.

Single Environmental Body – Policy into Law (3)

- If toolkit provided by Public Bodies Bill proves insufficient as policy develops - possible additional provision in future Assembly Environment Bill
- For the Assembly's competence to pass Bills, see Schedule 7 to GOWA 2006 (not merely Heading 6 - "Environment")

Towards a Single Environmental Body – legal issues

- Combining the roles of plan-maker and statutory advisor – AGO in Court of Justice case C-474/10 *Seaport*
- Art. 6(3) SEA Directive: Member States must designate the authorities to be consulted in relation to “plans or programmes”

Legal Issues – *Seaport* ctd

- Those authorities are ones with specific environmental responsibilities, making them likely to be concerned by the environmental effects of the “plans or programmes”
- But what if the body making the plan is also the most environmentally concerned – and expert?

Issues – *Seaport* ctd

- AGO considers that the plan-maker and the consultee body cannot be the same
- UK and Commission argued against because of effect on small Member States, e.g. Malta
- Expertise vs independence also an issue
- Implications for SEB if Court agrees with AG – e.g. the EA prepares River Basin Plans, while CCW is a statutory consultee in relation to those plans.



Llywodraeth Cymru
Welsh Government

www.cymru.gov.uk

Sustainable Development Bill

Sustainable Development Bill [1]

Current position:

- s.79 GOWA 2006 places, inter alia, a duty on Welsh Ministers to make a scheme setting out how they propose to promote SD in the exercise of their functions
- The existing scheme confirms that SD is the central organising principle of the Welsh Government

Sustainable Development Bill [2]

Labour Manifesto commitments:

- Legislate to establish an independent SD body to replace the SD Commission
- Legislate to embed SD as the central organising principle across government and all public bodies

Sustainable Development Bill [3]

What do we mean by SD?

- *“Promoting the long-term wellbeing of people and communities in Wales...promoting social justice and equality of opportunity...and reducing our use of the earth’s resources”*
- Emphasises environmental limits but wider in scope, reflecting economic and social considerations

Sustainable Development Bill [4]

What about 'central organising principle'?

- Long-termism – sustainable wellbeing
- Integration – taking account of social, economic and environmental outcomes
- Involvement – engaging and involving people and communities

Sustainable Development Bill [5]

- The challenge: translating an internal “central organising principle” into a legal duty

Sustainable Development Bill [6]

Possibilities:

- An advisory body and a ‘declaratory’ duty?
- A duty to have a scheme?
- A process - more prescriptive? Compare existing SEA and EIA
- An approach based on “value” and/or “weighting”?

Sustainable Development Bill [7]

Possibilities continued:

- An approach focusing on particular areas or aspects of policy?
- A simplification approach, removing existing duties?
- Other legislation?



Llywodraeth Cymru
Welsh Government

www.cymru.gov.uk

Environment Bill

Environment Bill [1]

- Likely to focus on legislative aspects of an ecosystem approach currently being developed (Living Wales Framework)
- Ecosystems approach?
 - Integrated, sustainable management of land, air, water and living resources
 - Recognises services provided by ecosystems
 - Recognises that people, with their economic, social and cultural needs, are an integral part of ecosystems

Environment Bill [2]

- Aim of Living Wales framework
 - *“To ensure that Wales has increasingly resilient and diverse ecosystems that are managed to deliver economic, social and environmental benefits”*
- An approach which requires a more proactive and planned spatial dimension
- More integrated, less sectoral approach to decision-making and delivery

Environment Bill [3]

➤ **Welsh antecedents (1) The Wales Spatial Plan**

S. 60, Planning and Compulsory Purchase Act 2004 (as amended by the Government of Wales Act 2006)

(1) There must be a spatial plan for Wales (known as the Wales Spatial Plan).

(2) The Wales Spatial Plan must set out such of the policies (however expressed) of the Welsh Ministers as they think appropriate in relation to the development and use of land in Wales.

Environment Bill [4]

- **Welsh antecedents (2) Glastir**
 - a holistic approach to the environment and agriculture
- Glastir replaced 4 more “sectoral” agri-environment schemes
- Glastir pays for the delivery of specific environmental goods and services aimed at:
 - combating climate change;
 - improving water management; and,
 - maintaining and enhancing biodiversity
- It is designed to deliver measurable outcomes at both a farm and landscape level in a cost effective way.

Environment Bill [5]

Possible legislative changes to deliver approach:

- Development of place-based plans
- Rationalising duties on public bodies to ensure consistency
- Reviewing assessment to provide analysis of ecosystem impacts
- Reviewing how designations are applied

Environment Bill [6]

- Review and simplify regulatory framework, ensuring greater integration between decisions in a spatial context
- Review alignment between regulatory systems for planning and environmental consents
- Next steps - Green Paper scheduled end of 2011/early 2012

Legal “challenges”

- Welsh town and country planning system is based on local planning authority areas (but Wales Spatial Plan has started more “holistic” approach)
- EU and international legislation gives protection on the basis of specific sites or species (Habitats Directive – 92/43/EEC; Ramsar Convention)

Legal “challenges”

- EU legislation requires “reactive” assessment in cases of large development (EIA Directive, 85/337 EEC) – how do we avoid dual burdens?
- But thrust of EU assessment duties in line with holistic approach – SEA, Habitats Directive “in combination” assessment.

Diolch / Thank you