



Eich cyf/Your ref  
Ein cyf/Our ref MA/JJ/2670/21

Huw Irranca-Davies MS  
Chair, Legislation, Justice and Constitution Committee

6 August 2021

Dear Huw,

Thank you for your letter of 14 July about the Legislative Consent Memorandum for the UK Government's Environment Bill. Please accept my apologies for not meeting your deadline. I am pleased to provide additional information as requested below.

**1. For every regulation-making power identified in Annex A to the Memorandum, you agreed to write and indicate when you intend to use each such power.**

To assist the Committee, I attach information on the proposed timing of the subordinate legislation under this Bill at Annex A to this letter, with the caveat that this is an initial view and subject to prioritisation and scheduling considerations.

**2. Please will you (a) provide the Committee with a copy of the guidance [on Welsh Ministers' consent to the UK exercising powers in relation to Wales] that you referred to in the committee meeting, and (b) confirm whether you will be formally seeking the Senedd's views before giving Ministerial consent to any relevant regulations to be made under the Bill (once enacted).**

I attach a copy of the guidance at Annex B.

For UK Government Statutory Instruments under the Environment Act (once enacted) where the consent of the Welsh Ministers is required, I will write to the relevant policy committees to inform them of an intention to consent, and, where time allows, provide an opportunity for the Senedd to express a view before Ministers give consent. I will also lay written statements in the Senedd after the laying of the Statutory Instruments in Parliament.

**3. You confirmed that an amendment had been tabled to the Bill on 9 June that consequently amended the Government of Wales Act 2006, which would then allow the Senedd to remove concurrent plus functions given to the Secretary of State under the Bill. Please can you provide an update on the status of this amendment, and whether it was agreed to.**

The amendment was debated and agreed to on 14 July.

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

**4. You said that you were working with all the other Governments in the UK to determine the requirements that arise from the UK-EU Trade and Co-operation Agreement (TCA). Please can you provide a more detailed update regarding these UK-wide discussions on the implications of the TCA and on the Welsh Government's plan to ensure it remains in compliance when exercising powers provided by the Bill.**

The TCA has a complex governance structure, the specifics of which are being clarified. Environmental issues will fall under the remit of the Level Playing Field for Open and Fair Competition (LPFOFC) Trade Specialised Committee. This Committee is led by the Cabinet Office with BEIS support.

Some key level playing field provisions include the agreement not to regress on environmental protection standards in a way which gives trade advantage to either the UK or the EU, and to cooperate on monitoring and enforcement.

Welsh Government officials are part of Defra co-ordinated cross UK Environment Working Group. This Group will provide a link on environmental matters to BEIS and the (LPFOFC) Specialised Committee. We are working with the other UK administrations to determine how the requirements in the TCA translate into practical measures to support implementation. It is not clear precisely at this stage what degree of oversight is required at a domestic level to comply with these requirements, or how an impact on trade or trade distortion will be determined and how will it be used (by EU and UK). Discussions are currently underway to clarify roles and responsibilities in relation to this oversight.

Once the required clarity emerges we will be in a position to determine what mechanisms are required in Wales for us to contribute to meeting the TCA requirements.

**5. When responding to questioning regarding bilingual Welsh law you indicated that there was an ongoing conversation about UK Government Bills being made available in Welsh. Please could you provide us with more information on this interesting development.**

I am sorry to disappoint the Committee but I was referring in general terms to ongoing debates within the public sphere about the accessibility of the law and strengthening the use of the Welsh language across all domains of life, rather than to specific conversations.

Yours sincerely



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

## Summary of timing for subordinate legislation in the UK Environment Bill

(A)= Affirmative Procedure (N) = Negative Procedure

Section or schedule of the Bill	Power conferred on	Effect	Timing for Subordinate Legislation
<p>Clause 50 Schedule 4 Producer responsibility obligations</p> <p>(A) with exceptions.</p>	<p>Welsh Ministers, or the Secretary of State in relation to Wales with the consent of the Welsh Ministers.</p>	<p>Confers a power to make Regulations to impose producer responsibility obligations on specified persons and in relation to specified products or materials</p>	<p>Autumn 2022 - secondary legislation to implement extended producer responsibility for packaging waste.</p>
<p>Clause 51 Schedule 5 Producer responsibility for disposal costs</p> <p>(A)</p>	<p>Welsh Ministers, or the Secretary of State in relation to Wales with the consent of the Welsh Ministers</p>	<p>Confers a power to make Regulations that require those involved in manufacturing, processing, distributing or supplying products or materials to meet, or contribute to, the disposal costs of those products.</p>	<p>Autumn 2022 - secondary legislation to implement extended producer responsibility for packaging waste.</p>
<p>Clause 52 Schedule 6 Resource efficiency information</p> <p>(A)</p>	<p>Welsh Ministers, or the Secretary of State in relation to Wales with the consent of the Welsh Ministers.</p>	<p>Confers a power to make regulations that set requirements for manufacturers and producers to provide information about the resource efficiency of their products.</p>	<p>Autumn 2022 – these clauses will be first used for proposed mandatory labelling requirements in both Extended Producer Responsibility for packaging waste and a deposit return scheme for drink containers.</p>

Section or schedule of the Bill	Power conferred on	Effect	Timing for Subordinate Legislation
<p>Clause 53 Schedule 7 Resource efficiency requirements</p> <p>(A)</p>	Welsh Ministers	Confers a power on the relevant national authority to make regulations that set resource efficiency requirements that products are required to meet.	No timetable as yet for secondary legislation to use these powers.
<p>Clause 54 Schedule 8 Deposit schemes</p> <p>(A) With exceptions.</p>	Welsh Ministers	Confers a power on the relevant national authority to make regulations establishing deposit schemes	Autumn 2022 – secondary legislation to implement a deposit return scheme for drink containers.
<p>Clause 55 Schedule 9 Charges for single use plastic items</p> <p>(A) With exceptions.</p>	Welsh Ministers	Regulation making power to make provision about charging by sellers of goods for the supply of single-use items.	No timetable as yet for secondary legislation to use these powers.
<p>Clause 58 Electronic waste</p>	Welsh Ministers	Confers powers on Welsh Ministers to introduce electronic (digital) waste tracking and to establish an	Autumn 2022 - secondary legislation to implement electronic waste tracking.

Section or schedule of the Bill	Power conferred on	Effect	Timing for Subordinate Legislation
tracking: Great Britain  (N) with exceptions.		electronic system for that purpose by regulations	
Clause 60 Hazardous waste: England and Wales  (N) with exceptions.	Welsh Ministers	<p>Confers a power to make regulations to make provision about, or connected with, the regulation of hazardous waste.</p> <p>This is a power to ensure we can continue to maintain current subordinate hazardous waste legislation as and when, needed. Repeal of the European Communities Act 1972 removed the current power to amend or replace secondary legislation.</p>	Changes will need to be made to the existing Hazardous Waste (Wales) Regulations 2005 when we make secondary legislation to introduce the mandatory waste tracking system. The Regulations will go before the Senedd in Autumn 2022.
Clause 68 Littering enforcement  (N)	Welsh Ministers	Amends Part 4 of the Environmental Protection Act 1990 in relation to enforcement against littering, and other offences of littering from a vehicle and the unauthorised distribution of free printed material.	Late 2022/ Early 2023. Development of conditions and statutory guidance will be subject to public consultation so this may impact timescales for introduction.

Section or schedule of the Bill	Power conferred on	Effect	Timing for Subordinate Legislation
		<p>Confers a new Regulation making power on the Welsh Ministers in section 88 of the 1990 Act to prescribe conditions that must be met by an authorised officer operating on behalf of a litter authority, and to make provision requiring a litter authority to revoke an officer's authorisation if that officer fails to meet the prescribed conditions.</p> <p>Also confers guidance making powers on the Welsh Ministers.</p>	
Clause 69 Fixed Penalty Notices  (N)	Welsh Ministers	Amends sections 33ZA, 33ZB, 34ZA and 34ZB of the EPA 1990 to provide powers to vary Fixed Penalty Notice levels and how payment can be made	To be reviewed in 2022 in line with draft Litter & Fly-tipping Prevention Plan commitments.
Clause 78 Water resources management plans, drought plans and joint proposals	Welsh Ministers (in relation to water undertakers wholly or mainly in Wales)	<p>Newly inserted section 39E allows Welsh Ministers to give a direction to two or more water undertakers to publish a joint proposal.</p> <p>Newly inserted section 39F gives Welsh Ministers a power to make Regulations about the procedure for preparing and publishing water</p>	<p>Water companies are due to update water resource management plans for 2022 and water resources regional groups are producing regional plans.</p> <p>There is no specific timetable for the introduction of subordinate legislation yet.</p>

Section or schedule of the Bill	Power conferred on	Effect	Timing for Subordinate Legislation
(N)		<p>resources management plans, a drought plan and a joint proposal.</p> <p>Newly inserted section 39G says that the Regulation making power under section 39F may confer on the Minister powers to make provisions by direction.</p> <p>Newly inserted section 39H makes various miscellaneous supplementary provision about the aforementioned regulation making powers.</p>	
<p>Clause 79 Drainage and sewerage management plans</p> <p>(N)</p>	<p>Welsh Ministers (in relation to water undertakers wholly or mainly in Wales)</p>	<p>This clause makes provision in relation to drainage and sewerage management plans and the preparation and review of such.</p> <p>The newly inserted section 94A(7) includes a power for Welsh Ministers to issue directions specifying the form in which a drainage and sewerage management plan must take or the planning period to which such a plan must relate.</p>	<p>Spring 2023</p>

Section or schedule of the Bill	Power conferred on	Effect	Timing for Subordinate Legislation
		<p>Further, newly inserted s.94B includes a power for Welsh Ministers to, by Order, amend the period of time by which a sewerage undertaker must publish a plan (that provision is in s.94A(6)(c))</p> <p>The newly inserted section 94C gives Welsh Ministers a regulation making power to make provision about the procedure for preparing and publishing drainage and sewerage management plans. This includes allowing provision to be made for information sharing, consultation on draft plans and responses to such, circulation of draft plans, and a provision conferring a power on Ministers to make any (further) provision by directions- see s.94C(8).</p> <p>The newly inserted section 94D makes supplementary provision for the regulations made under s.94C.</p> <p>Newly inserted section 94E make provision regarding the form of any directions made under s.94C(8).</p>	



Section or schedule of the Bill	Power conferred on	Effect	Timing for Subordinate Legislation
Clause 86 Water quality: powers of Welsh Ministers  (N)	Welsh Ministers	Power to amend legislation to make technical updates in the field of water quality, following the departure from the EU.	No timetable at present.
Clause 91 Valuation of other land in drainage district: Wales  (A)	Welsh Ministers	Amendment to the Environment (Wales) Act 2016 which amends the Land Drainage Act 1991. Restates existing Regulation making powers in light of amendments to the 1991 Act, including the related regulation making power introduced in clause 88.	2022 -2023
Clause 92 Valuation of agricultural land in drainage district: England and Wales  (A)	Welsh Ministers	Confers power to make regulations providing an alternative methodology for the calculation of drainage rates	2022 - 2023

Section or schedule of the Bill	Power conferred on	Effect	Timing for Subordinate Legislation
Clause 93 Disclosure of Revenue and Customs information  (A)	Welsh Ministers	This provision amends the Land Drainage Act 1991 to allow HMRC to share information to qualifying persons for qualifying purposes. A regulation making power is conferred to enable the list of 'qualifying persons' to be added to.	2022-2023
Schedule 21 para 1(1) Amendment of the REACH regulation  (A)	Secretary of State with consent of Welsh and Scottish Ministers	Confers a power on Welsh Ministers to consent to the Secretary of State making regulations amending the UK REACH Regulation which applies to GB as a whole.	<p>From 2022 onwards.</p> <p>Secondary legislation to be made by SoS and consented to by Welsh Ministers.</p> <p>Use of the powers will be required intermittently to update UK REACH, for example following updates by the EU and to address implementation issues arising the operation of UK REACH.</p> <p>It should be stressed that the amending powers cannot be used to change the fundamental principles of UK REACH.</p>
Schedule 21 2(1) Amendment of the REACH Enforcement Regulations	Welsh Ministers, or the Secretary of State in relation to Wales with the	Confers a powers on Welsh Ministers to amend the REACH Enforcement Regulations 2008 (S.I. 2008/2852) under this provision to the extent that the exercise of that	Use of the powers will be required intermittently to update UK REACH enforcement regulations. Such updates are likely to be required when changes are made to the obligations placed on organisations and individuals by the main UK

Section or schedule of the Bill	Power conferred on	Effect	Timing for Subordinate Legislation
2008 (S.I. 2008/2852).  (A)	consent of the Welsh Ministers.	power would be within legislative competence.	REACH Regulation, in order to ensure those obligations are appropriately enforced.

## Guidance for Welsh Government officials on concurrent powers

### 1. Concurrent Powers

A concurrent power is a power which can be exercised:

- (a) by Welsh Ministers, in relation to Wales; or
- (b) by UK Ministers in relation to Wales (for example, where UK Ministers are exercising powers in relation to the whole of the UK; or in relation to England and Wales).

UK Ministers should not normally exercise their powers in relation to Wales without the agreement of the Welsh Ministers, but (unless it is a concurrent plus power – see below) they are not legally required to obtain consent in order to legislate.

### 2. “Concurrent plus” powers

A “concurrent plus” power is a special type of concurrent power which can be exercised:

- (a) by the Welsh Ministers, in relation to Wales; or
- (b) **provided** that the Welsh Ministers consent, by UK Ministers in relation to Wales.

When the Welsh Ministers are considering whether to give consent to UK Ministers exercising a concurrent plus power, they are exercising a statutory function. If they do not consent, UK Ministers cannot exercise these powers in relation to Wales. An example of a “concurrent plus” power is:

#### [The Transmissible Spongiform Encephalopathies and Animal By-Products \(Amendment etc.\) \(EU Exit\) Regulations 2019](#)

Regulation (EC) No. 999/2001, which lays down the rules for the prevention, control and eradication of certain transmissible spongiform encephalopathies, provides that each Member State shall draw up a list of establishments, plants and operators which have been approved or registered in accordance with this regulation within its territory. As this reference in retained EU law will be deficient post exit, regulation 2(22) of the Transmissible Spongiform Encephalopathies and Animal By-Products (Amendment etc.) (EU Exit) Regulations 2019 provides for this to be exercised by the appropriate authority within its constituent nation. The appropriate authority includes the Secretary of State in respect of England and devolved administrations in respect of Wales and Scotland, and the NI Department of Agriculture, Environment and Rural Affairs in respect of Northern Ireland. It further provides that the Secretary of State may also be the appropriate authority for Wales, Scotland or Northern Ireland with the consent of the relevant devolved administration or NI Department.

This is concurrent plus because the substantive power is transferred to the Welsh Ministers in relation to Wales, the only way it can become exercisable by the UK Ministers in relation to Wales is if the Welsh Ministers give their statutory consent to the UK Ministers to do so. It is this statutory consent power of the Welsh Ministers that is the “plus” element of a “concurrent plus” power.

We use the term “concurrent powers” in this guidance to cover both concurrent and concurrent plus powers, except where we say otherwise.

### **3. Concurrent functions created by UK Brexit SIs and UK Brexit Bills**

The Government of Wales Act 2006 (GoWA) as amended requires Minister of the Crown consent for Senedd legislation modifying or removing concurrent powers.

The Government of Wales Act 2006 (Amendment) Order 2021 made under s109 of GoWA, commonly known as a “section 109 Order”, removed this requirement in relation to the removing of concurrent powers created in specific Brexit enactments only.

### **4. Exercise of concurrent functions**

Ministers have agreed the following principles for exercise of concurrent functions.

***Principle 1: There must be robust governance arrangements – i.e. clearly defined processes covering detailed policy negotiations at official level right through to oversight by Ministerial forums – to enable intergovernmental agreement about the exercise of functions.***

Work is underway to map intergovernmental machinery and assess its robustness with a view to agreeing a consistent set of principles which can apply across intergovernmental relations, frameworks and negotiations.

***Principle 2: If we are recommending consent for expediency in the absence of fully developed governance arrangements, or if we are not certain about how the functions will be exercised at the point when consent is sought, we should ensure that our consent is as narrowly defined as possible in terms of:***

- exactly what exercise of what functions we are consenting to;
- the period for which we are giving consent – preferably a short period, with a defined review mechanism, and without prejudice to longer term arrangements;
- the minimum requirements for ongoing intergovernmental engagement.

***Principle 3: Officials must be able to provide assurance to Ministers that they have:***

- carefully considered the longer term policy rationale and wider constitutional principle that the Welsh Ministers exercise functions in

relation to Wales, in the expectation that capacity issues are only material in the short term;

- evaluated the Wales only option and found it undesirable in this case;
- considered whether or not the governance arrangements are robust enough to protect Wales' interests;
- designed the best possible terms and process for giving consent which safeguards our position in the longer term (with clearly defined scope and duration as well as full involvement at all stages of policy development and implementation); and
- taken a consistent approach to decision making, so that the Welsh Government overall is acting coherently – at both portfolio level and more widely.

***Principle 4:*** A decision on whether to give consent for the UK Government to exercise a concurrent function in relation to Wales for the first time should be presented to the Counsel General and the portfolio Minister at the earliest possible stage in the process.

***Principle 5:*** Ministers should write to the relevant policy committees to inform them of an intention to consent to the UK Government exercising a concurrent plus legislative function in relation to Wales, and where time allows provide an opportunity for the Senedd to express a view before Ministers give consent.

***Principle 6:*** The same principles around intergovernmental working, Ministerial agreement and notifying the Senedd apply to both providing and withdrawing consent to exercise a concurrent function.

## **5. Removal of concurrent functions**

***Principle 7:*** Concurrent functions should be removed at the first opportunity.

The removal of concurrent functions by way of provisions in an Act of the Senedd trigger the requirement in GoWA to obtain Minister of the Crown consent. It is important, given their constitutional implications (i.e. they limit legislative competence) that opportunities to remove functions are taken as soon as possible.

## **6. Proposals for new concurrent powers**

***Principle 8:*** New concurrent functions should only be created in very exceptional circumstances and teams should ensure that a carve out will apply such that no consent will be required when removing them (to protect legislative competence), and that they are concurrent plus (to protect executive competence).

Given that the creation of concurrent powers confines the Senedd in exercising its legislative competence, and GoWA is constructed on the basis that the number of concurrent powers will reduce, rather than increase, we should avoid

seeking or agreeing to new concurrent powers wherever possible. Alternative solutions such as taking the powers for the Welsh Ministers only, implementing intergovernmental agreements through separate regulations, or composite instruments, should be sought.

Where a new concurrent power is proposed, Ministers (including the Counsel General **through whom all MAs proposing a new power of this sort must be routed**) will need assurance that there is a very clear and strong rationale for requiring the power to be created in this way. Welsh Government officials should also satisfy themselves that a carve out will apply to the power being created, to ensure that removal of the power, in an Act of the Senedd, would not trigger any consent requirement.