

# Agenda – Climate Change, Environment and Rural Affairs Committee

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Meeting Venue:

Committee Room 3 – Senedd

Meeting date: 20 June 2019

Meeting time: 09.15

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## 1 Introductions, apologies, substitutions and declarations of interest

## 2 Environmental Principles and Governance post-Brexit – Evidence session 2

(09.15–10.15)

(Pages 1 – 28)

Alan Hunt, Senior Brexit Policy Advisor – Natural Resources Wales

Ruth Jenkins, Head of Natural Resources Management Policy – Natural Resources Wales

Attached Documents:

Research Brief

Paper – Natural Resources Wales

## 3 Environmental Principles and Governance post-Brexit – Evidence session 3

(10.15–11.15)

(Pages 29 – 41)

Ruth Chambers, Senior Parliamentary Affairs Associate – Green Alliance

Dr Tom West, Law and Policy Advisor, UK Environment – Client Earth

Attached Documents:

Paper – Greener UK

Paper – ClientEarth



## **Break (11.15–11.30)**

### **4 Environmental Principles and Governance post–Brexit – Evidence session 4**

(11.30–12.30)

(Pages 42 – 55)

Rebecca Williams, Director Wales – Country Land and Business Association

Huw Thomas, Political Adviser – National Farmers Union Cymru

Charlotte Priddy, Policy Officer – Farmers’ Union of Wales

Attached Documents:

Paper – CLA Cymru

Paper – NFU Cymru

Paper – FUW

### **5 Paper(s) to note**

(12.30–12.35)

#### **5.1 Correspondence from Wales Environment Link to the Chair – follow up from meeting on 6 June 2019**

(Pages 56 – 62)

Attached Documents:

Correspondence from Wales Environment Link – 10 June 2019

### **6 Motion under Standing Order 17.42 (vi) to resolve to exclude the public from item 7 of today's meeting**

## **Private Session (12.35–12.45)**

**7 Environmental Principles and Governance post-Brexit –  
Consideration of evidence received under items 2,3 and 4**

Document is Restricted

Cynulliad Cenedlaethol Cymru | National Assembly for Wales

Y Pwyllgor Newid Hinsawdd, Amgylchedd a Materion Gwledig | Climate Change, Environment and Rural Affairs Committee

Ymchwiliad i lywodraethu ac egwyddorion amgylcheddol ar ôl Brexit | Inquiry into environmental principles and governance post-Brexit

Ymateb gan : Cyfoeth Naturiol Cymru

Evidence from : Natural Resources Wales

Natural Resources Wales welcome the opportunity to provide written evidence to the National Assembly for Wales' CCERA Committee - inquiry into environmental governance and principles.

In preparing our response we have drawn on our wider work in relation to Brexit, our close liaison with other regulators and advisory bodies throughout the UK and environmental NGOs and sector representatives in Wales. This has helped us to better understand the potential issues, risks, gaps and impacts of the proposals set out in the Environmental principles and governance in Wales post European Union exit consultation. As with our response to Welsh Government's consultation, in responding to this request for written evidence we have considered the full breadth of Natural Resources Wales' role and remit.

In principle, Natural Resources Wales is supportive of the need for an Environmental Oversight Body, whether at a UK or Wales level. However, we have identified a number of areas of concern:

- There is significant benefit in building a consensus with other regulatory and advisory bodies, environmental NGOs and sector organisations by taking a collaborative approach to delivering environmental governance and principles in Wales to ensure the best outcome.
- A shared approach across the UK to environmental governance with a common framework including common objective, principles and standards would help to avoid gaps in the implementation of environmental policy across the UK and reduce the risk of regression in standards. A common framework that followed a similar approach to the current EU framework would fully recognise and respect the different legal frameworks and devolved legislation across the UK.
- There is a potential gap in governance in the current proposals in Wales and England in terms of transboundary issues, such as climate change, water quality or air pollution where a collaborative approach is essential. It is important to clarify how regulators and administrations work together effectively across the UK to manage transboundary issues and where devolved and non-devolved remits coincide.

The Committee sought a response on three specific questions.

**Gaps in environmental governance structures and principles post-Brexit in Wales and whether the Welsh Government's analysis (within the consultation) correctly and comprehensively identifies the deficiencies;**

In our consultation response, we identified there is a need for an overarching objective of "a high level of protection for the environment", as currently stated in Article 191(2) of the

Treaty on the Functioning of the European Union. This would underpin the four environmental principles noted in the consultation and provide an overarching framework for public authorities that supports delivery and proportionate application of the environmental principles with a clear and consistent aim. This would also support the integration of environmental policy across wider policy remits and help to maintain and enhance functional environmental standards. This more holistic and integrated approach will promote better environmental outcomes and reduce the risk of regression in standards or gaps in application.

This approach of a high-level objective supported by, and framing, a comprehensive set of integrated principles has been followed in the Environment (Wales) Act. The objective of Sustainable Management of Natural Resources underpins the SMNR principles and provides a clear and consistent aim in their application.

It is important that all four EU environmental principles are recognised as overarching principles either at a UK or a Wales level, rather than focussing on them in isolation in specific functional legislation that may not provide comprehensive coverage. There may also be value in considering wider principles currently applied in European law or in international agreements such as non-regression, environmental enhancement and proportionality.

Currently EU Directives require monitoring and evidence-based reporting against environmental standards. These reports are aggregated at an EU level and direct transposition of this duty to UK law without recognition of the wider impacts and benefits such as reporting against international standards may leave a gap.

The EU Commission and the CJEU have also provided guidance on the implementation of EU law, either in FAQs or as further directions, or in the case of the CJEU as case law or judgements. This function, when applied to Welsh legislation and Wales and England legislation is undertaken by various bodies and could result in a gap if there is variation in approach and decisions between different parts of the UK.

Further clarity is needed on the role of the proposed environmental oversight body in relation to the review and setting of standards and scrutiny of performance against those standards. This is an important function that should be supported by suitably resourced and impartial expert reference panels including policy makers, regulators and academics. If not sufficiently supported or clearly defined this could result in a significant gap in accountability and would be a regression.

### **The Welsh Government's consultation proposals and questions regarding the environmental principles, and the function/constitution/scope of the proposed governance body;**

It is essential that there is no overlap in functions between the new body and existing agencies such as Natural Resources Wales. In particular there is a need for further clarity on provision of advice and how this fits with the role and remit of the new body, Natural Resources Wales' leadership role on SMNR and our statutory regulatory powers, functions and duties. There is also the potential for wider impacts on other aspects of our role including reporting and monitoring, policy and guidance. Currently EU Directives require monitoring and evidence-based reporting against environmental standards. These reports are aggregated at an EU level and direct transposition of this duty to UK law without

recognition of the wider impacts and benefits such as reporting against international standards may leave a gap.

The oversight body should act as a high-level strategic body, rather than risk duplication and confusion with the remits of other public bodies. To avoid duplication and the cost and competition for specialist technical expertise, the oversight body's advisory remit should focus on the matters relating to environmental law, application of the new framework including environmental principles and their application by public bodies.

It is important that the oversight body is able to give sufficiently impartial and correct advice, therefore it may be advantageous or indeed necessary to draw upon expertise from across the UK. The proposals laid out in the consultation include the oversight body being able to draw upon the expertise and technical knowledge of other bodies. It is important to recognise that the expertise and knowledge pool may be relatively small in Wales for some technical areas. A common framework and UK wide agreement on the overarching principles would aid this approach.

Any new environmental oversight body, or function, should have environmental protection (as enacted in law) as a core remit. This would help to ensure a full application of the environmental principles and would reduce the risk of a dilution or reduction in standards or focus during any transitional period in governance and legislation. During any transitional period, following EU exit, stability and continuity of standards and environmental oversight are essential.

It is essential that the oversight body is independent of Government and therefore able to pursue its remit fully but subject to appropriate scrutiny, as proposed in the consultation. It is also important that however the body is constituted it is able to work closely with the equivalent oversight bodies elsewhere in the UK to reduce the risk of regulatory divergence and provide a common baseline to landowners and industry, regardless of location. This would also reduce the risk of a 'race to the bottom' and encourage a more collaborative approach to cross-border issues such as transboundary environmental damage where, for example, the point of origin and the location where impacts are observed could be in different administrations. In these cases, collaboration with other UK regulators and oversight bodies would be essential to ensure good outcomes for the environment.

**The value and practicality of a UK joined approach given the [UK Government's Department of Environment Food and Rural Affairs's \(DEFRA\) proposal](#) that new governance structures in England could exercise functions more widely across the UK.**

Currently the proposals for a Welsh body, that is separate to the Defra proposal for an English body, may result in different processes, interpretations and functions either side of the border. This risks a lack of 'level playing field' for businesses and organisations. It is important that we have clarity on the regulatory floor and any regional variances to allow Natural Resources Wales to be transparent in our regulatory functions and to support existing and future cross-border working and interpretation and delivery of policy and regulatory decisions. This is important, for example, in the management of cross border

rivers, where there is a need for a consistent approach across environmental catchments that cross the border.

A Common environmental framework, objective and principles at a UK level would reduce the risk of regulatory divergence and provide a common baseline to landowners and industry, regardless of location. This would also reduce the risk of a 'race to the bottom' or other cross-border issues such as transboundary environmental damage being subject to different regulatory standards. It would also recognise that although environmental policy is a devolved matter, environmental challenges such as air pollution, water quality and climate change where these are transboundary and can only be addressed collaboratively. A common framework that followed a similar approach to the current EU framework would fully recognise and respect the different legal frameworks and devolved legislation across the UK.

Environmental principles help to drive environmental standards and inform the development of policy and legislation. The EU environmental principles currently apply to all administrations in the UK equally and are the legal framework for the development of policy and legislation by UK government and the Welsh Government. Without a shared approach to a common overarching objective and environmental principles, the consultation's stated aim of a commitment to non-regression and enhancing environmental standards is likely to be more difficult to achieve.

I hope this response helps to set the context within which our consultation response has been made and addresses the areas raised by the Committee.

Ceri Davies  
Executive Director of Evidence, Policy and Permitting

## Our Roles and Responsibilities

- **Adviser:** principal adviser to Welsh Government, and adviser to industry and the wider public and voluntary sector, and communicator about issues relating to the environment and its natural resources
- **Regulator:** protecting people and the environment including marine, forest and waste industries, and prosecuting those who breach the regulations that we are responsible for
- **Designator:** for Sites of Special Scientific Interest – areas of particular value for their wildlife or geology, Areas of Outstanding Natural Beauty (AONBs), and National Parks, as well as declaring National Nature Reserves
- **Responder:** to some 9,000 reported environmental incidents a year as a Category 1 emergency responder
- **Statutory consultee:** to some 9,000 planning applications a year
- **Manager/Operator:** managing seven per cent of Wales' land area including woodlands, National Nature Reserves, water and flood defences, and operating our visitor centres, recreation facilities, hatcheries and a laboratory
- **Partner, Educator and Enabler:** key collaborator with the public, private and voluntary sectors, providing grant aid, and helping a wide range of people use the environment as a learning resource; acting as a catalyst for others' work
- **Evidence gatherer:** monitoring our environment, commissioning and undertaking research, developing our knowledge, and being a public records body
- **Employer:** of almost 1,900 staff, as well as supporting other employment through contract work

# Agenda Item 3

Cynulliad Cenedlaethol Cymru | National Assembly for Wales

Y Pwyllgor Newid Hinsawdd, Amgylchedd a Materion Gwledig | Climate Change, Environment and Rural Affairs Committee

Ymchwiliad i lywodraethu ac egwyddorion amgylcheddol ar ôl Brexit | Inquiry into environmental principles and governance post-Brexit

Ymateb gan : Greener UK

Evidence from : Greener UK

## 1. Introduction

Thank you for the opportunity to provide written evidence to the Committee's inquiry into environmental principles and governance. This written evidence is submitted on behalf of Greener UK, a group of 14 major environmental organisations, with a combined public membership of over 8 million.

This evidence focuses on whether Welsh Government's proposals on environmental principles and governance will adequately address the gaps created by Brexit and the importance of ensuring that arrangements work effectively across the UK. This evidence complements the more detailed evidence submitted by our partners RSPB Cymru and WWF Cymru.

## 2. Environmental principles

It is essential that all four core EU environmental principles (precautionary, polluter pays, rectification at source and prevention) are explicitly listed and enshrined in Welsh primary legislation to provide equivalence with existing EU legal protections and legal and public clarity on the status and the application of the principles.

We disagree that existing Welsh legislation provides equivalence for the precautionary and prevention principles. While the Well-being of Future Generations Act and Environment (Wales) Act reflect these principles to a degree, they do not provide legal equivalence as the scope and effect of the Acts differ from how the principles function at the EU level. The current approaches in these Acts mean the principles would not apply to all policies, laws and activities.

In the EU Treaties the core environmental principles are aimed at an overarching objective of 'a high level of environmental protection'. However, the Sustainable Management of Natural Resources (SMNR) principles have been designed to function at an operational level in specific contexts and the SMNR duty is centred on an ecosystems resilience objective. This means that only including environmental principles in a legal context defined by SMNR will be narrower than the current EU position.

Instead, we believe that Welsh Government must provide a legislative framework that:

- Explicitly lists all four key EU principles in primary legislation
- Sets an overarching objective, ensuring the principles aim at achieving a high level of environmental protection
- Includes a non-regression commitment (we do not agree this is encapsulated within the SMNR framework given the limited scope of the SMNR duty and application framework)
- Provides for the principles to be legally enforceable through a clear duty applying to all public bodies in Wales

Welsh Government should also take this opportunity to incorporate the procedural rights for the public to environmental information, participation and access to justice set out in the Aarhus Convention into

primary legislation. This would be a powerful statement of intent from Welsh Government and a visible commitment to public participation in environmental decision making.

We are keen to ensure there is consistency across the UK for public bodies and the public on implementing environmental principles, for example through a shared high level statement.

### **3. Governance arrangements**

The consultation identifies the environmental governance gaps that will be created by Brexit, which we agree are in three broad areas: enforcement, scrutiny and advice. A new body will need to be created as no current body within the Welsh delivery landscape has the sufficient remit, status and powers to deliver this breadth of functions independently from government. We are also concerned at suggestions that an existing body could be repurposed to fulfil these functions. We would strongly guard against this as retrofitting an existing body would not deliver as coherent and functionally effective a body as one specifically designed to meet clearly identified needs and functions. It would also be unlikely to deliver either cost savings or a simpler solution.

Any new governance body must have the necessary independence, resources, remit, powers and expertise to deliver its functions effectively.

We agree with the consultation proposal that the body should be transparent, accountable to the National Assembly for Wales, independently audited, and, critically, independent of government with regard to appointments and funding.

One of the key strengths of current EU structures is the powerful and dissuasive deterrent effect provided by a system which can result in financial, practical and reputational penalties. In Wales, current environmental enforcement structures are weak due to the lack of remedy and sanction for non-compliance with legislation. This is therefore a key opportunity for Welsh Government to strengthen existing protections as well as to replace existing functions.

It is therefore essential that the body should have dedicated and bespoke enforcement processes which include the power to issue binding decision notices and the ability to seek enforcement action when its decision notices are not complied with. It must also have the power to initiate formal investigations into potential breaches of environmental law and inquiries on systemic problems. It must also be able to issue guidance and recommendations as a result of these investigations.

### **4. The need for effective governance systems across the UK**

Given that the environment does not respect boundaries, a joined up approach to environmental governance across the UK will be essential.

The UK government has said it “would welcome the opportunity to co-design proposals with [the devolved administrations] to ensure they work across the whole of the UK”, and Welsh Government has expressed its keenness to work with other administrations in addressing the environmental governance gap.

These welcome commitments offer a good basis on which to discuss and develop proposals that would ensure that governance and enforcement gaps are addressed and join up across the whole of the UK.

It is difficult to assess whether there has been sufficient collaboration between the UK government and the devolved administrations on environmental governance, and whether the right processes are in place to agree the most environmentally rational settlement. This is because many of the discussions take place within processes such as the Joint Ministerial Committee, or in quadrilateral working groups of officials, which currently have no direct stakeholder engagement and lack transparency.

A UK-wide approach (as a single/joint body or an arrangement between four bodies) would have a number of potential advantages including greater durability and resilience, greater resource efficiency, a more co-ordinated approach to transboundary issues and a counter to competitive deregulation (a 'race to the bottom') by one or more of the other governments. But a UK-wide approach would only succeed if it was the product of genuine co-design and ownership that respected the devolution settlements and their asymmetric nature.

If a Wales only body is created, there will need to be co-ordination with whatever arrangements are put in place across the rest of the UK. We strongly recommend that stakeholders are involved in shaping how this co-ordination is delivered in legal and practical terms. This should include discussion of a number of matters including:

- Developing and delivering common standards
- Co-ordinating action and decisions, particularly on matters with transboundary impacts
- Co-operating on the scrutiny of international agreements and commitments
- Mechanisms for resolving inter-governmental disputes

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Ymchwiliad i lywodraethu ac egwyddorion amgylcheddol ar ôl Brexit | Inquiry into environmental principles and governance post-Brexit

Ymateb gan : ClientEarth

Evidence from : ClientEarth

ClientEarth is thankful for the opportunity to give evidence to Wales' CCERA Committee regarding the gaps in principles and environmental governance post-Brexit in Wales. We focus on the Welsh Government's consultation proposals and questions concerning environmental principles and the function, constitution and scope of the proposed governance body.

## Summary

Leaving the EU would mean a loss of crucial aspects of environmental law that are currently found in the EU Treaties or carried out by EU institutions. To prevent the coherence and effectiveness of environmental law being undermined, action must be taken at the domestic level to enshrine environmental principles into the law and to establish new governance mechanisms. ClientEarth has previously published reports on both of these matters, available on our website [here](#)<sup>1</sup> and [here](#).<sup>2</sup>

In particular, we raise the following in response to this consultation:

### *Principles*

- To ensure consistency in the application of environmental principles post EU-exit, the full set of EU environmental principles should be clearly stated as principles in primary legislation. Additional constructs such as non-regression are also worth specifically legislating for.
- An overarching statutory environmental objective is also needed to tie together and direct the effect of the principles. New binding environmental objectives should also be used to guide the development of environmental law as a whole.
- The duty to pursue sustainable management of natural resources and the application of the sustainable management of natural resources (SMNR) principles should be extended to additional Welsh public bodies as well as other actors exercising public functions to the extent that they are dealing with or relate to environmental issues.

### *Governance*

- The governance gap created by leaving the EU is wide, multifaceted and problematic for both people and nature.
- A new body must be created in order to replace the role of the EU institutions in overseeing full and proper compliance with environmental law.
- This new body must be responsible for holding public authorities to account and ensuring their compliance with environmental law. As such, it is crucial that it is properly independent from

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<sup>1</sup> Available at: <https://www.documents.clientearth.org/library/download-info/environmental-principles-in-uk-law-after-brexit/>

<sup>2</sup> Available at: <https://www.documents.clientearth.org/library/download-info/a-new-nature-and-environment-commission/>

government in particular in terms of its funding, appointments process, and accountability to the Welsh assembly.

- To ensure full and proper implementation of environmental law and policy it must also be able to take meaningful enforcement action where necessary. It should have access to a bespoke enforcement procedure and while the aim will be for most matters to be resolved via amicable means, legal teeth will be needed.
- The body's functions should allow it to act in advisory capacity with regards compliance with the law, be able to scrutinise the implementation of environmental legislation and receive, respond to and investigate complaints.
- To reflect the transboundary nature of environmental issues, cross-border collaboration between the Welsh Government, the EU and other UK Governments will be necessary. A coordinated governance mechanism must be developed, preferably through the establishment of a co-designed and co-owned UK-wide institution.

## Environmental principles

**Question 1: Do you agree the following principles should be included within legislation for Wales?**

o **Rectification at Source;**

o **Polluter-pays**

**Yes**, in addition to other principles as detailed below.

**Question 2: In addition, to the principles already within Welsh primary legislation and the two outlined in Question 1, do you think there are other principles, which may also need to be included?**

**Yes**

Additional principles should be included in the proposed legislation, as should other important environmental legal constructs which are sometimes considered to be 'principles'. The following are key tenets of environmental law that should be specifically and appropriately recognised within the proposed legislation.

The **precautionary** principle is a crucial component of environmental law. We are not of the view that it is already adequately encapsulated within the sustainable management of natural resources (SMNR) principles. The precautionary principle is complex in its definition and application and, as such, there is real value in having it stated clearly as a principle in primary legislation.

Given that the Welsh Government does not appear to be opposed to the precautionary principle, it is unclear why it would not clearly set it out in the new proposed primary legislation. Such an approach would improve clarity and coherence for all stakeholders, and ensure that Welsh environmental law and policy continues to be in line with this essential principle.

While **integration** does constitute one of the five ways of working in the Well-being of Future Generations Act (WFGA), this is in a more limited form than in the Treaty on the Functioning of the European Union (TFEU).

Integration in the WFGA refers only to integration among the well-being objectives and goals, whereas a fuller version of integration should be enacted that ensures that environmental considerations feature in the design of all government policy. Article 11 TFEU, on the other hand, requires that environmental protection is integrated within and across all policy areas and decision-making – not just that which is immediately focussed on environmental issues. The principle can help to fill normative gaps and ensure that environmental protection is a consideration in all relevant decision-making.

Integration should be explicitly recognised as a principle, along with mechanisms of implementing it such as requiring all Welsh Ministers to make a statement whenever they produce a new policy explaining how it will impact on the environment and existing environmental commitments. This could be designed in such a way to complement and bolster the existing reporting requirements under the WFGA.

The consultation document claims that **non-regression** is “reflected in the objective of SMNR” – but this important and emerging core principle of environmental law clearly has much more to offer. Non-regression requires that environmental regulation and standards should not be diminished, promoting a ratcheting up of ambition in subsequent law reform and policy. Non-regression has found recognition in a number of places, including the 2017 Draft Global Pact for the Environment and the French Environmental Code.<sup>3</sup> It has an increasingly important role to play in environmental law. It should be incorporated as a specific standalone component of environmental law, though we note that it will require different legal framing than the existing SMNR principles.

Also mentioned in the consultation document are some of the **Aarhus rights** – these rights are hugely valuable aspects of environmental law. However, rights do not have the same legal character as principles: they provide specific and enforceable legal advantages rather than pointing in a general direction. Their legal treatment must reflect this. As such, while it is crucial that the Aarhus rights are protected in domestic legislation, they cannot be properly provided for through the same legal mechanism as the principles. The Aarhus Convention itself could also be brought closer to Welsh law in a manner similar to the WFGA’s treatment of the Convention on Biological Diversity.

**Environmental rights** – including those to access to information, public participation and to access to justice and effective remedies should be enshrined in legislation – should be enshrined in domestic law. There would also be considerable value in enshrining the right to a healthy environment in law. The Welsh Government has recognised the value of designing legislation in line with UN frameworks (including in the consultation document), and its environmental legal framework should also be consistent with the UN’s Framework Principles on Human Rights and the Environment.<sup>4</sup>

Finally, the environmental principles must be tied to an overarching statutory **environmental objective** in order to bring direction and purpose to the interpretation and application of the principles. The TFEU contains such an objective (a high level of environmental protection), and this has proved valuable to the principles, including in cases before the CJEU.

There would be further value in applying such a legally binding overarching objective of environmental law beyond the principles. This would set a clear direction of travel for government, business and the public and provide a unifying and integrating yardstick for environmental action

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<sup>3</sup> See Greener UK, ‘Briefing on non-regression in the Environment Bill’. [https://greeneruk.org/sites/default/files/download/2019-01/Greener UK briefing on non-regression in the Environment Bill.pdf](https://greeneruk.org/sites/default/files/download/2019-01/Greener%20UK%20briefing%20on%20non-regression%20in%20the%20Environment%20Bill.pdf)

<sup>4</sup> Available at <https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/FrameworkPrinciplesReport.aspx>

and improvement. Environmental protection and restoration must be clearly enshrined as a legitimate objective within the law, in part to ensure that it receives appropriate consideration in decision-making by all public bodies

The objective in Welsh law to 'maintain and enhance the resilience of ecosystems and the benefits they provide' currently only relates to the sustainable management of natural resources under the EWA 2016 and the WFGA. An objective is needed that covers all aspects of environmental law and policy. The objective should also be framed in such a way that it creates an obligation of result on the government.

### **Question 3: Do you agree the duty to pursue sustainable management of natural resources and the application of the SMNR principles should be extended?**

The duty to pursue sustainable management of natural resources and the application of the SMNR principles should be applied to additional Welsh public bodies as well as other actors exercising public functions to the extent that they are dealing with or relate to environmental issues.

### **Question 4: On which Welsh public bodies, within devolved competence do you consider a duty to pursue SMNR should apply?**

The duty to pursue SMNR should also apply to public authorities and actors that exercise public functions that deal with or relate to environmental issues. All public bodies have specific and general responsibilities, powers and duties with regards the state of the environment. Given this, all public bodies must be subject to meaningful duties to pursue sustainable management of natural resources and with apply the principles.

## **Accountability, Accessibility and Enforcement Structure**

### **Question 5: Do you agree with the gaps identified, or do you consider there are other gaps, which need to be considered?**

There will be a significant governance gap in relation to environmental law as a result of the loss of EU functions. Robust processes, requirements and institutions are needed to implement and review environmental law in order to prevent it becoming unimplemented or ignored. The consultation document identifies a number of important gaps that must be filled on exiting the EU.

However, there are other gaps that must also be considered, such as reviewing and reporting of information regarding both the state of the natural world and performance against objectives, and the publishing of environmental information fully and transparently. Greener UK has been raising this issue since 2017.<sup>5</sup>

While there is an existing bespoke reporting framework in Wales under the WFGA and EWA 2016, this does not replicate much of the EU regime that is being lost. It is notable and concerning that many important governance functions, such as reporting requirements, are not being properly

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<sup>5</sup> The key points are available in the following briefing:

[https://greeneruk.org/sites/default/files/download/2018-07/Greener\\_UK\\_Governance\\_Gap.pdf](https://greeneruk.org/sites/default/files/download/2018-07/Greener_UK_Governance_Gap.pdf)

retained under the EU (Withdrawal) Act and associated secondary legislation. It is therefore crucial that a new holistic and comprehensive governance regime is established.

The governance gap is wider than just accountability, accessibility and enforcement, crucial though these are. Continued participation in EU agencies such as the European Environment Agency and/or the establishment of new mechanisms at a domestic level are needed.

### **Question 6: What role should existing accountability bodies provide in a new environmental governance structure for Wales?**

The capacity and expertise required for effective oversight of environmental law cannot be met exclusively by existing bodies, though the remit of some can likely be extended and improved to fill some gaps. While the Future Generations Commissioner (FGC) has a role to play in environmental governance, the consultation document itself notes that the FGC's powers "do not extend to the implementation of law", and it does not currently have the required environmental expertise to fully and properly investigate matters relating to environmental law.

The creation of a new institution is therefore necessary. The UK Government has recognised this and, in response, has proposed the creation of a new Office for Environmental Protection subsequent to the UK Parliament's instruction to do so in s16 of the European Union (Withdrawal) Act 2018. A new institution provides an opportunity to not only replace, but in fact build and improve on, the role of the European Commission in overseeing the proper implementation of the law.

## **Role, Scope and Constitution of a body operating in Wales**

### **Question 7: Is the outlined role and objective appropriate for a body responsible for overseeing the implementation of environmental law in Wales?**

There are three key ways in which the outlined role and objective should be improved. Firstly, it must be made clearer that the body will have a role in enforcing the law, and so also the consequent powers necessary to do this properly. Secondly, it must be clear that the scope of the body is not limited to that of the WFGA and EWA 2016. Thirdly, a co-ordinated transboundary approach is needed.

Assessing and ensuring the effectiveness of the implementation of legislation is noted as an important objective. In order to do this properly, meaningful legal enforcement powers will be required. As recognised below, these would be powers of last resort, but are necessary in order to impart weight onto other less formal means of ensuring effective implementation of the law.

While it is clear that any new environmental law or functions in Wales must be in line with existing Welsh legislation, the scope of any new body should not be unnecessarily limited. For example, matters such as access to information and access to green space must be covered, and any advisory capacity could usefully be deployed beyond SMNR.

The role of the new body must be to act on behalf of people and nature to ensure full and proper implementation of environmental law and policy, including by taking enforcement action where necessary. Its objectives should include ensuring that the environment is healthy, resilient and diverse for present and future generations, and that all public bodies are properly complying with their legal obligations, including those contained in WFGA and the EWA.

### **Question 8: Which policy areas should be included within the scope of new governance arrangements?**

To ensure proper protection of the environment, the scope of new governance arrangements should be broad. All environmental issues as well as issues which touch on the environment should be within scope. In particular, the remit of the new environmental governance body must include climate change.

The policy areas listed in the EWA 2016 of 'natural resources' provide a decent starting point. However, in order to ensure a suitably broad scope is covered and to assure coherence with existing environmental law frameworks, we recommend the relevant scope of 'environmental law' draws on the definition of 'environmental information' contained in the Aarhus Convention in Article 2(3), which is already mirrored in Welsh law through the Environmental Information Regulations 2004. This definition encompasses all measures that affect or are likely to affect the environment.

### **Question 9: Do you consider the proposed list of bodies to be appropriate?**

The proposed list of bodies should be broadened to extend to public authorities and actors that will be covered by the extension of the SMNR duty.

We note too that a new body will not only need advisory and scrutiny functions over these public bodies (as suggested in the consultation). Enforcement functions are also necessary.

### **Question 10: Do you consider there are other Welsh bodies, which should also fall within the remit of a body?**

**Yes**

All public bodies have specific and general responsibilities, powers and duties with regards the state of the environment. There also needs to be collaboration between the new body and the Office of the Future Generations Commissioner so it can give guidance and support to FGC.

### **Question 11: What should be the status, form and constitution of an oversight body?**

It is crucial that a new environmental body is sufficiently independent from Government. This independence can be assisted through a combination of various structural features including through an appropriate funding source and process; a robust and transparent procedure for the appointment of key members of staff; and accountability to the Welsh Assembly rather than Government.

In general, independence can be better achieved by making key ties with the legislature rather than the executive. This helps prevent the watering down of powers or reduction in capacity of the body over time.

The expertise and skills necessary to ensure a well-functioning body will be extensive and varied: lawyers will of course be needed, but so too will those with specialist technical knowledge and understanding of local issues, priorities and histories. This will be important across the body's

functions – from developing its overarching strategy and priorities to investigating specific cases of potential breaches of the law.

## Functions of a body operating in Wales

### Question 12: Should an oversight body be able to act in an advisory capacity?

**Yes**

The advisory functions described in the consultation document would be valuable. It is worth noting that advice should be geared towards improving implementation of existing law and policy, and therefore connected to the body's overall enforcement function.

In order to effectively perform this function, the body should be able to initiate inquiries of its own accord as well as respond to requests from public bodies. It would also be valuable for such inquiries to be general in nature, considering systemic issues with implementation of the law by all (or a range of) public bodies, rather than just one. Guidance and recommendations would then be general in nature, comparable to those of the FGC.

Recommendations produced by the body should have a meaningful legal status, with public bodies required to normally follow them, unless there is a legitimate and compelling reason of public interest for them not to do so. Recommendations may vary in the level of detail they provide, depending on the nature of the issue at hand and the body or bodies to which the advice is directed.

### Question 13: Should an oversight body be able to scrutinise implementation of environmental legislation?

**Yes**

The overarching aim of this body should be to improve compliance with the law. This new body must be able to conduct deep and thorough assessments of public body (in)action, looking at whether they are implementing the law in the most effective way.

### Question 14: What should be the extent of this function?

The ability to undertake thematic reviews of implementation of the law would be a useful function, and related to the above advisory function. These should cover not just the state of the national resources in Wales but also the implementation of environmental legislation. A careful balance will need to be struck to make sure the body is exhaustive in its coverage while not being overly prescriptive or overburdening. Off the back of such reports, the body should be able to make recommendations that public authorities must normally follow.

This generic scrutiny power may prove a useful pre-emptive power that could be used to identify and avoid potential breaches of the law (including systemic issues) before they occur.

In conducting thematic reviews and other assessments of implementation, this body should adopt open, deliberative and iterative processes. Stakeholders should be involved regularly, with important goals being to understand the nature of the issues at hand and seeking to co-develop solutions with wide buy-in. In general, the body should seek to improve compliance with environmental law and resolve issues via collaborative means where possible before relying on harder edged legal processes.

### **Question 15: What powers should a body have in order to investigate complaints from members of the public about the alleged failure to implement environmental law?**

The body should receive, respond to and investigate complaints. In doing so, it should continue to involve the complainant(s) and other relevant stakeholders throughout follow-up procedures. The body's processes should be transparent, deliberative and iterative – seeking to engage complainants, understand their concerns, build consensus and develop solutions with wide buy-in.

Transparency and information sharing throughout the investigation of a complaint are crucial. Relevant information should be made public throughout, and if the body proposes not to pursue a complaint at any stage, the complainant should receive a formal notification of this with a chance to respond and challenge in an appropriate forum.

There is also a need to ensure there is full and proper connection between the complaints and enforcement functions. A complainant must have satisfaction that the body has done all within its powers to remedy the complaint at hand. As such, the complaints process must not end simply with the providing of recommendations, but should be explicitly linked into further harder enforcement powers of the body – to be applied as and when necessary.

### **Question 16: What informal and formal methods of enforcement do you consider an oversight body should operate in order to delivery on its role and objectives?**

There is clearly a need for both formal and informal methods, and both hard and soft powers, for the oversight body. When a matter first comes to the body's attention, either via a complaint or through its own processes, it should seek to resolve the matter via dialogue and consultation to the satisfaction of all involved. Where this is not possible, the body should have the power to issue an escalating series of notices (initially advisory and then binding) to which the relevant authority must respond. If a public authority elects not to comply with the body's notices, then it must state its reasons why it believes to do so is in the public interest, and its proposed alternative course of action.

Notices issued by the body should require the public authority in question to comply with the law, including setting out the steps for doing so where necessary. Notices may also request additional information, although public authorities should be under a duty to co-operate with the body from the earliest stage possible in terms of information sharing and seeking to find a collaborative solution. Clear timeframes for response and requirements for publication should be included with respect to the notices.

Specific functions or powers may be desirable in order to improve the efficacy and effectiveness of the WFGA and EWA 2016 and compliance with the particular obligations in those pieces of legislation. However, the body's remit should extend to all environmental law.

Where softer procedures do not bring about compliance or when the potential environmental harm requires more focussed action, it is crucial that the new body has recourse to more serious mechanisms. And where compliance is still not achieved, the body should be able to launch enforcement proceedings in an appropriate court or tribunal.

### **Question 17: What enforcement actions do you consider need to be available?**

If an authority fails to comply with a notice and continues to fall outside compliance with the law, the new body should be able to refer the matter to an appropriate judicial forum for review. This forum must be able to undertake a procedural and substantive review of the issue. In order to

ensure high quality and properly engaged decision-making, its judges or panel should include relevant non-legal experts where this is appropriate. Expertise in a range of environmental policy areas may need to be covered, including ecology, climate change and land use. A range of remedies – including fines, restoration orders, and a ‘special measures’ type procedure – may also prove necessary. A specific and specially-designed environment court or tribunal may well be the best way of ensuring these requirements are met.

Other mechanisms and processes will be needed to complement this bespoke enforcement procedure. For example, it may sometimes be appropriate for the body to take alternative enforcement actions (such as interim measures or interventions).

It will be crucial that the creation of a new body with a bespoke enforcement procedure does not diminish existing rights. As such, it must be made clear that the public and civil society are not prevented from pursuing enforcement action just because related matters are currently being considered by the new body. In fact, the new enforcement procedure should be designed in such a way that the public can also have access to it in order to seek redress for failures to comply with environmental law by public authorities, as a step toward achieving compliance with the Aarhus Convention.

## Working across the UK

### Question 18: Would there be advantages in have a shared core set of common environmental principles?

**Yes**

There would be advantages in a shared core set of common environmental principles in order to bring commitment, consistency and cooperation in environmental policy and law across the nations of the UK.

### Question 19: What potential governance structures do you consider are needed to enable collaboration and collective decision-making to enable interface between administrations?

Environmental issues are transboundary and, reflecting this, cross-border collaboration will be important. The review should consider how effective collaboration can best be achieved including how the Welsh Government can work with the EU and other UK Governments to develop co-ordinated governance mechanisms which will better safeguard the environment. For example, continuing to participate in the European Environment Agency would be very valuable, as would specific mechanisms regarding compliance with international law and mutual non-regression across the UK.

It is also worth noting that new scrutiny and enforcement arrangements will need to be cognisant of and responsive to the cross-border nature of environmental problems. In the context of the new governance body, this will require close linkages and co-operation with EU bodies and other new bodies to be established in the rest of the UK. A co-designed and co-owned UK-wide institution remains the preferable route from an environmental perspective.

Such a body should be accountable to all devolved legislatures as well as the UK Parliament - this would enable collective decision-making. It would be more independent, more robustly resources and better able to hold the four governments to account. The body should also work closely with the other UK governments to ensure there consistency of the enforcement of environmental principles. There must also be a dispute resolution mechanism when issues arise between the four countries.

However, if this approach is not adopted, to ensure consistency and co-ordination there should be duties on each of the relevant institutions to co-operate and procedures should be developed to co-ordinate equivalent processes in other parts of the UK.

# Agenda Item 4

Cynulliad Cenedlaethol Cymru | National Assembly for Wales  
Pwylyger Newid Hinsawdd, Amgylchedd a Materion Gwledig | Climate Change,  
Environment and Rural Affairs Committee  
Ymchwiliad i lywodraethu ac egwyddorion amgylcheddol ar ôl Brexit | Inquiry into  
environmental principles and governance post-Brexit  
Ymateb gan : Cymdeithas Tir a Busnesau Cefn Gwlad (CLA Cymru)  
Evidence from : Country Land and Business Association (CLA Cymru)

## CLA Cymru: The voice of the Rural Economy

1. CLA Cymru represents the broadest possible range of economic players in Wales. These include rural businesses and service-providers, manufacturers and the supply chain for primary producers and those who can manage land. In Wales, rural business totals nearly 105,000 enterprises.
2. The CLA offers expertise on the requirements of the full range of land uses, the needs of rural communities and the importance of economic resilience to achieve sustainable development for rural Wales. Our members are the owners and custodians of our land and natural resources.
3. In Wales, CLA Cymru's membership reaches 3,000 businesses. We play a full and dynamic part in government and stakeholder engagement. Part of a well-established organisation, the CLA includes some 33,000 members across England and Wales.

## General Comments

4. CLA Cymru acknowledge the need to maintain high environmental standards. As the UK works towards leaving the European Union, the issue of how to sustain these standards is of critical importance. What governance arrangements are needed in Wales to ensure we do not degrade progress is an important consideration, but how we achieve this outside the EU, with full understanding of the evolution of legislation in Wales is essential. It is not a black and white issue and the 'solution' must fit within the context of sustainable development and natural resources management.
5. A primary strength of the EU is that it enables member states to work within common principles to achieve common goals whilst retaining flexibility to implement these in a way that reflects national and domestic priorities. This balance between creating common principles and recognising national delivery has been particularly prevalent in the development of environmental standards, an area in which the EU is a global leader. It is essential that this flexibility and collaborative working is retained in the context of the UK.

### *Environmental Principles in Wales*

6. The Welsh Government consultation, Environment Principles and Governance in Wales after EU Exit, provides a comprehensive analysis of the situation with regard to environmental standards, legislation and interaction. However, the consultation approaches the exercise from a perspective of recreating the current EU principles and functions directly to Wales.

<sup>1</sup>CLA research, *Standing Up for Rural Business*, p 4-5

While this makes it a robust gap analysis, it fails to provide a needs analysis of what the optimal solution would be for an infrastructure that embeds the ambition of world leading environmental principles and governance in Wales. Maybe this is unsurprising in the context of leaving the European Union and the immediacy of the issue, but might this be a lost opportunity to create a bespoke solution as opposed to 'plugging the gaps'?

7. The Welsh Government consultation focuses almost exclusively on the four main EU environment principles that stem from article 191 of the Treaty on the Functioning of the European Union (which itself stems from the Maastricht Treaty) – precautionary, preventative, rectification at source and polluter pays. Whilst these form the backbone of the interpretation and delivery of environmental standards and law in the EU, there have been a number of supplementary additions to these principles over decades as awareness and understanding of environmental impact has grown. The concentration on core principles in the Welsh Government consultation, excludes consideration of subsequent developments, for example, the Cardiff process on integration and the importance of the Aarhus Convention, which are actually essential to understand and interpret some of the decisions and development in EU thinking. This is a concern and needs to be reviewed.
8. In more recent times, the 'environment question' itself has expanded beyond the confines of the topic, reflecting and acknowledging that integrated policy around sustainable development is more beneficial than fractured policies around environment, economic and social issues. Whatever the outcome to the environmental governance and principles debate, it must not be a static solution, stuck in the words of legislation. The concept of environmental principles must be able to mature and adapt in a way that reflects the understanding of the day and reach across all policy. It is not clear from the consultation if this will be the case.
9. In many ways, while in the European Union, it may be argued that the Welsh Government had essentially replicated the all-embracing approach to European principles with the Well-being of Future Generations (Wales) Act. It is a novel piece of legislation in as far as it sets ambition for the public sector to work towards sustainable development in a holistic way, acknowledging that no single pillar of sustainability can be considered more important than the others. It could be argued that considering environmental matters in isolation in the wake of leaving the European Union is a retrograde step. This point that requires further exploration.
10. To ensure Wales is achieving its overarching social, economic, environmental and cultural goals, CLA Cymru would suggest that a more nuanced needs analysis around environmental principles and necessary governance structures would be beneficial. More consideration needs to be given to understand the role of environmental principles in Wales and how the idea of specific principles for the environment fit into the broader picture of sustainable development already enshrined here.
11. In addition to the principles and treaties directly relating to the environment, consideration also needs to be given to broader principles and ways of working across the EU that allowed the environmental principles to operate effectively and develop into the more cohesive foundation that has underpinned European thinking. Article 5 of the Treaty on European Union (TEU) defines general principles for the functioning of the EU and EU law. These principles of Conferral, Proportionality and Subsidiarity are the context within which the EU environmental principles and governance were developed. If the ambition of Welsh Government is to bring EU environmental principles and governance to Wales, this broader context also needs to be

considered as without the general principles, the environmental principles would have little meaning.

12. Another important distinction which could be better understood in the consultation is the distinction between what 'principles' are required and those which are 'policy objectives' that Government seek to deliver. Furthermore, the concept of 'principles' need to be broken down to understand which are guiding principles in terms of decision making and which are operational principles in terms of ways of working.
13. The Welsh Government consultation concludes that the prevention and precautionary principles are already embedded in Wales by virtue of the provisions of the Well-being of Future Generations (Wales) Act and further embedded through the commitment to delivering Sustainable Management of Natural Resources (SMNR). However, these legislative instruments were enacted during a time when the UK was a member of the European Union. The provisions within were intended to complement and co-exist with the EU general and environmental principles and not replace them.
14. CLA Cymru would suggest that the five ways of working in the Well-Being of Future Generations (Wales) Act and the policy of SMNR imbibe the spirit of these principles as opposed to overtly encapsulate their precise function. If a needs analysis was completed, it may become apparent that this approach works for Wales, but in the absence of this broader analysis, it is necessary to question to what extent a more prescriptive definition of these principles may be needed.
15. Questions can also be raised around the extent to which the Environment (Wales) Act, which introduced SMNR into our legal framework, is an operational piece of legislation as opposed to a legal instrument that embeds far-reaching principles. Timing is unfortunate as the scope of the legislation has not been fully tested - some elements, such as Area Statements, are not yet enacted and in general SMNR is not yet fully embedded into wider Welsh Government policy. To stretch the meaning and purpose of the legislation, without first understanding its capability to deliver its primary function could create even bigger gaps and unintended consequences at a later point in time.
16. Furthermore, the first five sections of the Environment (Wales) Act sets out the duties placed on Welsh Ministers and Natural Resources Wales. Duties on the wider public bodies are not included until section 6 of the Act. This raises question not only how effectively the act covers the principles of precaution and prevention but also if all necessary public bodies are adequately within its full scope.
17. Finally, an important consideration when assessing the role of principles is the recognition that the legal system of the UK (and Wales) works in a fundamentally different way from European law. The way the EU environmental principles operate is more interpretive and ingrained into ways of working. The legal system in the UK is literal and placing principles on a statutory footing make them specific to a point in time with a defined and fixed definition which is difficult to change as evidence or understanding evolves. In looking to adopt EU environmental principles to Wales, consideration needs to be given to the consequences of taking interpretive principles and creating statutory legislation; particularly what this means in the long term understanding of the role that principles play in our legal system.

### *Environmental Governance in Wales*

18. In the absence of a comprehensive needs analysis to compliment to gap analysis already prepared by Welsh Government for the consultation, it is difficult to understand what new bodies or governance reform is needed to ensure that environmental standards in Wales are met. Again, there is a feeling of 'plugging the gaps' as opposed to exploring the possible.
19. This point is particularly well demonstrated in the suggestion that the office of the Future Generations Commissioner for Wales could be adapted and supplemented to cover environmental governance. Whilst technically probably achievable, such as alternation could be detrimental to the integrity of the role as defined. Furthermore, as currently defined, the extent to which the Future Generations Commissioner can truly be held to be independent of political intervention is questionable as the reporting lines are directly to Welsh Ministers. If the role was to be expanded and replicate what many consider to be lost in terms of being able to hold Governments and Ministers to account, its remit and accountability would need to change considerably. The role of the Commissioner is to be the 'guardian of future generations' and ensuring that public bodies in Wales commit to the delivery of sustainable development in the long term. Adding a separate function that looks closely at an individual element of sustainable development, the environment, could undermine confidence in the role and the office overall.
20. Many people would argue that one of the greatest strengths of the European environmental governance structure has been the ability for individuals and organisations to instigate action against national Governments. Being able to hold your Government to account so directly has undoubtedly had an impact on driving forward the environmental debate. While domestic offices like the Future Generations Commissioner or even the Auditor General and Public Services Ombudsman may be able to replicate some elements, and established legal processes like judicial review could be a helpful substitutes, these do not replicate the power of the individual. Serious consideration needed to be given to the need to develop a mechanism through which individual citizens can shape our collective conscious. Recent examples show how individuals have shaped our collective views on climate change or how a TV programme can change our actions on plastic waste.

### *Working within the UK*

21. Matters of land use and environment do not respect political boundaries and it is concerning that this consultation seems insular in approach and does not recognize the fact that Wales is not an island. While environmental policy is clearly a devolved matter and it is appropriate that policy is Welsh focused, this should not be at the expense of collaboration and working at a UK level where this is most efficient and beneficial.
22. Devolution of powers to Wales is an ongoing process, and there remain many instances where the 'jagged edge of devolution' create grey areas that make having wholly disjointed solutions for England and Wales impractical and, probably, unworkable. For individual businesses, the prospect of separate solutions for environmental governance and principles is problematic and concerning.

23. For this reason, CLA Cymru has long advocated to need for UK Framework(s)<sup>2</sup> in response to leaving the European Union. Understanding how the UK will function as a whole is fundamental to understanding how devolution in Wales will develop in the future. While for some policy areas ‘doing your own thing’ may be an acceptable outcome, for issues relating to environmental governance this is unrealistic and consistency in terms of understanding of environmental principles and governance structures is essential.

*UK draft Environment Bill and Office for Environmental Protection*

24. The UK Government’s draft Environment Bill primarily aims to bring into force the proposals set out in the recently published ‘25 year Environment Plan’. In many ways, it could be argued that the legislation is taking England down a path that Wales already tread with the formation of Natural Resources Wales and the introduction of the Environment (Wales) Act. However, the proposed legislation also includes elements where there is the potential to cross over and collide with the on-going Welsh Government governance and principles consultation.

25. As is the case with the Welsh consultation, the work on the UK draft Environmental Bill has been somewhat diverted by the need to address imminent new environmental matters arising as a result of leaving the European Union. In response to this ‘governance gap’, and primarily the political need to replace or replicate the Court of Justice of the European Union (CJEU) and its function in holding member states to account in delivering the environmental obligations, the proposals are to establish an English ‘Office for Environmental Protection’

26. While this establishment may be a logical solution to fill the governance gap, its function as an ‘England only body’ is fundamentally flawed. The territorial extent of the proposed new body is further complicated by the fact that its remit covers England and also decisions by the Ministers of the Crown in Wales to the extent that they are applied to reserved matters. It is suggested that such an approach will soon become a legal minefield if not resolved quickly.

27. In looking at the needs of a governance body to replace the CJEU, CLA would again suggest that a needs based analysis would be beneficial. Historically, a low number of cases have been referred to the CJEU from the UK and looking from a resources and cohesion perspective, a single suitable body that delivers this function across the UK would be sensible.

28. It is essential to respect devolution and the role of the Devolved Administrations in this issue and there is a challenge of time and resource to either change the current proposals, develop a new UK solution or ensure that all four areas of the UK have an adequate solution to deliver environmental governance.

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<https://www.cla.org.uk/sites/default/files/CLA%20New%20Opportunities%20Devolution%20email%204pp%20D4%20V2%2022.09.16%20HR%20SPREADS.pdf>

## Conclusion

29. CLA Cymru call on the CCERA Committee to explore and interrogate further the interrelationship between the Welsh Government consultation on Environmental principles and governance and the ongoing work of the UK Government in relation to the development of the Environment Bill and specifically the proposals for the Office of Environmental Protection.
  30. There is no doubt that these fundamental issues of environmental principles and governance is being considered against the backdrop of leaving the European Union, but the fear is that the response of Government(s) is reactionary as opposed to understanding the opportunities that exist outside the European Union.
  31. In creating separate 'solutions' CLA Cymru believe that both the UK and Welsh Government are seeking to deliver along the path of least resistance, avoiding the need to work collaboratively to deliver workable, pragmatic, and realistic outcomes. This seems another example where political fractions arising from Brexit are interfering in sensible progress.
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### **CCERA Questions**

- Gaps in environmental governance structures and principles post-Brexit in Wales and whether the Welsh Government's analysis (within the consultation) correctly and comprehensively identifies the deficiencies;
- The Welsh Government's consultation proposals and questions regarding the environmental principles, and the function/constitution/scope of the proposed governance body; and
- The value and practicality of a UK joined approach given the [UK Government's Department of Environment Food and Rural Affairs's \(DEFRA\) proposal](#) that new governance structures in England could exercise functions more widely across the UK.

Cynulliad Cenedlaethol Cymru | National Assembly for Wales

Y Pwyllgor Newid Hinsawdd, Amgylchedd a Materion Gwledig | Climate Change, Environment and Rural Affairs Committee

Ymchwiliad i lywodraethu ac egwyddorion amgylcheddol ar ôl Brexit | Inquiry into environmental principles and governance post-Brexit

Ymateb gan : Undeb Cenedlaethol Amaethwry Cymru

Evidence from : National Farmers Union Cymru

## 1. Introduction and overview

NFU Cymru welcomes the opportunity to respond to the CCERA Committee's call for evidence into environmental governance and principles.

**1.1** Farming is the backbone of Wales' rural economy, providing employment for 55,000 people and supplying the raw ingredients for our food and drink sector, worth almost £6.8bn and providing work for almost 217,000 people<sup>1</sup>

**1.2** Wales' farmers manage over 80% of our land and have a daily interest in managing and protecting environmental resources alongside the practical challenges of food production. With this in mind NFU Cymru has given careful consideration to the aims and objectives of any new, independent oversight body set up to protect the environment.

**1.3** The Union's interests in this new governance body and policy principles will relate to how these

- Are framed to support a productive, profitable and progressive agriculture in Wales, while protecting our key natural resources including soils, air, water and wildlife
- Provide clarity and certainty for our members without adding unnecessary costs and burdens to business
- Improve environmental legislation
- Ensure that regulatory frameworks are evidence-based and outcome focused
- Give the EU and other trading partners confidence in our environmental standards; and
- Ensure that our regulatory regimes have appropriate levels of regulatory equivalence with trading partners, to maximise the potential and fairness of our trading relationships

Turning to address those issues that Committee is seeking our views on, NFU Cymru would offer the following commentary

**Gaps in environmental governance structures and principles post-Brexit in Wales and whether the Welsh Government's analysis correctly and comprehensively identifies the deficiencies**

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<sup>1</sup> <https://businesswales.gov.wales/foodanddrink/about-us/welsh-food-and-drink-numbers>

**2.1** NFU Cymru accepts and recognises that environmental governance structures and principles will open up (if and) when the UK should leave the EU. We are in broad agreement with those gaps which have been identified in the Welsh Government's consultation.

**2.2** We would however emphasise the point that the only true governance gap which opens up as a direct result of the UK's intended departure from the EU is that which accompanies the loss of the European Commission's supervisory and enforcement function in relation to Member States' Community derived obligations.

**2.3** Whilst the consultation points to other apparent gaps in environmental governance, it must be emphasised that these do not arise by dint of the UK's intended departure from the EU, rather they are gaps that the Welsh Government perceives to exist in relation to domestically inspired provisions and bodies (such as the Wellbeing of Future Generations Act, the work of the Future Generations Commissioner, the Public Services Ombudsman and the Auditor General).

**2.4** The gaps that the Welsh Government perceives in relation to domestically inspired provisions relate to matters which have never been under the control of the European Commission

**2.5** Through the consultation proposals, the Welsh Government therefore appears to be considering going somewhat beyond the closing of the governance gap which will open up on our anticipated EU departure, as the consultation appears to propose to bring into the remit of the new oversight body not only compliance with retained EU law, but also compliance with domestically inspired environmental law, which has never been the purview of the European Commission in the first place.

**2.6** With regard to principles of polluter pays and rectification at source, NFU Cymru would stress that before considering the import of these principles into Welsh legislation, there needs to be a mutually agreed definition of what these principles are. We would further add principles imported into domestic law should also be underpinned by the five principles of good regulation, namely proportionality, accountability, consistency, transparency and targeting.

**2.7** The introduction of new principles must be accompanied with guidance as to how these principles can be interpreted in order to try and reduce unnecessary litigation in future, with such guidance subject to consultation. Such guidance would also need to be amendable in response to the latest scientific and economic developments.

**2.8** NFU Cymru would make the point that whilst such overarching principles may appear as gaps in existing Welsh legislation, such overarching principles are not set to disappear entirely from the policy and legal landscape. They are for example referenced in Directives such as the Water Framework Directive, which will be maintained as part of our domestic legal framework via the EU Withdrawal Bill.

**2.9** Further to this, the body of pre-exit CJEU case law will continue to bind the lower UK courts, and so where these principles have informed decisions of the CJEU, they will, even

after EU departure, by dint of our observance of pre-existing CJEU case law, find expression via decisions of the domestic courts.

### **Environmental Principles and the function, constitution and scope of the proposed governance body**

**3.1** If the purpose of the new oversight body is to replace the role of the European Commission and the Court of Justice of the European Union, then we are certainly of the view that the role of any new body should not exceed the functions and powers that are currently exercised by the European Commission in conjunction with the CJEU.

**3.2** As such we do not for example believe that the new body should have powers to levy fines, we believe that such powers should rest with the Courts.

**3.3** We do not believe that the new body should have any sort of policy making function either, we are of the view that such a role should remain the domain of the government and its agencies.

**3.4** NFU Cymru is of the view that the oversight body's work must be subject to the control of the courts and its determinations susceptible to judicial review. As a public body, we also assume its actions will be captured by s6 of the Human Rights Act 1998, and the prohibition this introduces on public bodies acting in a way which is incompatible with Convention rights.

**3.5** It has been suggested that the oversight body could be given a role in investigating complaints from members of the public. NFU Cymru sees the primary function of this body as being the oversight of public bodies rather than the investigation of complaints from members of the public. NFU Cymru is of the view that there are already existing routes by which members of the public may raise complaints. This includes in the first instance directing a complaint to the relevant organisation that they have a complaint against so that the matter is investigated internally, there is also recourse to the relevant ombudsmen, to elected representatives as well as the option of taking a matter to judicial review.

**3.6** NFU Cymru is opposed to members of the public being able to raise complaints directly with the oversight body. If Welsh Government were to decide to give the oversight body a role in investigating complaints from members of the public then we would expect this to be confined exclusively to a vertical effect against a limited number of public bodies. We would not want to see a horizontal effect established providing individuals with a route for making claims against other private individuals.

**3.7** If the new oversight body has a role in investigating complaints from the public, then it also needs to be equipped with sufficient latitude and discretion to screen out frivolous or vexatious complaints. In the absence of such latitude, we believe there is a real risk that the body could become inundated with complaints lacking in merit, leaving it unable to discharge its functions properly.

**3.8** It is important for the credibility of any new body that it is not only independent of Welsh Government but also seen to be independent of Welsh Government.

**3.9** We would expect the new body to be accountable to the National Assembly for Wales, and subject to independent audit by the Auditor General for Wales, to have an independent appointment structure and independent sources of funding.

**3.10** NFU Cymru is of the view that any powers for the new body to hold government to account for non-compliance should apply to central government. Extending this provision to other bodies such as NRW and local authorities would undermine the rights and responsibilities of Welsh Ministers.

**3.11** As a Union we are quite strongly opposed to the creation of any advice giving role for the new body. It is our view that there is an inherent tension in a body having concurrent responsibility for the provision of advice around environmental legislation and the enforcement of any breaches of environmental legislation.

**3.12** It is not difficult to envisage a situation arising whereby the advice of the oversight body has been sought and acted upon in good faith by one of the public bodies under its remit, and a complaint is lodged (perhaps by a member of the public) that the public body has breached its environmental duties. This immediately places the oversight body in the invidious position of having to decide whether the public body, in acting on the advice of the oversight body actually breached environmental law, a situation akin to the oversight body marking its own homework.

**3.13** The role of the National Assembly for Wales in holding the Welsh Government to account is constitutionally fundamental. For the avoidance of doubt, NFU Cymru would make it clear that the existing role of the National Assembly for Wales and its committees should not in any way be diluted, diminished or displaced by the creation of a new environmental governance structure.

### **The value and practicality of a UK joint approach**

**4.1** NFU Cymru has discussed with its members the advantages and disadvantages of closing the governance gap with a stand-alone Wales only body, or alternatively with a body which has a wider remit (England and Wales, GB or even UK wide).

**4.2** Our members did acknowledge that there were advantages and disadvantages associated with each approach, and also recognised the strong political considerations that would accompany any joint approach.

**4.3** Amongst the advantages to creating a body with a wider territorial remit our members took the view that a large number of farm businesses straddle the Welsh-English border, and so it should offer these businesses greater certainty and consistency, as well as hopefully ensuring a more level playing field between the home nations. Members also identified the potential cost savings that would attach to not having an oversight body in each of the home nations.

**4.4** In terms of the disadvantages of creating a body with a remit beyond Wales our members recognised the surrender of control that this would imply on the part of Welsh

Government and the National Assembly, and the desirability of having a Welsh body, answerable exclusively to the National Assembly.

**4.5** Whilst recognising the advantages and disadvantages of either approach our members did not reach a concluded view on which approach might be better.

**4.6** In terms of complying with international obligations in relation to the environment, this would probably be more easily achieved via a body which is UK wide.

**4.7** There are of course other practical considerations such as how the financing of such a body might be agreed upon, to which bodies (legislatures) would the oversight body answer to, and how would any disagreements between those home nations which subscribe to the same oversight body might be resolved.

**4.8** NFU Cymru recognises that some of the difficulties with having a joint body could be mitigated by for example ensuring that any joint body has offices in each nation, ensuring staff are recruited from each of the home nations, ensuring that there are robust dispute resolution mechanisms in place etc.

**4.9** Other obvious difficulties that might attach to a joint approach include the fact that the home nations are not starting from a position of regulatory alignment, rather domestic initiatives such as Wales' Environment Act and the Wellbeing of Future Generations Act place Wales in a stronger starting position with regard to the environment than for example England. It is difficult to see how an oversight body might manage a situation whereby different territories are working to different standards and objectives.

**4.10** It may also be the case that the window of opportunity that was presented by Defra to work together jointly with them (mooted in their consultation of last summer) may now have closed and there may not now be the opportunity to do so. We would also re-iterate that the prospect of a no-deal Brexit this Autumn is a real one, and time for devising governance arrangements, be they joint or stand-alone is very limited.

Cynulliad Cenedlaethol Cymru | National Assembly for Wales  
Y Pwyllgor Newid Hinsawdd, Amgylchedd a Materion Gwledig | Climate  
Change, Environment and Rural Affairs Committee  
Ymchwiliad i lywodraethu ac egwyddorion amgylcheddol ar ôl Brexit | Inquiry  
into environmental principles and governance post-Brexit  
Ymateb gan : Undeb Amaethwyr  
Evidence from : Farmers' Union of Wales

**General comments:**

1. In terms of this written response, the FUW have attempted to keep comments relevant to both the remit of the Committee and the FUW's key areas of expertise. As such, the observations provided below are not exhaustive in terms of possible areas of concern which fall within the Committee's remit.
2. The FUW has concern about the timing of the Welsh Government's current consultation and the associated CCERA inquiry given the current pressures on resources and uncertainty caused by Brexit, and the significant cuts to public funding which have reduced the capacity of departments to deal with such work.
3. The FUW believes that the consultation document adequately identifies the gaps in environmental governance structures and principles that will be created in leaving the EU.
4. That said, the FUW would highlight that in attempting to identify gaps, as opposed to carrying over EU functions in a straightforward way, there is a danger of creating large amounts of unnecessary or additional work without any consideration of the financial implications for bodies or others - and this at a time when the budgets of public bodies have been cut, workloads increased, and there is great uncertainty regarding the impact of Brexit on the public purse.
5. The FUW appreciates that Brexit provides an opportunity to take another look at the arrangements for environmental governance and consider how to make improvements in this area, but would recommend that any changes that are decided upon be regularly reviewed, and that where possible small steps - as opposed to sweeping changes - be implemented in order to minimise the likelihood of unforeseen consequences.
6. The FUW agrees that there is a need to enhance governance arrangements to encompass the current role of the European Commission (EC) and the European Court of Justice (ECJ) upon the UK's exit from the EU.

7. The FUW notes that in Wales, since 2015, there has been a programme of legislation placing sustainable development at the centre of Welsh governance through both the Well-being of Future Generations (Wales) Act 2015 (WFGA) and the Environment (Wales) Act 2016 (EA), with the latter designed to work together with the former to encourage a systematic approach to the environment by public authorities. The objectives of Sustainable Management of Natural Resources (SMNR), within the EA, show strong links to the WFGA's 'well-being goals'.
8. However, both the WFGA and the EA are still largely unknown to the general public, while similarly 'SMNR' is an unknown acronym for the vast majority of people. As such, the FUW would suggest that the terminology needs to be looked at while exploring how to better engage with the normal people to whom governments and public bodies are ultimately accountable.
9. It should be born in mind that Wales already has policies in place to deliver two of the four EU environmental principles, whereas other parts of the UK do not; Prevention - which can be delivered through the five ways of working outlined in the WFGA, and Precaution - which is encapsulated within the SMNR principles.
10. The FUW believes it makes sense to align future legislation to encompass all the EU environmental principles as well as the polluter pays and rectification at source principles. However, this should be done in a way that complements and enhances the environmental principles already reflected in the Environment Act, while adhering to the overarching context of sustainable development as outlined in the WFGA.
11. The polluter pays principle is by and large already a feature of the law, with a broad acceptance of the principle. However, clarity and recognition is needed as regards genuine accidents which occur when all the legislation has been followed correctly, as opposed to negligent or deliberate actions.
12. Critically, any actions taken after a problem has occurred (i.e. polluter pays) are far less desirable than prevention and pre-emptive action. The key merit of rectification at source is that it is more cost effective and more environmentally effective to prevent accidents rather than to pay for impacts afterwards. The First EU Environmental Action Plan describes rectification at source as *"The best environmental policy consists in preventing the creation of pollution or nuisances at source, rather than subsequently trying to counteract their effects"*.

- 13.** The FUW believes that principles which need to be further explored in order to maximise such benefits include:
- a.** Incentivisation - rewarding those who act proactively and implement good working practices.
  - b.** Education - understanding why actions are necessary and the consequences of pollution compliments the other principles and reduce the likelihood of problems
  - c.** Co-operation - Working collaboratively and adopting a holistic approach to environmental governance.
- 14.** The FUW believes that there is both value and practicality in designing a UK joint approach within which the WFGA and the EA could continue to function in Wales as intended.
- 15.** In this context it is worth noting that, following consultation with members, the Farmers' Union of Wales has agreed that frameworks should be established which prevent unfair competition between devolved regions and secure and protect adequate long term funding for agriculture, whilst respecting devolved powers over agriculture and the need for flexibility which allows devolved governments to make decisions which are appropriate for their regions.
- 16.** As such, it is believed that a UK joint approach to environmental principles would be a sensible way forward as it is important to maintain a level playing field for farmers that ensures no bias or advantage.
- 17.** However, mechanisms would have to be put in place to ensure a joint UK approach did not lead to conflict, given, for example, the number of rivers which cross boundaries between devolved regions.
- 18.** The FUW would like to emphasise that any UK joint approach needs to be co-designed by all UK Governments.
- 19.** In addition, while it is proper to consider which areas should require common or legal frameworks, it is equally important to consider how the creation, policing and enforcement of frameworks will be governed in a way which respects devolution and is sufficiently robust.
- 20.** As stated in previous submissions to committees of the National Assembly for Wales, the FUW believes mechanisms should be found to ensure sensible mutual agreement can be reached between the UK administrations in terms of the development, implementation and governance of frameworks, and arbitration of any disputes.



Mike Hedges AM  
Chair of Climate Change, Environment & Rural Affairs Committee  
National Assembly for Wales  
Cardiff Bay  
CF99 1NA

*Sent via email*

10<sup>th</sup> June 2019

Dear Mr Hedges,

**RE: Further evidence on fisheries licences**

Further to our oral evidence to the CCERA Committee on Thursday 6<sup>th</sup> June for the [follow up work on Marine Protected Area management](#), we are writing to provide further information on fisheries licences in relation to factory fishing (annex 1).

This was prompted by the following question:

*If we leave the EU and if the Welsh Government gets control of licensing of fishing in Welsh waters, what's to stop them simply only issuing licences for small-scale fishing and simply not issuing licences for factory fishing?*

We have also provided a second briefing on European Marine Sites and Marine Conservation Zones (provided as an attachment to this email). We share this in response to some evidence from other attendees that suggested European Marine Sites could be converted into Marine Conservation Zones. Our briefing outlines why we consider European Marine Sites and the Nature Directives to be vital to the network of Marine Protected Areas in Wales. Please note that this briefing pre-dates the consultation on environmental governance and principles in Wales, which is relevant to the final paragraph.

We thank you again for the opportunity to input into the Committee's inquiry on Marine Protected Area management.

Yours sincerely,

Emily Williams  
Co-Chair of WEL's Marine Working Group  
**Marine Policy Officer, RSPB Cymru**

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## Annex 1: Briefing on fisheries licences

### Fisheries licences after Brexit

The UK Fisheries Bill, as currently drafted, makes it clear that each administration is responsible for the licensing of its own vessels<sup>1</sup>. The Bill also provides powers to Welsh Ministers to license foreign fishing vessels within Wales and the Welsh zone<sup>2</sup>. In preparation for a possible exit before the UK Fisheries Bill receives Royal Assent, the Fisheries Administrations have also introduced secondary legislation<sup>3</sup> to allow control of foreign vessels in UK Waters in the interim. Under this new legislation, from exit day, fishing in the Welsh zone by a foreign fishing boat is prohibited unless authorised by a licence granted by the Welsh Ministers.

However, in response to the Committee's fourteenth conclusion on the Legislative Consent Memorandum for the UK Fisheries Bill<sup>4</sup>, the Minister highlighted that Welsh Government "*do not have the means to license other UK vessels in our waters as they will be licensed by their respective administrations (although their actions can be controlled, as necessary, via subordinate legislation specific to the activity that needs to be controlled).*" Based on this, our current understanding is that the licence (and licence conditions) of fishing vessels from the rest of the UK in Welsh waters shall not be under the control of Welsh Ministers. It should therefore be noted that the ability of Welsh Ministers to control factory fishing in Welsh waters by non-Welsh, UK vessels after Brexit may be limited; it will be dependent on the powers contained within the legislation under which they may choose to bring forward subordinate legislation. Clarity from Welsh Government as to which powers it would use to control fishing activities by these vessels, if required, is needed.

It may be the case that securing legislative competence for the Welsh Zone for the Welsh Assembly, could provide greater control over the types of fishing activity in this area; if this was used to bring forward a Welsh Fisheries Bill that sought to do so. However, concerns have been raised regarding the Welsh Government's proposed method for securing this competence (via the UK Fisheries Bill)<sup>5</sup>.

### Enhancing sustainability of fisheries in Wales post-Brexit

As highlighted in our oral evidence to the Committee, enhanced sustainability of fisheries in Wales could also be achieved through allocation of any new quota according to criteria developed in accordance with the Wellbeing of Future Generations Act. We were pleased to see that the Minister agreed with this<sup>6</sup> in her response to the Legislative Consent Memorandum on the UK Fisheries Bill. It should be noted however, that allocation of *existing* quota is complicated by the existence of Fixed Quota Allocations. Welsh Government describes<sup>7</sup> Fixed Quota Allocation as follows:

*"We apportion quota within the UK fishing industry using fixed quota allocation units. This allocation of quota:*

- *is held per vessel*
- *allows the holder to catch their share of the quota for fishing stock*
- *is not given to vessels under 10m*
- *follows various adjustments applied by the Fisheries Administrations...*

*Once the quota has been allocated, there is an amount left over. This forms the 'pool' against which the under-10m vessel fleet can fish. Again, this pool is split between the four UK Fisheries Administrations, as set out in the UK Fisheries Concordat of 2012."*

### Additional considerations

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<sup>1</sup> UK Fisheries Bill. Clause 10. Power to grant licences in respect of British fishing boats

<sup>2</sup> UK Fisheries Bill. Clause 12. Power to grant licences in respect of foreign fishing boats

<sup>3</sup> The Sea Fish Licensing (Wales) Order 2019

<sup>4</sup> **Conclusion 14:** The Welsh Government should provide further details about how it intends to use licensing conditions for UK vessels to secure adherence to environmental standards in the Welsh zone. In particular the Welsh Government should set out how licence conditions will be used to address plastic pollution and other, related matters.

<sup>5</sup> Letter from Welsh Government to CCERA, dated 27<sup>th</sup> March 2019. *Climate Change, Environment and Rural Affairs Committee report on the Legislative Consent Memorandum in relation to the UK Fisheries Bill.* [Online] Available at:

<http://www.senedd.assembly.wales/documents/s86861/Paper%20to%20Note%20-%20Correspondence%20from%20the%20Minister%20for%20Environment%20Energy%20and%20Rural%20Affairs%20-%2027%20Marc.pdf> [Accessed 10.6.2019]

<sup>6</sup> Letter from Welsh Government to CCERA, dated 27<sup>th</sup> March 2019. *Climate Change, Environment and Rural Affairs Committee report on the Legislative Consent Memorandum in relation to the UK Fisheries Bill.* [Online] Available at:

<http://www.senedd.assembly.wales/documents/s86861/Paper%20to%20Note%20-%20Correspondence%20from%20the%20Minister%20for%20Environment%20Energy%20and%20Rural%20Affairs%20-%2027%20Marc.pdf> [Accessed 10.6.2019]

<sup>7</sup> Fishing quota allocations [Online] Available at: <https://gov.wales/fishing-quota-allocations> [Accessed 10.6.2019]

- The term “factory fisheries” typically refers to fishing vessels with processing and freezing facilities onboard. We do not know the extent of this practice in Welsh waters, however, we would stress that other vessels also have the potential to take vast quantities of fish in a non-sustainable manner.
- Following our departure from the EU, we would welcome greater protections for forage fish species in Wales and are seeking reassurances from Welsh Government that no new fishery for such species will be developed. Forage fish, prey fish or low trophic fish, are small fish species (such as herring, sprat and sandeel) upon which larger animals prey for food. As such, these species are vital for the resilience of the wider ecosystem, providing a crucial trophic link between plankton, seabirds, cetaceans and other top predators in the marine food web.
- The replacement of European funding pots presents an opportunity to further incentivise sustainable practices.

## Briefing: European Marine Sites and Brexit in Wales

### Summary

- Welsh waters are rich in **wildlife and biodiversity**;
- Marine protected areas (MPAs) have a **vital** role to play in the conservation of habitats and species in the marine environment, and supporting a healthy functioning marine ecosystem upon which many Welsh communities and businesses depend;
- Ecologically coherent networks of MPAs are needed;
- The vast majority of **MPAs in Wales have been designated under European legislation**;
- Different approaches are taken to identify and manage European and domestic MPAs. **Both are crucial to ensuring Wales's marine biodiversity is safeguarded for future generations.**

### Welsh seas matter

The waters around Wales contain a staggering variety of species and habitats. They provide a home for amazing wildlife including bottlenose dolphins (the Cardigan Bay population is one of only two resident populations in the entire British Isles), over half of the world's Manx shearwaters and nationally scarce species such as delicate pink sea fans. Much of this special wildlife is found within marine protected areas (MPAs); nonetheless, many of Wales' marine site features are not in favourable condition<sup>1</sup> and need our protection.

### Much of our current site protection comes from European law

Wales' MPAs include sites designated under European, as well as domestic legislation. **Currently over 61% of Welsh waters is within MPAs designated under European law. However, to date less than 2% is designated under domestic law<sup>2</sup>** (see table 1).

**Table 1. Marine Protected Areas in Wales<sup>3</sup>**

Marine protected area classification	Designated under	Number in Welsh waters <sup>2</sup>	% coverage of Welsh waters <sup>4</sup>
Special Areas of Conservation (SAC) with marine components	Directive on the Conservation of Natural Habitats and of Wild Fauna and Flora (EU)	15	(44.3%)
Special Protection Areas (SPA) with marine components	Directive on the Conservation of Wild Birds (EU)	12	(17.1%)

<sup>1</sup> Natural Resources Wales. Indicative feature condition assessments for European marine sites (EMS) [Online] Available at: <https://naturalresources.wales/guidance-and-advice/environmental-topics/wildlife-and-biodiversity/find-protected-areas-of-land-and-seas/indicative-feature-condition-assessments-for-european-marine-sites-ems/?lang=en> [Accessed: 06.07.18]

<sup>2</sup> A Welsh Government led process to designate some additional Marine Conservation Zones under the UK Marine and Coastal Access Act is expected to commence in 2018.

<sup>3</sup> Pers comms. NRW. (2018)

<sup>4</sup> Offshore and inshore waters

Marine Conservation Zones	Marine and Coastal Access Act (England and Wales)	1	(0.04%)
Special Sites of Scientific Interest (SSSI) with marine components:	Wildlife and Countryside Act (UK)	107	(1.3%)

Yellow – Sites underpinned by European legislation. Green – sites underpinned by domestic legislation

### The European Nature Directives are fit for purpose

European Marine Sites have been designated in Wales under the Nature Directives<sup>5</sup>. In 2017, following a major review and public consultation, the European Commission announced that these Directives were fit for purpose but in need of better implementation:

*“The Commission has made public the results of its fitness check for the two nature directives on birds (Directive 2009/147) and habitats and species (Directive 92/43). It has found them to be **fit for purpose but in need of better implementation**. The Commission’s fitness checks serve to examine whether directives are still relevant or should be amended, in particular in view of deregulation, and **continue to be acceptable to economic operators...**”*

The four countries of the UK, including Welsh Government, submitted evidence to this fitness check<sup>6</sup>, highlighting their importance:

*“The Article 12 & 17 reports provide evidence of **the direct contribution that the Directives have made towards ensuring biodiversity**. The implementation of the Directives has also had a range of incidental benefits for broader biodiversity...”* [emphasis added].

### Domestic legislation was designed to complement, and not to replace the Nature Directives

The UK Marine & Coastal Access Act (MACAA), passed in 2009, introduced new legislation for the better general protection and management of UK seas, including a duty<sup>7</sup> to designate Marine Conservation Zones (MCZs) to form part of the UK’s MPA network. The MCZ provisions in the MACAA were designed to complement the existing protection in the marine environment, creating additional opportunities to protect nationally-important biodiversity. They were not designed to replace the provisions under the Nature Directives for European Marine Sites (EMS). Indeed, the MACAA is clear that EMS are also part of the UK network.

Marine Conservation Zones offer vital protection to nationally-important species and habitats. Nonetheless, the designation, management and monitoring processes required by MACAA are different and less stringent than those required under the regulations that implement the Nature Directives. As such, a direct conversion of European Marine Sites into Marine Conservation Zones, as currently defined, would risk a significant loss of environmental protection.

<sup>5</sup> European Union’s Directive on the Conservation of Natural Habitats and of Wild Fauna and Flora and European Union Directive on the Conservation of Wild Birds

<sup>6</sup> Evaluation study to support the Fitness Check of the Birds and Habitats Directives: UK submission. [Online] Available at: [http://ec.europa.eu/environment/nature/legislation/fitness\\_check/evidence\\_gathering/docs/Member%20State%20Stakeholders/Nature%20Protection%20Authorities/UK/MS%20-%20UK%20-%20NPA%20-%20EGQ.pdf](http://ec.europa.eu/environment/nature/legislation/fitness_check/evidence_gathering/docs/Member%20State%20Stakeholders/Nature%20Protection%20Authorities/UK/MS%20-%20UK%20-%20NPA%20-%20EGQ.pdf) [Accessed: 06.07.18]

<sup>7</sup> See relevant sections 116 – 124 of the Marine & Coastal Access Act 2009

## Marine protected area networks and Brexit

It is expected that the UK will remain a signatory to the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR) following EU exit, and therefore that Wales will continue to be bound by the requirements of this Convention. Under OSPAR, the UK is committed to contributing to an ecologically coherent network of MPAs in the North East Atlantic; this, in turn, is linked to international commitments under the World Summit on Sustainable Development and Convention on Biological Diversity. Both Marine Conservation Zones and European Marine Sites<sup>8</sup> are part of this network. Furthermore, our EMS are part of the EU-wide Natura 2000 network, the largest co-ordinated network of protected sites in the world<sup>9</sup>.

Wales' approach to marine protected areas following our departure from the EU should uphold its OSPAR obligations and its commitment to an ecologically coherent UK network, whilst also recognising the need to maintain (if not enhance) the current level of protection currently afforded to our European Marine Sites, which is not sufficiently replicated by OSPAR. Careful consideration should also be given to the role of Wales' (and all of the UK's) European Marine Sites with regards to the ecological coherence of the Natura 2000 network.

## Welsh Government's commitments to biodiversity and ecosystem resilience

The Welsh Government has committed to maintaining environmental standards post-Brexit. And indeed, Wales has world-leading legislation for sustainability, with the Environment (Wales) Act (2016) and the Well-being of Future Generations Act (2015) setting out Wales' commitment to biodiversity, ecosystem resilience and sustainable development. It is, therefore, essential that Wales champions European Marine Sites, as a vital way to safeguard our most precious marine life for the future. This will be achieved by **retaining and effectively managing these special sites, designating national sites to complement them and ensuring the ecological coherence of the UK network.**

An ecosystem-based approach to all decisions affecting the marine environment is needed. Welsh Government's current work programmes on marine spatial planning and future fisheries policies are further opportunities to embed this. At the same time, as Wales prepares to leave the EU, it must also ensure that all law and decision making, whether by governments or the courts, is underpinned by strong environmental principles.

Those principles that are set out in the EU treaties, such as the precautionary principle<sup>10</sup>, are fundamental to the success of MPA management practices which will deliver ecological, social and economic benefits for future generations. We welcome the Welsh Government's commitment to enshrine the environmental principles in law and address the governance gap that will arise when the UK leaves the EU at the first proper legislative opportunity<sup>11</sup>. The oversight and enforcement roles currently played by the European Commission are among those that must be replaced by robust new arrangements.

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<sup>8</sup> As well as Ramsar sites and SSSIs with marine components

<sup>9</sup> European Commission. Natura 2000. [Online] Available at: [http://ec.europa.eu/environment/nature/natura2000/index\\_en.htm](http://ec.europa.eu/environment/nature/natura2000/index_en.htm) [Accessed: 06.07.18]

<sup>10</sup> The Precautionary Principle is described as follows: "the precautionary principle is detailed in Article 191 of the Treaty on the Functioning of the European Union (TFEU). It relates to an approach to risk management whereby if there is the possibility that a given policy or action might cause harm to the public or the environment and if there is still no scientific consensus on the issue, the policy or action in question should not be pursued. Once more scientific information becomes available, the situation should be reviewed". EUR-LEX. Precautionary principle. [Online]: Available at: [https://eur-lex.europa.eu/summary/glossary/precautionary\\_principle.html](https://eur-lex.europa.eu/summary/glossary/precautionary_principle.html) [Accessed: 06.07.18]

<sup>11</sup> Commitment by Julie James AM during the Stage 3 debate of the Legislation Derived from the EU Bill.

**Wales Environment Link (WEL)** is a network of environmental, countryside and heritage Non-Governmental Organisations in Wales, most of whom have an all-Wales remit. WEL is a respected intermediary body between the government and the environmental NGO sector in Wales. Our vision is a healthy, sustainably managed environment and countryside with safeguarded heritage in which the people of Wales and future generations can prosper.

This briefing represents the consensus view of a group of WEL members working in this specialist area. Members may also produce information individually in order to raise more detailed issues that are important to their particular organisation.

