

National Assembly for Wales  
**Climate Change, Environment and Rural Affairs Committee**

# Environmental principles and governance post-Brexit

October 2019



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National Assembly for Wales

**Climate Change, Environment and Rural Affairs Committee**

# Environmental principles and governance post-Brexit

October 2019

# About the Committee

The Committee was established on 28 June 2016. Its remit can be found at: [www.assembly.wales/SeneddCCERA](http://www.assembly.wales/SeneddCCERA)

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Welsh Labour

## Current Committee membership:



**Andrew RT Davies AM**  
Welsh Conservatives



**Llyr Gruffydd AM**  
Plaid Cymru



**Neil Hamilton AM**  
UKIP Wales



**Jenny Rathbone AM**  
Welsh Labour



**Joyce Watson AM**  
Welsh Labour

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The following Members were also members of the Committee during this inquiry



**John Griffiths AM**  
Welsh Labour



**Dai Lloyd AM**  
Plaid Cymru

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## Overview

This is the Committee's second report in which we consider the effect of the UK's departure from the European Union on environmental principles and governance structures in Wales. This report builds on the conclusions and recommendations in our first report, *Environmental governance arrangements and environmental principles post-Brexit*, June 2018, taking account of proposals that have emerged from the Welsh and UK Governments since then.

Between the time of taking evidence to inform our work and the writing of this report, significant developments have taken place in Westminster in relation to the UK's departure from the EU. These include the prorogation of the UK Parliament and passing of legislation which aims to prevent a "no deal" Brexit. This report has been written at a time of unprecedented uncertainty about the UK's exit from the EU, and the outcome of these developments remain to be seen. Our conclusions and recommendations reflect the circumstances at the time of writing.

## Recommendations

**Recommendation 1.** The Welsh Government’s future Bill to address the environmental principles and governance gaps post-Brexit should:

- include an overarching objective to secure a high level of environmental protection within which the environmental principles are framed;
- list all four core environmental principles on the face of the Bill; and
- list “non-regression” or “progression” as a principle on the face of the Bill.  
..... Page 24

**Recommendation 2.** The Welsh Government should assess the benefits of including EU and international principles, other than the four core principles, within a future Welsh Bill, and report back to this Committee on its findings.  
..... Page 24

**Recommendation 3.** In determining the extent to which the duty to apply future environmental principles should apply, the Welsh Government should use, as its starting point, the public bodies listed in the Well-being of Future Generations (Wales) Act..... Page 24

**Recommendation 4.** The Welsh Government should endeavour to secure a commitment from the UK Government that non-devolved bodies operating in Wales will adhere to the future environmental principles..... Page 24

**Recommendation 5.** The Welsh Government’s future Bill should include provision for the list of principles, and public bodies to which the duty applies, to be amended for the purpose of adding to, or removing from, those lists. Amendments to these lists should be subject to an appropriate level of Assembly scrutiny..... Page 24

**Recommendation 6.** The Welsh Government should, within three weeks of the publication of this report, provide the Committee with further details on its agreement with the UK Government to have a shared, common set of environmental principles. In doing so, it should:

- clarify the form that the agreement with the UK Government takes and how it will be delivered in practice;
- clarify what the set of environmental principles will be;

- set out the rationale for each of those principles; and
- set out how the current domestic principles will be maintained within the shared principles. .... Page 24

**Recommendation 7.** The Welsh Government should clarify its position on the establishment of a UK-wide environmental governance body, as a matter of urgency. In doing so, it should provide details, beyond those already provided, of what it considers would constitute a UK-wide body that meets the needs of Wales. .... Page 38

**Recommendation 8.** The Welsh Government should report back to the Committee on its latest discussion with the UK and Scottish Governments on proposals for a UK-wide approach to addressing the governance gaps. This report should include details of any discussion with its counterparts on the development of a UK-wide environmental governance body, and the outcome of this. .... Page 38

**Recommendation 9.** The Welsh Government must ensure that the role and objectives of the new environmental governance body are clearly defined within a future Welsh Bill. There must be clear delineation between the role and functions of the new body and those of existing Welsh bodies. Where overlap, or potential overlap occurs, suitable legislative and non-legislative mechanisms must be in place to manage these. .... Page 39

**Recommendation 10.** The Welsh Government should set out how it intends any new Welsh governance body to work with the proposed OEP and any equivalent body in Scotland to ensure a co-ordinated approach to environmental protection across the UK post-Brexit. .... Page 39

**Recommendation 11.** The new environmental governance body must be fully independent of the Welsh Government. It must be:

- appointed by, and accountable to, the National Assembly;
- audited by the Auditor General for Wales; and
- funded through the Welsh Consolidated Fund. .... Page 40

**Recommendation 12.** The Welsh Government should make provision to ensure that the new Welsh governance body puts in place suitable arrangements to provide clear and strong structural separation between its advisory and regulatory functions. .... Page 40

**Recommendation 13.** The Welsh Government should ensure that the scope of the new governance body should extend to all Welsh public bodies who will be required to apply the environmental principles (see Recommendation 3).  
..... Page 40

**Recommendation 14.** The Welsh Government should provide a detailed explanation of the gaps arising as a result of the loss of the EU’s monitoring and reporting function, and its proposals to address these, beyond those set out in its consultation..... Page 41

**Recommendation 15.** The Welsh Government should clarify what monitoring and reporting requirements, beyond those contained in existing Welsh law, will be in place post-Brexit to support the effective oversight and scrutiny of the implementation of environmental legislation. In doing so, it should clarify whether and how EU reporting requirements have been retained in domestic law, and adapted..... Page 41

**Recommendation 16.** The Welsh Government should report back to the Committee on any discussions with the UK Government on how it intends to meet its international reporting obligations on environmental matters following exit from the EU..... Page 41

**Recommendation 17.** The Welsh Government should clarify what role the new governance body will have in facilitating reporting on international obligations and agreements on environment matters..... Page 41

**Recommendation 18.** The Welsh Government should adopt a clear and strong position that the UK should continue its membership of the EEA, and other EU agencies with environmental expertise, where there is demonstrable value. It should report back to the Committee on the outcome of future discussion with the UK Government on this matter. .... Page 41

**Recommendation 19.** The Welsh Government should develop proposals for a fining system to support the effective enforcement of environmental law post-Brexit. These proposals should be informed by a review of international examples of fining systems that operate within a domestic context, such as New Zealand. The proposals should be subject to consultation with stakeholders..... Page 42

**Recommendation 20.** The Welsh Government should consider whether, and if so how, fines for continued non-compliance with environmental law should apply to other Welsh public bodies which fall within the remit of the new governance body..... Page 42

**Recommendation 21.** The new governance body must be able to receive substantive complaints from citizens on breaches, or potential breaches, of environmental law..... Page 43

**Recommendation 22.** The new complaints system must be simple to access, free of charge, and liability free, for citizens..... Page 43

**Recommendation 23.** The Welsh Government should update the Committee on any preliminary work undertaken to assess the resources associated with the establishment of a new Welsh governance body. .... Page 43

**Recommendation 24.** The Welsh Government should report back to the Committee on any discussions with the UK Government on future funding to meet the cost of a new Welsh governance body. .... Page 43

**Recommendation 25.** The Welsh Government should set out a timeline for the development and implementation of its preferred transitional arrangements. In addition, it should report back to the Committee, within three weeks of the publication of this report, on the work of the stakeholder group tasked with considering proposals for transitional arrangements. .... Page 46

**Recommendation 26.** As soon as practicable after it has determined its preferred approach to transitional arrangements, and before developing final proposals, the Welsh Government should report back to the Committee. This report should include a comprehensive impact assessment of approaches considered, including details of the associated costs, and the rationale for its preferred approach..... Page 46

## Chair's foreword

Air pollution, decline in biodiversity, climate change are, in my opinion, the greatest challenges of our age.

Over many years, the EU's policies, shaped by Member States including the UK, have played a central role in tackling these challenges. These policies have helped put environmental protection firmly on the political agenda; driven up environmental standards; and have been a catalyst for improvements to the environment in which we live. When the UK leaves the EU, a new approach will be needed, one that can rise to meet the challenges we face. How that can be achieved is the subject of this Report.

Currently, the EU develops environmental policies and laws and acts as a watchdog to ensure that Member States comply with them. The EU can take action against governments that fail to comply, which can eventually lead to significant financial penalties.

On leaving the EU, this system of environmental governance will no longer apply in the UK. As the environment is a devolved area of responsibility, it will be for the Welsh Government to determine future environmental governance arrangements for Wales. What will this new system look like? And how will it meet Wales' needs? These are complex, but vital questions that need to be answered if we are to build on what we already have.

We have sought to influence the development of this new system from an early stage. We published our first report on this issue in June 2018, and made a number of high level recommendations. Over a year on, and with proposals emerging from the UK and Welsh Governments, we returned to the issues. This, our second report, sets out in detail our thinking on a post-Brexit governance system that delivers high environmental standards. It will ensure that the Welsh Government not only fulfils its commitment to non-regression, but, most importantly, has the potential to enhance the environment.

## 1. Introduction

1. Currently, EU bodies, such as the European Commission and the Court of Justice of the European Union (the CJEU) play an important role in the implementation and enforcement of EU derived environmental laws across the UK. These laws, and how they are interpreted, are shaped by the EU environmental principles, which are designed to ensure high environmental standards.
2. On exiting the EU, these governance structures and environmental principles will no longer apply in the UK. There is wide concern that this will create a “governance gap”, and potentially, lead to a reduction in environmental protection.
3. The Welsh Government has made clear that protecting and enhancing Wales’ natural resources and maintaining current standards in environmental protection post-Brexit is a priority. While recognising the loss of EU governance mechanisms, it asserts that the UK’s exit from the EU provides an opportunity to develop a system, which not only delivers on its commitment to non-regression, but enhances the environment over the longer term.<sup>1</sup>
4. Currently, as the environmental principles and governance structures are EU-wide, there is a common approach across the UK. There may be divergence following Brexit as the UK countries develop their own proposals.
5. The Welsh Government’s consultation, *Environmental Principles and Governance in Wales Post European Union Exit*, March 2019, highlights the different gaps and starting positions across the UK, and refers to Wales’ unique legislation. However, it recognises the importance of the four UK administrations working more collaboratively post-Brexit. More recently, the Welsh Government has reported that it has agreed with the UK Government to have a common set of environmental principles, although no further details are available. There is also still a question about whether the UK nations will come together to establish a joint governance body.

### Our first report

6. In June 2018, the Climate Change, Environment and Rural Affairs Committee (the Committee) published its report, *Environmental governance arrangements*

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<sup>1</sup> Welsh Government Consultation Document, *Environmental Principles and Governance in Wales Post European Union Exit, March 2019*

*and environmental principles post-Brexit* (our first report). In that report we explored a number of issues, including how best to retain the EU environmental principles post-Brexit, and whether a successor environmental governance body is needed to replace the governance functions currently carried out an EU level.

**7.** We called on the Welsh Government, amongst other things:

- to bring forward legislation to enshrine the EU environmental principles in law;
- to clarify its position on the establishment of a new environmental governance body post-Brexit; and
- to explain potential transitional arrangements for environmental governance in the event that a new governance body is not established before the UK exits the EU.

**8.** The Welsh Government responded to our first report in August 2018. It explained that it would be undertaking a full analysis of the governance gaps in Wales, in order to inform its approach post-Brexit. It committed to consulting on proposals to address the gaps before bringing forward primary legislation.

**9.** Since our first report, there have been a number of key developments, with proposals emerging from the UK Government and the devolved administrations. In light of these, the Committee agreed to undertake a further inquiry in this policy area.

## Terms of reference

**10.** The Committee's inquiry considered:

- Gaps in environmental governance structures and principles post-Brexit in Wales and whether the Welsh Government's analysis 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.

## Approach

**11.** We held meetings on 12, 20 and 26 June to take oral evidence from a range of witnesses. Details of these can be found at the end of this report. We would like to thank all those who contributed to our work.

**12.** We wrote to the Minister for Environment, Energy and Rural Affairs (the Minister) on 19 July to highlight issues which we believe need addressing as a matter of urgency. The Minister's response has been used to inform our conclusions and recommendations in this report.

## 2. Key developments since our first report

### 2.1. UK Government's draft Environment (Principles and Governance) Bill

- 13.** In December 2018, the UK Government published its draft Environment (Principles and Governance) Bill (the UK draft Bill), in line with the requirement in section 16 (Maintenance of environmental principles etc.) of the European Union (Withdrawal) Act 2018 (the EU Withdrawal Act).<sup>2</sup>
- 14.** The draft Bill requires the Secretary of State to prepare a policy statement explaining how the “environmental principles” set out in the Bill are to be interpreted and applied when making, developing and revising policies. Ministers of the Crown must “have regard to” the policy statement when making decisions on policies dealt with in the statement.
- 15.** The “environmental principles” include, amongst other things, the four EU core principles, and sustainable development.
- 16.** The draft Bill also provides for a new post-Brexit environmental governance body to be established, to be known as the Office for Environmental Protection (OEP). Defra announced that the OEP will be an independent, statutory environmental body that will hold government and public bodies to account on environmental standards, including taking legal action to enforce the implementation of environmental law where necessary.
- 17.** The provisions in the draft Bill mainly apply to England and Northern Ireland. However, they also apply to the other devolved nations in relation to “reserved matters”. On publishing the draft Bill, the UK Government invited joint working with the devolved administrations to extend the provisions more widely.
- 18.** In commenting on the draft Bill, the Minister stated that the proposed model for England is “not a workable approach for Wales” and is “not compatible with the devolution settlement or our existing legislation”. However, she reiterated her

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<sup>2</sup> Section 16 of the European Union (Withdrawal) Act 2018 places a requirement on the Secretary of State, within six months of the Act being passed, to publish a draft Bill consisting of (amongst other things) a set of environmental principles and provision for the establishment of an environmental governance body.

willingness to work collaboratively on potential UK-wide approaches and said she would “continue to proactively engage with the UK Government”.<sup>3</sup>

## 2. 2. Welsh Government’s consultation proposals

**19.** In March 2019, the Welsh Government published its much anticipated consultation, *Environmental Principles and Governance in Wales Post European Union Exit*. The consultation considers the implications of exiting the EU when the EU environmental principles and governance structures will no longer apply in the UK. It includes an analysis of the gaps in environmental principles and governance as they apply in Wales, and seeks views on an approach to addressing them. Further details on these can be found in subsequent chapters of this report.

**20.** The Welsh Government asserts that unique Welsh legislation, namely, the Well-being of Future Generations (Wales) Act (WBFG Act) and the Environment (Wales) Act (Environment Act), puts Wales in a favourable position with regards to gaps post-Brexit. The Welsh Government explains, therefore, that a different response is required for Wales than the other UK nations. Notwithstanding this, it acknowledges that a UK-wide governance mechanism may be appropriate and reiterates its willingness to collaborate on how such a mechanism could be designed.

## 2. 3. Latest Welsh Government developments

**21.** In July 2019, the Minister announced that a stakeholder task group had been established to help further develop the details of the environmental governance structure for Wales.

**22.** In August 2019, the Minister informed the Committee that the Welsh Government “[has] already agreed with the UK Government to have a common set of environmental principles and work is on-going on proposals, which where appropriate enable collaborative governance approaches”.<sup>4</sup> No further details have been provided.

**23.** In September 2019, the Welsh Government published a summary of responses to its consultation proposals.

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<sup>3</sup> Letter from the Minister for Environment, Energy and Rural Affairs to the Committee Chair, dated 7 February 2019

<sup>4</sup> Letter from the Minister for Environment, Energy and Rural Affairs to the Committee Chair, dated 21 August 2019

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## 2. 4. The future relationship between the UK and EU

**24.** The Withdrawal Agreement commits the UK to non-regression in the level of environmental protection and stipulates that, in giving effect to this, the UK must “reflect [the four EU core environmental principles] in [its] environmental legislation”. Furthermore, it commits the UK to implementing “a transparent system for the effective domestic monitoring, reporting, oversight and enforcement of its obligations...by an independent and adequately resourced body or bodies”.<sup>5</sup>

**25.** At the time of writing this report there remains considerable uncertainty around the terms on which the UK will exit the EU, and on the future UK-EU relationship. Regardless of the terms of exit, it is likely that environmental non-regression will be a prerequisite for any future UK-EU agreements.

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<sup>5</sup> Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council on 25 November 2018

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## 3. Environmental principles

### 3.1. Incorporating the EU principles

**26.** Under Article 191 of the Treaty on the Functioning of the European Union (TFEU), Union policy on the environment “shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union”. It goes on to list the EU principles on which legislation and policies must be based:

- The prevention principle;
- The principle that environmental damage should as a priority be rectified at source;
- The polluter pays principle; and
- The precautionary principle.

**27.** These principles flow through EU environmental legislation as the laws are developed within the context of the principles. This EU legislation has been converted to domestic law through the EU Withdrawal Act. However, the relevant articles of the TFEU will no longer apply when the UK leaves the EU.

**28.** One of the key questions for the Welsh Government (and the other UK administrations) is how the EU principles should be incorporated into domestic law post-Brexit.

#### The Welsh Government’s proposals

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**29.** According to the Welsh Government, two of the four EU principles, “precautionary” and “prevention”, are already captured within domestic law; the “sustainable development” principle and “five ways of working” of the WBFG Act, and the “sustainable management of natural resources” principles (SMNR) of the Environment Act.

**30.** It proposes to include the remaining EU principles, “polluter pays” and “rectification at source”, within Welsh primary legislation.

**31.** The Welsh Government explains that incorporating the “rectification at source” and “polluter-pays” principles into the existing legislative framework in Wales will address the gaps in relation to the principles covered. However, there would be a gap in relation to the scope of the application of the SMNR principles.

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**32.** Currently, the requirement in the Environment Act to apply the SMNR principles and pursue SMNR applies to Natural Resources Wales' (NRW) functions and to the Welsh Ministers in the development, production and implementation of the Natural Resources Policy, but not more generally.

**33.** The Welsh Government therefore proposes to extend the requirement to apply the SMNR principles and pursue SMNR to additional Welsh public bodies falling within devolved competence.

### Evidence from stakeholders

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**34.** Stakeholders highlighted key differences between the way in which the EU principles and the domestic principles currently function. They emphasised that the core principles were “overarching principles”, which shape the development of all law and policy, and are used to interpret the law. They argued that the domestic principles (in the WBFG and Environment Acts) do not function in the same way. Given this, the majority of stakeholders did not support the Welsh Government’s assertion that the “precautionary” and “prevention” principles were sufficiently captured within the WBFG and Environment Acts.

**35.** Greener UK stated:

“[The domestic principles] 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.”<sup>6</sup>

**36.** UK Environmental Law Association Wales Working Party (UKELA WWP) asserted:

“...the principles contained in [the WBFG and Environment] Acts are included in support of a well-being agenda across government that can be clearly distinguished from the specific needs of environmental protection; and, in support of the operationalisation or Sustainable Management of Natural Resources (SMNR).”<sup>7</sup>

**37.** Stakeholders also raised concern that the domestic principles were weaker than the “precautionary principle”. For example, the SMNR principles include the need to “take account of all relevant evidence and gather evidence in respect of uncertainties”. In contrast, the “precautionary principle” ensures that scientific

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<sup>6</sup> Written evidence PG06, Greener UK

<sup>7</sup> Written evidence PG03, UKELA WWP

uncertainty should not be a reason to avoid taking action to avoid environmental harm.

**38.** RSPB Cymru<sup>8</sup> and WWF Cymru<sup>9</sup> pointed out that the SMNR principles refer to the need to [emphasis added] “take action to prevent **significant** damage to ecosystems”, whereas the “precautionary principle” requires action in response to “potentially dangerous” effects.

**39.** A number of stakeholders pointed out that the WBGf and Environment Acts were designed with the assumption that the core principles would continue to apply to Wales. CLA Cymru explained that these Acts “were intended to complement and co-exist with the EU general and environmental principles and not replace them”.<sup>10</sup>

**40.** There was strong support among stakeholders for all four core principles to be included on the face of a future Bill to ensure clarity and consistency in application.

**41.** The majority of stakeholders emphasised that Article 191 of the TFEU, provides an overarching objective of securing “a high level of [environmental] protection”. This sets the framework within which the core principles are interpreted. RSPB Cymru argued that SMNR did not provide equivalence or “adequately encompass the objective of protecting the environment in its own right”.<sup>11</sup> Similar views were expressed by ClientEarth<sup>12</sup>, Greener UK<sup>13</sup> and WWF Cymru<sup>14</sup>.

**42.** There was widespread support from stakeholders for replicating the EU’s overarching objective in a future Bill to underpin the principles and support their application. NRW asserted that this would “promote better environmental outcomes and reduce the risk of regression in standards or gaps in application”.<sup>15</sup>

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<sup>8</sup> Written evidence PG08, RSPB Cymru

<sup>9</sup> Written evidence PG05, WWF Cymru

<sup>10</sup> Written evidence PG02, CLA Cymru

<sup>11</sup> Written evidence PG08, RSPB Cymru

<sup>12</sup> Written evidence PG09, ClientEarth

<sup>13</sup> Written evidence PG06, Greener UK

<sup>14</sup> Written evidence PG05, WWF Cymru

<sup>15</sup> Written evidence PG10, NRW

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### 3. 2. Application of the principles

**43.** There was widespread support among stakeholders for the Welsh Government’s proposal to extend the requirement to apply the SMNR principles and to pursue SMNR to public bodies falling within devolved competence. WWF Cymru believed that the requirement should be extended to all public bodies operating in Wales, including reserved bodies with functions falling within devolved competence. It also suggested that consideration should be given to including public body/private sector coalitions (for example, City Deals).<sup>16</sup>

**44.** UKELA WWP supported extending the SMNR requirements to all public bodies in Wales “so far as they are relevant to the discharge of their functions”. This would “ensure that these principles are considered in the work of these bodies wherever relevant without creating a duty for them to pursue them exclusively”.<sup>17</sup>

**45.** Notwithstanding their support for extending the requirement to apply the SMNR principles, stakeholders reiterated that this would be insufficient to provide equivalence post-Brexit. The majority of stakeholders called for a duty on public bodies to apply all four core principles. RSPB Cymru told the Committee that the Welsh Government’s proposal “shows commitment to applying a strong duty [in respect of] the principles”, which it welcomed. However, it called for “a new public duty”, which would encompass the SMNR duty and include “a duty to apply the core principles to secure a high level of environmental protection”. This should apply to all public bodies, as defined under section 6 of the Environment Act.<sup>18</sup>

### 3. 3. Other principles

**46.** Stakeholders identified a number of additional principles that they believed should be included within Welsh law, with calls for a more ambitious approach than to recreate the core EU principles. For example, CLA Cymru suggested that the Welsh Government’s approach to address gaps was a “lost opportunity”, and that focusing on the core principles was “limited” and “too static”. It stated:

“Whilst [the core principles] 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

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<sup>16</sup> Written evidence PG05, WWF Cymru

<sup>17</sup> Written evidence PG03, UKELA WWP

<sup>18</sup> Written evidence PG08, RSPB Cymru

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.”<sup>19</sup>

**47.** A number of stakeholders, including WWF Cymru<sup>20</sup>, Greener UK<sup>21</sup>, ClientEarth<sup>22</sup> and RSPB Cymru<sup>23</sup> called for the Welsh Government to consider including a “non-regression” principle within Welsh law. They asserted that this principle was not sufficiently captured in the SMNR framework given its “limited scope”. Some stakeholders, including The Woodland Trust<sup>24</sup>, called for the Government to commit to going further than non-regression and include a “progression” principle, which is an aspect of the TFEU.

**48.** The majority of stakeholders identified “integration” as a key principle. According to Professor Richard Cowell (Cardiff University), Dr Ludivine Petetin (Cardiff University) and Dr Mary Dobbs (Queen’s University Belfast) (Cowell et al) “integration” was “essential to a holistic and effective system of environmental governance”. It should, therefore, “become a central pillar of future Welsh legislation”.<sup>25</sup> Other stakeholders, including RSPB Cymru<sup>26</sup> and ClientEarth<sup>27</sup> echoed this. They did not consider that “integration” within the WBFG Act was equivalent to the EU principle.

**49.** Cowell et al emphasised that other principles “addressing borders, co-operation (including within the UK) and the allocation of responsibilities across territory” would become more significant post-Brexit. For example, “the obligation to avoid transboundary environmental damage”, which is a commonly recognised principle of international environmental law.<sup>28</sup> Several stakeholders echoed this.

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<sup>19</sup> Written evidence PG02, CLA Cymru

<sup>20</sup> Written evidence PG05, WWF Cymru

<sup>21</sup> Written evidence PG06, Greener UK

<sup>22</sup> Written evidence PG09, ClientEarth

<sup>23</sup> Written evidence PG08, RSPB Cymru

<sup>24</sup> Written evidence PG12, The Woodland Trust

<sup>25</sup> Written evidence PG04, Cowell et al

<sup>26</sup> Written evidence PG08, RSPB Cymru

<sup>27</sup> Written evidence PG09, ClientEarth

<sup>28</sup> Written evidence PG04, Cowell et al

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**50.** CLA Cymru<sup>29</sup>, NFU Cymru<sup>30</sup>, NRW<sup>31</sup> and WWF Cymru noted the broader principles of the TFEU and international agreements, including “conferral”, “proportionality”, “accountability”, “transparency” and “subsidiarity”, which provide the context within which the EU environmental principles were developed. They suggested that this broader context needs to be considered post-Brexit in Welsh law to give meaning to the principles.

### 3. 4. UK-wide environmental principles

**51.** Several stakeholders called for a shared set of common UK environmental principles and an overarching UK environmental objective. WWF Cymru suggested defining UK-wide principles in relation to an overarching objective but affording flexibility to the four nations to deliver the objective, and apply the principles, in a way bespoke to their needs.<sup>32</sup>

## Our view

For over forty years, the EU’s environmental principles have shaped the development of EU environmental law and policy. On leaving the EU, these core principles will no longer apply in the UK. Whether, and if so how, these principles should be incorporated in domestic law following the UK’s exit from the EU has been the subject of on-going debate.

In our first report, we recommended that the four core principles should be explicitly listed on the face of a future Welsh Bill. The Welsh Government accepted our recommendation, although committed only to “address any [post-Brexit gaps in Wales] in relation to the four core EU environmental principles”. The Welsh Government subsequently published its analysis of those gaps, which formed the basis of its consultation proposals.

The Welsh Government’s analysis of the gaps and its proposed approach to addressing them by integrating the core principles into Wales’ existing legislative framework is laudable but complex.

We do not believe the Welsh Government’s proposals will provide equivalence to the “prevention” and “precautionary” principles. The domestic principles do

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<sup>29</sup> Written evidence PG02, CLA Cymru

<sup>30</sup> Written evidence PG11, NFU Cymru

<sup>31</sup> Written evidence PG10, NRW

<sup>32</sup> Written evidence PG05, WWF Cymru

not provide the same, overarching framework for decision making and policy development as the EU principles.

While extending the application of the SMNR principles and legislating for the “polluter pays” and “rectification at source” will go some way in addressing the gaps, we are not convinced that this approach goes far enough. Indeed, the evidence we received reinforces the need for all four core principles to be explicitly listed on the face of a future Welsh Bill. We see no reason for this to contradict or undermine Wales’ existing legislative framework, given that this framework and the core principles already co-exist. We believe that listing the core principles in this way will provide certainty and clarity for the sector and Welsh citizens. This will also demonstrate to Wales’ global partners, simply and clearly, its continuing commitment to the four core principles post-Brexit.

We believe that the four core principles should be accompanied by an overarching objective to secure “a high level of environmental protection”, essentially replicating the current EU approach.

The Welsh Government’s proposals show a willingness to consider legislating to include other principles which may be of benefit to the new governance system in Wales. We are encouraged by this. We received evidence about the need to include a range of EU and international principles within a future Welsh Bill. We believe this merits further consideration.

The Welsh Government has made clear its commitment to non-regression. While we welcome this, we believe the Welsh Government should, as a minimum, reinforce its commitment by including “non-regression” as an additional core principle in a future Welsh Bill. We strongly believe the Welsh Government should consider including “progression” as a core principle, to demonstrate its ambition in this regard.

There must be sufficient flexibility within new governance system to enable changes to be made to reflect future developments within Wales and, where appropriate, internationally. The Welsh Government must ensure that the future Welsh Bill provides for this.

We heard from stakeholders about the advantages of a common set of environmental principles for the UK. While we are encouraged that the Welsh and UK Governments have agreed to such an approach, we are disappointed that no further details have been provided in relation to this. The Welsh Government must address this as a matter of urgency.

**Recommendation 1.** The Welsh Government's future Bill to address the environmental principles and governance gaps post-Brexit should:

- include an overarching objective to secure a high level of environmental protection within which the environmental principles are framed;
- list all four core environmental principles on the face of the Bill; and
- list “non-regression” or “progression” as a principle on the face of the Bill.

**Recommendation 2.** The Welsh Government should assess the benefits of including EU and international principles, other than the four core principles, within a future Welsh Bill, and report back to this Committee on its findings.

**Recommendation 3.** In determining the extent to which the duty to apply future environmental principles should apply, the Welsh Government should use, as its starting point, the public bodies listed in the Well-being of Future Generations (Wales) Act.

**Recommendation 4.** The Welsh Government should endeavour to secure a commitment from the UK Government that non-devolved bodies operating in Wales will adhere to the future environmental principles.

**Recommendation 5.** The Welsh Government's future Bill should include provision for the list of principles, and public bodies to which the duty applies, to be amended for the purpose of adding to, or removing from, those lists. Amendments to these lists should be subject to an appropriate level of Assembly scrutiny.

**Recommendation 6.** The Welsh Government should, within three weeks of the publication of this report, provide the Committee with further details on its agreement with the UK Government to have a shared, common set of environmental principles. In doing so, it should:

- clarify the form that the agreement with the UK Government takes and how it will be delivered in practice;
- clarify what the set of environmental principles will be;
- set out the rationale for each of those principles; and
- set out how the current domestic principles will be maintained within the shared principles.

## 4. Environmental governance

**52.** The European Commission, CJEU and other European institutions have a role in ensuring Member States comply with EU environmental law. These functions include monitoring and reporting on environmental law implementation, receiving citizens' complaints, and taking enforcement action.

**53.** As a result of exiting the EU, environmental law and policy, which was derived from the EU, will no longer be subject to the oversight of EU institutions and the CJEU.

### The Welsh Government's proposals

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**54.** The Welsh Government's consultation seeks views on "the most effective and coherent approach to improving environmental governance" following the UK's exit from the EU. This includes whether improvements could be made to existing governance structures in Wales, or whether a specific oversight body is required.

**55.** The Welsh Government considers that exiting the EU could lead to three potential governance gaps, namely the loss of:

- Independent accountability;
- A simple and inexpensive mechanism for citizens to raise complaints; and
- Enforcement mechanisms.

**56.** In considering how best to address the above gaps, it seeks views on the role of existing bodies in a new environmental governance structure.

**57.** The Welsh Government proposes that the role of any new body would be "to provide oversight and implementation of legislation relating to Wales' natural resources in a way which is aligned to the existing Welsh legislation". It seeks views on the functions of a new body, in particular, advisory, scrutiny and enforcement functions. It does not propose a specific governance model, nor does it explicitly seek views on preferences for a Welsh body or a UK-wide body.

### 4.1. A UK-wide body

**58.** While stakeholders agreed the need for co-ordination across the UK, there were differing views on whether a UK-wide governance body should be established.

**59.** WWF Cymru<sup>33</sup>, Greener UK<sup>34</sup> and FUW<sup>35</sup> called for a UK-wide body that respects devolution and existing Welsh law, co-owned and co-designed by the UK nations. While RSPB Cymru acknowledged the potential advantages of a UK-wide body, it highlighted the risk that the body’s attention could be concentrated where resources are greatest; “most likely in England”. It highlighted that this risk could be more significant if, rather than a UK-wide body, a joint body between 2 or 3 of the UK nations was established.<sup>36</sup>

**60.** NFU Cymru questioned the practicalities of developing joint governance arrangements given that the proposals of respective governments were at different stages, and the time available before exit day.<sup>37</sup>

**61.** In terms of the UK draft Bill’s proposed OEP, CLA Cymru raised concern that it would “cross over and collide” with the Welsh Government’s proposals and could become a “legal minefield”.<sup>38</sup>

## 4. 2. Role of existing accountability bodies in new governance structure

**62.** While existing bodies such as the Auditor General for Wales (AGW) and the Public Services Ombudsman for Wales (PSOW) provide oversight of Welsh public bodies, they are not responsible for scrutinising the proper implementation of environmental law, nor do their functions extend to undertaking continuous monitoring or enforcement.

### Evidence from stakeholders

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**63.** Cowell et al highlighted the challenges faced by the Welsh Government in seeking to address the gaps in environmental governance so as to ensure integration with existing Welsh governance structures. They stated:

“the issue of how existing organisational roles fit within any new environmental governance structure raises dilemmas and raises

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<sup>33</sup> Written evidence PG05, WWF Cymru

<sup>34</sup> Written evidence PG06, Greener UK

<sup>35</sup> Written evidence PG07, FUW

<sup>36</sup> Written evidence PG08, RSPB Cymru

<sup>37</sup> Written evidence PG11, NFU Cymru

<sup>38</sup> Written evidence PG02, CLA Cymru

complex questions with potentially far-reaching implications for [the existing Welsh governance structures].”<sup>39</sup>

**64.** Cowell et al asserted that these challenges were greatest in respect of integration with the Future Generations Commissioner for Wales (the FGC). They told the Committee that, “in the longer term, the small size of Wales might raise questions about having separate “watchdogs” for environmental protection and sustainable development”.<sup>40</sup>

**65.** The evidence received from stakeholders reinforced the conclusion in our first report, that there are no UK or Welsh bodies, as currently constituted, that could take on the EU environmental governance functions, in whole or part. Furthermore, some stakeholders asserted that improving or adapting existing governance structures to address the gaps post-Brexit would be problematic.

**66.** WWF Cymru told the Committee that changing an existing body to undertake the necessary functions “would be as complex as establishing a new one and risks fundamentally changing/losing the purpose that existing body currently has”. It also noted that the constitution of some existing bodies, including the FGC were not sufficiently independent of Government.<sup>41</sup>

**67.** Greener UK echoed the above and warned against “retrofitting an existing body”. It stated:

“[This] 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.”<sup>42</sup>

**68.** There was strong support among stakeholders for a new governance body to be established, not least to ensure that the environment remains a priority for Government post-Brexit, particularly within constrained budgets, and to drive forward change.

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<sup>39</sup> Written evidence PG04, Cowell et al

<sup>40</sup> Written evidence PG04, Cowell et al

<sup>41</sup> Written evidence PG05, WWF Cymru

<sup>42</sup> Written evidence PG06, Greener UK

### 4. 3. Scope of the new body

#### Welsh Government proposals

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**69.** The Welsh Government states that the policy areas covered by the body could be guided by the Environment Act approach and the definition of natural resource. This would mean that the scope of a body would, for example include: water, air, nature conservation, climate change, soils, forestry, chemicals, pesticides, waste, circular economy and where these intersect with other policy areas for example where water and agriculture intersect.

**70.** It acknowledges that, in areas where an existing body provides advice, for example the UK Committee on Climate Change (UK CCC), there will need to be clear delineation of roles to ensure there is no overlap or duplication.

**71.** It is proposed that the remit of the new body could extend to: Welsh Ministers, NRW, local authorities, and Ministers of the Crown (consistent with their responsibilities under the Environment Act).

#### Evidence from stakeholders

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**72.** Stakeholders highlighted the need for the scope of the new governance arrangements to be broad and to cover all policy areas that interact with the environment, in line with the current EU arrangements.

**73.** ClientEarth asserted that “all environmental issues as well as issues which touch on the environment should be within the scope”. It recommended drawing on the definition of “environment” in the Environmental Information Regulations 2004. This definition “encompasses all measures that affect or are likely to affect the environment”. RSPB Cymru echoed this.<sup>43</sup>

**74.** The majority of stakeholders suggested that the bodies within the remit of the new governance body should mirror those to whom the principles and accompanying duty would apply.

**75.** NFU Cymru expressed a different view. It suggested that the primary role of the new body should be to hold the Welsh Government to account for non-compliance with of EU derived environmental law. As such, it was not in favour of extending the remit of the new body to other public bodies. It asserted that this would “undermine the rights and responsibilities of Welsh Ministers”.<sup>44</sup>

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<sup>43</sup> Written evidence PG09, ClientEarth

<sup>44</sup> Written evidence PG11, NFU Cymru

## 4. 4. Constitution of a new body

### The Welsh Government's proposals

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**76.** The Welsh Government proposes that “any oversight body should be independent of government”. It seeks views on how this could best be achieved. It has put out proposals for how this could be achieved.

### Evidence from stakeholders

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**77.** There was overwhelming support among stakeholders for the new governance body to be fully independent of government, and for this to be reflected in its constitution UKELA WWP stated:

“To establish any body that is capable of bringing government departments and public bodies to account absolutely requires a body with a strong measure of independence from the executive...”<sup>45</sup>

**78.** Stakeholders called for the National Assembly to have a role in appointments; for the new body to be funded directly through the Welsh Consolidated Fund; and to be accountable to the Assembly.

**79.** UKELA WWP<sup>46</sup> and William Wilson (Wyeside Consulting Limited)<sup>47</sup> suggested that the Commissioner for the Environment and Sustainable Development in Canada, could be drawn upon as suitable model for independence. Greener UK suggested that the Hungarian Commissioner for Future Generations is a “commendable” model.<sup>48</sup> However, they emphasised that neither of these Commissioners undertook enforcement functions.

**80.** The AGW emphasised the need for independent sources of funding “to avoid perverse disincentives” and for adequate funding to enable the new body to exercise its functions. He referred to “challenges of lacking capacity and capability” faced by NRW, which is funded directly by the Welsh Government.<sup>49</sup>

**81.** Linked to this, some stakeholders highlighted that independence would be important to ensure that the environment is afforded sufficient priority in the face of competing government priorities and constrained budgets.

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<sup>45</sup> Written evidence PG03, UKELA WWP

<sup>46</sup> Written evidence PG03, UKELA WWP

<sup>47</sup> Written evidence PG07, William Wilson

<sup>48</sup> RoP, para 271, 20 June 2019

<sup>49</sup> [Letter from the Auditor General for Wales to the Committee Chair, dated 4 June 2019](#)

## 4. 5. Avoiding overlapping functions

### Evidence from stakeholders

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**82.** While there was strong support for the establishment of a new governance body, stakeholders emphasised the need to avoid duplication or overlap of the body's functions with those of existing oversight and accountability bodies.

**83.** The AGW explained that “overlapping functions clearly risk inefficiency” and that “interlocking functions also risk confusion, duplication and inefficiency”.<sup>50</sup> A similar point was raised by the PSOW.<sup>51</sup>

**84.** NRW highlighted the need for the role and function of the new body to be clear and, “where there are overlaps, to clarify exactly how those exist and how those will be dealt with”.<sup>52</sup> In particular, it called for further clarity on the proposed advisory function of the new body, and how this would fit in with NRW's leadership role on SMNR, for example, in providing advice and guidance on SMNR principles and their application.<sup>53</sup>

**85.** Professor Robert Cowell told the Committee that “an overlap [in functions] is probably better than a gap” and that Memoranda of Understanding could be used to address this.<sup>54</sup>

## 4. 6. Monitoring and reporting

**86.** The European Commission currently monitors the implementation of environmental laws by reference to sets of national indicators and implementation reports. European Commission reporting on progress provides scientific data and a basis for holding Member State governments to account in terms of implementation.

**87.** Following Brexit, the UK Government will no longer be required to submit implementation reports to the European Commission. However, the UK will still be required to report under a range of international agreements. Where this is currently done through the EU, the UK will need to do this independently. The UK will no longer have access to the wider expertise, systems and data of the EU; or

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<sup>50</sup> Letter from the Auditor General for Wales to the Committee Chair, dated 4 June 2019

<sup>51</sup> Letter from the Public Services Ombudsman for Wales to the Committee Chair, dated 3 June 2019

<sup>52</sup> RoP, para 30, 20 June 2019

<sup>53</sup> Written evidence PG10, NRW

<sup>54</sup> RoP, para 117, 12 June 2019

the economy of scale for information gathering through the European Environment Agency (EEA) and European Chemicals Agency (ECHA).

### The Welsh Government's proposals

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**88.** The Welsh Government's proposals set out the monitoring and reporting requirements in the WBFG and Environment Acts. It suggests that, in carrying out its scrutiny function, the new body should be able to utilise the reports published by other bodies, such as NRW, and to commission or request additional information from other public bodies as appropriate.

### Evidence from stakeholders

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**89.** Stakeholders highlighted the role of the EU Commission in monitoring the implementation of environment law to ensure compliance. According to stakeholders, monitoring and reporting would be "vital functions" of the new body, which would be needed to support the delivery of its wider role.

**90.** WWF Cymru asserted:

"[The Welsh Government's proposals] understate the strength of the EU system with regards to how it functions to extensively monitor and collect data. While we do have some national data collection and analysis it is not as expansive, nor does it proactively monitor compliance with objectives and regulations in the same manner."<sup>55</sup>

**91.** A similar view was expressed by RSPB Cymru who suggested that further consideration should be given to how best to address "the extensive monitoring and data collection activities of the EU, including proactive monitoring of compliance with objectives and regulations".<sup>56</sup>

**92.** Cowell et al suggested that further clarification was required on how far the current reporting requirements under the WBFG and Environment Acts "would fill the potential vacuum left by EU obligations".<sup>57</sup>

**93.** ClientEarth raised concern that EU reporting requirements have been lost in the process of transposing EU to domestic law.<sup>58</sup> Cowell et al suggested that the these requirements should be replaced with comparable requirements to report

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<sup>55</sup> Written evidence PG05, WWF Cymru

<sup>56</sup> Written evidence PG08, RSPB Cymru

<sup>57</sup> Written evidence PG04, Cowell et al

<sup>58</sup> RoP, para 235, 20 June 2019

to the new body. This would “facilitate its reporting capacity and provide the information to conduct closer investigations of particular implementation problems”.<sup>59</sup>

**94.** In commenting on the need for the UK to independently meet international reporting requirements on environmental matters post-Brexit, NRW stated:

“EU directives require monitoring and evidence-based reporting against environmental standards. Some of these are aggregated at EU level and provided to international obligation or direct to UN obligations...it's important that there's not a gap here, and that we recognise that there's a need for further clarity on how reporting and aggregating of environmental monitoring data for Wales and the UK against international and UN requirements is undertaken and delivered in the future.”<sup>60</sup>

**95.** Many stakeholders raised concern about the “loss of technical expertise” in collecting and assessing data.

**96.** RSPB Cymru told the Committee that the European Environment Agency (EEA) “represents a massive resource for reporting and gathering information and it would be extremely difficult to replicate that outside of the European Union”.<sup>61</sup>

**97.** Green Alliance echoed this and stated “it seems inconceivable that we wouldn't want to retain membership [of the EEA]”.<sup>62</sup> There were calls from stakeholders for Wales and/or the UK, where possible, to retain membership of the EEA, and other relevant agencies, post-Brexit. They emphasised that this would be an effective use of resources.

## 4. 7. Enforcement

**98.** The European Commission can take enforcement action which includes taking a Member State to the CJEU in the case of a breach of EU law. Only a small number of cases are heard by the CJEU.

**99.** The CJEU may require a remedy and potentially impose infraction fines if the Member State has not complied with the initial judgement. An important feature

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<sup>59</sup> Written evidence PG04, Cowell et al

<sup>60</sup> RoP, para 41, 20 June 2019

<sup>61</sup> RoP, para 89, 26 June 2019

<sup>62</sup> RoP, para 236, 20 June 2019

of the EU process is that, unlike judicial review, it is not limited to considering due process but can also consider whether a breach has occurred.

### The Welsh Government's proposals

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**100.** The Welsh Government's consultation seeks views on how effective enforcement action can be taken. It proposes informal and formal mechanisms to seek solutions to issues of non-compliance. These include an oversight body and the government/public body working collaboratively to seek a solution, and, more formal procedures similar to those used within the EU system.

**101.** The Welsh Government's proposals do not explicitly include the imposition of infraction fines. It states that deterrents should be "genuine and effective".

### Evidence from stakeholders

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**102.** Stakeholders highlighted the EU's strong enforcement function, and called for this to be replicated post-Brexit. They reported weaknesses within domestic enforcement structures and lack of remedy and sanction for non-compliance with legislation.

**103.** There was widespread support among stakeholders for an informal enforcement mechanism to enable issues to be resolved via co-operation. However, they asserted that a robust, formal mechanism, including enforcement proceedings, and credible sanctions for continued non-compliance, was essential.

**104.** ClientEarth stated:

"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."<sup>63</sup>

**105.** There was strong support among stakeholders for a formal mechanism to enable cases investigated by the new body to be referred to an appropriate judicial forum for review. They reiterated the weakness of judicial view and argued it was not an appropriate or effective replacement for the infraction procedures available to the CJEU. A number of stakeholders called for the establishment of a bespoke environmental court or tribunal with technical experts from across a range of environmental policy areas.

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<sup>63</sup> Written evidence PG09, ClientEarth

**106.** The majority of stakeholders asserted that financial penalties were an essential enforcement tool, and that the threat of infraction fines was key to the success of the EU system. They argued strongly that fines for continued non-compliance should form part of the new domestic enforcement system.

**107.** Cowell et al explained:

“...there is much concern that the loss of the powers to fine governments for non-compliance with CJEU judgements represents the loss of a significant lever for driving enforcement. The power for courts to impose fines on the government and other public bodies should be seriously considered.”<sup>64</sup>

**108.** They suggested that revenue from fines could be used for environmental purposes, for example, to fund projects that would enhance environmental protection.<sup>65</sup>

**109.** Greener UK asserted that the threat of fines means that informal mechanisms were more likely to lead to resolution. While it acknowledged the practical challenges of replicating a fining system within the domestic context, it questioned whether any other enforcement action would be an equally effective deterrent.<sup>66</sup>

## 4. 8. Complaints

**110.** EU law currently allows citizens to report to the European Commission in instances of lack of compliance with EU legislation. The European Commission has discretion to act upon the information received, which can lead to infringement proceedings before the CJEU as discussed above.

**111.** Following Brexit, UK citizens will no longer be able to utilise the citizens complaint system provided by the EU.

**112.** Existing mechanisms in Wales are focused on assessing whether proper and legal processes have been followed rather than merits of complaints. The Welsh Government highlights in its consultation that there is no specific environmental focus within the existing bodies and a lack of expertise to assess individual complaints.

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<sup>64</sup> Written evidence PG04, Cowell et al

<sup>65</sup> Written evidence PG04, Cowell et al

<sup>66</sup> RoP, para 260, 20 June 2019

## The Welsh Government's proposals

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**113.** The Welsh Government states that there should be “no reduction in citizens’ rights as a result of Brexit”. It seeks views on how a governance body could receive complaints from citizens and civil society without conflicting with the complaints functions of other Welsh public bodies. It asserts that any new complaints system should be simple and free for citizens to use.

## Evidence from stakeholders

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**114.** There was strong support among stakeholders for the new governance body to undertake a complaints function as a means of addressing the gap arising from the loss of the EU citizens’ complaints system.

**115.** Stakeholders emphasised the importance of the EU system, which empowers citizens to instigate action against government for non-compliance with environmental law. CLA Cymru stated:

“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.”<sup>67</sup>

**116.** Stakeholders highlighted the limitations of existing domestic mechanisms as a means of access to justice on environmental matters. They asserted that these were inadequate substitutes for the EU citizens’ complaints system. Stakeholders, including ClientEarth<sup>68</sup>, Dr Ludivine Petetin<sup>69</sup> and WWF Cymru<sup>70</sup> called for a replacement system in Wales to ensure non-regression in UK citizens’ rights post-Brexit.

**117.** There was broad consensus that any new complaints mechanism should be simple to access, cost free, and liability-free, in line with the EU system. The

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<sup>67</sup> Written evidence PG02, CLA Cymru

<sup>68</sup> Written evidence PG09, ClientEarth

<sup>69</sup> RoP, para 73, 12 June 2019

<sup>70</sup> Written evidence PG05, WWF Cymru

PSOW<sup>71</sup> and FGC<sup>72</sup> highlighted the need to avoid duplication with existing systems and confusion for citizens.

**118.** NFU Cymru did not support the new governance body undertaking a complaints function. It asserted that “the primary function of [the new body is] the oversight of public bodies rather than the investigation of complaints from members of the public”. It raised concern about the volume of potential complaints, which could hinder the ability of the new body to discharge its other functions.<sup>73</sup>

**119.** NFU Cymru argued that citizens were already able to pursue complaints through a number of avenues, for example, raising complaints with elected representatives, relevant ombudsmen, or through judicial review.<sup>74</sup>

## 4. 9. An advisory role

### The Welsh Government’s proposals

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**120.** The Welsh Government suggests there is a potential role for the new body to act as an advisor to assist public bodies contribute to SMNR and deliver environmental legislation.

### Evidence from stakeholders

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**121.** There were mixed views from stakeholders on providing the new body with an advisory function. A few stakeholders raised concern about potential conflicts of interest in combining advisory and regulatory functions. Others suggested that advising on compliance issues would be an important function for the new body, with some advocating a broader advisory role.

**122.** The AGW pointed out that the EU Commission “sets strategy and provides interpretation of its principles, but it does not actually act in an advisory capacity to public bodies”. He urged caution about combining advisory and review functions:

“Having a specific function of acting in an advisory capacity risks undermining the regulatory functions. Combining advisory functions with review functions in one body tends to lead to apparent, if not

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<sup>71</sup> [Letter from the Public Services Ombudsman for Wales to the Committee Chair, dated 3 June 2019](#)

<sup>72</sup> [Letter from the Future Generations Commissioner for Wales, dated 7 June 2019](#)

<sup>73</sup> Written evidence PG11, NFU Cymru

<sup>74</sup> Written evidence PG11, NFU Cymru

actual, conflicts of interest and reduces confidence in the review functions.”<sup>75</sup>

**123.** NFU Cymru did not support the new body undertaking an advisory function. It asserted there was “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”.<sup>76</sup>

**124.** Greener UK noted that existing bodies managed to combine these functions successfully.<sup>77</sup> NRW confirmed that it “has structural separation of [its advisory and regulatory] functions”.<sup>78</sup>

## Our view

### A UK-wide governance body

In our first report, we set out the benefits of a UK-wide environmental governance body. We called for the Welsh Government to clarify whether it supports the establishment of such a body. The Welsh Government told us it was “too early to give a definitive response but that discussions were on-going with the other UK nations on the potential for a UK-wide approach”. Over a year on from our report, it has provided no evidence of progress in agreeing a way forward with its counterparts. It appears that the Welsh Government has not ruled out a UK-wide governance body. However, it remains unclear on what terms the Welsh Government would be willing to support the establishment of such a body, or whether this would be its preferred option. The Welsh Government must clarify its position on a UK-wide body, as a matter of urgency.

The Welsh Government asserts that the UK Government’s approach to establishing suitable governance arrangements, set out in the UK draft Bill, is not appropriate or acceptable for Wales. We strongly agree. We reiterate the recommendation made in our first report, that any UK-wide body must be co-designed; accountable to legislatures, rather than governments; resourced appropriately; and accompanied by appropriate mechanisms to resolve disputes. For the provisions of the draft Bill to work for Wales, wholesale changes would need to be made. With continuing uncertainty around the timing of the introduction of the UK Bill, and the Welsh Government’s proposals

<sup>75</sup> Letter from the Auditor General for Wales to the Committee Chair, dated 4 June 2019

<sup>76</sup> Written evidence PG11, NFU Cymru

<sup>77</sup> RoP, para 263, 20 June 2019

<sup>78</sup> RoP, para 122, 20 June 2019

still in the early stages of development, it remains unclear whether a UK-wide body remains a viable option.

We note the Welsh Government's assertion that "there are a number of ways to achieve a UK-wide approach [to address governance gaps] than merely by the development of a UK-wide body". We would like further details from the Welsh Government on the development of any related proposals.

### A Welsh governance body

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It is clear that existing oversight and governance bodies in Wales are not capable of undertaking the current EU environmental governance functions. It may be possible for improvements to be made to existing governance structures to address some of the gaps arising in environmental following Brexit. However, this would involve an overhaul of the role and functions of existing bodies. Furthermore, the level of independence required to effectively hold the Welsh Government to account would not be achieved without changes to the constitution of certain bodies. We do not consider this appropriate or desirable.

There is, therefore, a strong case for a new, dedicated, governance body to deliver a robust and effective system of environmental governance in Wales post-Brexit. The role and objectives of the new body must be clearly defined. There must be clear delineation between the role and functions of the new body and those of existing Welsh bodies.

The Welsh Government's proposals could have significant implications for existing oversight and governance bodies in Wales. We would, therefore, expect the Welsh Government to have fully engaged those bodies when developing its proposals. We are disappointed that this does not appear to have been the case. We expect a high level of engagement with these bodies in the development of more detailed proposals.

**Recommendation 7.** The Welsh Government should clarify its position on the establishment of a UK-wide environmental governance body, as a matter of urgency. In doing so, it should provide details, beyond those already provided, of what it considers would constitute a UK-wide body that meets the needs of Wales.

**Recommendation 8.** The Welsh Government should report back to the Committee on its latest discussion with the UK and Scottish Governments on proposals for a UK-wide approach to addressing the governance gaps. This report should include details of any discussion with its counterparts on the

development of a UK-wide environmental governance body, and the outcome of this.

**Recommendation 9.** The Welsh Government must ensure that the role and objectives of the new environmental governance body are clearly defined within a future Welsh Bill. There must be clear delineation between the role and functions of the new body and those of existing Welsh bodies. Where overlap, or potential overlap occurs, suitable legislative and non-legislative mechanisms must be put in place to manage these.

### Co-operation and co-ordination with equivalent UK bodies

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In the event that a UK-wide body is not established, environmental protection in Wales will be governed by two separate bodies: the proposed OEP and the new Welsh body. It is proposed that the OEP will carry out its functions in relation to “reserved matters” in Wales, while the Welsh body will operate in relation to devolved matters. We are concerned about the potential confusion arising from this two-tiered approach.

**Recommendation 10.** The Welsh Government should set out how it intends any new Welsh governance body to work with the proposed OEP and any equivalent body in Scotland to ensure a co-ordinated approach to environmental protection across the UK post-Brexit.

### Constitution and functions of a new Welsh body

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The new governance body must be fully independent of Welsh Government if it is to carry out its oversight and scrutiny functions effectively, and secure public confidence. In order to achieve this, the body must have an independent appointment structure, be accountable to the National Assembly, be independently audited, and funded independently of Government.

We support, in principle, the proposed functions of the new body. However, we believe that further consideration should be given to whether it is appropriate for the new body to provide advice to the Welsh Government on the development of policy and legislative proposals. Regardless of this, suitable arrangements must be put in place to ensure clear and strong structural separation between the body’s advisory and regulatory functions. This will minimise any conflict of interest, or perceived conflict of interest.

**Recommendation 11.** The new environmental governance body must be fully independent of the Welsh Government. It must be:

- appointed by, and accountable to, the National Assembly;
- audited by the Auditor General for Wales; and
- funded through the Welsh Consolidated Fund.

**Recommendation 12.** The Welsh Government should make provision to ensure that the new Welsh governance body puts in place suitable arrangements to provide clear and strong structural separation between its advisory and regulatory functions.

**Recommendation 13.** The Welsh Government should ensure that the scope of the new governance body should extend to all Welsh public bodies who will be required to apply the environmental principles (see Recommendation 3).

### Monitoring and reporting function

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While the EU's monitoring and reporting arrangements are not without criticism, they are a key feature of the EU governance system. We are concerned that the Welsh Government's proposals fail to acknowledge the full extent of the EU's monitoring and reporting function, and that the gaps arising from the loss of this function have therefore been understated.

There is a lack of clarity about whether existing EU reporting requirements to the EU Commission have been retained in domestic law, and appropriately adapted.

The monitoring and reporting requirements under existing Welsh law are designed for a different purpose. While these complement the existing EU requirements, they do not provide an adequate substitute. Unless robust, appropriate reporting requirements are put in place post-Brexit, it could limit effective oversight and scrutiny of the implementation of environmental law in Wales.

It is unclear what arrangements will be put in place at a UK level to facilitate reporting on the UK's international obligations and agreements on environmental matters. It is also unclear what role the new body will have within these arrangements. The Welsh Government must address this.

There are extensive benefits associated with the UK's membership of the European Environment Agency and other EU agencies with environmental expertise. We are concerned there is insufficient capacity and expertise within Wales, or indeed across the UK, to replicate the loss of knowledge and technical expertise when the UK's membership comes to an end. Any future relationship with the EEA and other EU agencies will be via the UK, as a nation state. It is important, therefore, that the Welsh Government adopts a clear and strong position on the UK's continued membership of the EEA, and other relevant EU agencies, post-Brexit.

**Recommendation 14.** The Welsh Government should provide a detailed explanation of the gaps arising as a result of the loss of the EU's monitoring and reporting function, and its proposals to address these, beyond those set out in its consultation.

**Recommendation 15.** The Welsh Government should clarify what monitoring and reporting requirements, beyond those contained in existing Welsh law, will be in place post-Brexit to support the effective oversight and scrutiny of the implementation of environmental legislation. In doing so, it should clarify whether and how EU reporting requirements have been retained in domestic law, and adapted.

**Recommendation 16.** The Welsh Government should report back to the Committee on any discussions with the UK Government on how it intends to meet its international reporting obligations on environmental matters following exit from the EU.

**Recommendation 17.** The Welsh Government should clarify what role the new governance body will have in facilitating reporting on international obligations and agreements on environment matters.

**Recommendation 18.** The Welsh Government should adopt a clear and strong position that the UK should continue its membership of the EEA, and other EU agencies with environmental expertise, where there is demonstrable value. It should report back to the Committee on the outcome of future discussion with the UK Government on this matter.

## Enforcement function

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We welcome the Welsh Government's proposals for the new governance body to be able to seek to resolve issues of non-compliance through informal procedures before pursuing formal procedures and enforcement action. It will

be key for the new governance body to have a range of credible enforcement tools at its disposal to enable the body to effectively carry out its compliance and enforcement functions.

While the Welsh Government's proposals refer to the use of the infraction fines within the EU system, it is silent on the potential role of financial penalties in the new governance system. Within the context of the EU, fines are a powerful enforcement tool. There is a risk that, without the threat of fines, the enforcement process within the new governance system could be ineffective. In principle, therefore, we support the use of fines as an enforcement tool. There are obvious challenges associated with operating a fining system that can impose financial penalties on government, within a domestic context. However, there are examples of countries that have managed to achieve this. We believe the Welsh Government should explore how a fining system for continued non-compliance with environmental law could operate in Wales.

**Recommendation 19.** The Welsh Government should develop proposals for a fining system to support the effective enforcement of environmental law post-Brexit. These proposals should be informed by a review of international examples of fining systems that operate within a domestic context, such as New Zealand. The proposals should be subject to consultation with stakeholders.

**Recommendation 20.** The Welsh Government should consider whether, and if so how, fines for continued non-compliance with environmental law should apply to other Welsh public bodies which fall within the remit of the new governance body.

## Citizens' complaints

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In our first report, we recommended that one of the key functions of any new governance body should be providing citizens and civil society with access to the complaints system. We are encouraged, therefore, that the Welsh Government's proposals reflect this. We welcome the Welsh Government's intention for any new complaints system to be simple and free for citizens to use. We believe that the system should also be liability free, in line with the EU system.

Critically, the EU system enables citizens to make complaints about breaches, or potential breaches, of environmental law on both substantive. It is unclear, whether, the new governance body will be able to receive substantive complaints from citizens. If the Welsh Government is to deliver on its

commitment to ensure no reduction in citizens' rights post-Brexit, it must make provision for this.

**Recommendation 21.** The new governance body must be able to receive substantive complaints from citizens on breaches, or potential breaches, of environmental law.

**Recommendation 22.** The new complaints system must be simple to access, free of charge, and liability free, for citizens.

### Financial implications of establishing a new body

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Establishing a new Welsh governance body is a significant undertaking and will require considerable resources. In its response to our first report, the Welsh Government told us it was “too soon” to commence an assessment of the resources required to establish a new body. We acknowledge that the Welsh Government’s proposals for a new governance system are in the early stages of development and it has yet to take any firm decisions. However, we would have expected the Welsh Government to have undertaken a preliminary assessment of the resources required before publishing its proposals. This does not appear to be the case.

We expect an appropriate level of funding to be made available for the purpose of establishing a new Welsh governance body. It is unclear what the future funding arrangements for the new body will be. The Welsh Government should clarify this.

**Recommendation 23.** The Welsh Government should update the Committee on any preliminary work undertaken to assess the resources associated with the establishment of a new Welsh governance body.

**Recommendation 24.** The Welsh Government should report back to the Committee on any discussions with the UK Government on future funding to meet the cost of a new Welsh governance body.

## 5. Transitional arrangements

**125.** Regardless of the terms on which the UK exits the EU, it is likely that transitional arrangements will be required if gaps in environmental principles and governance are to be avoided following Brexit. According to the First Minister's Legislative Statement, July 2019, the Welsh Government does not plan to legislate in this policy area during the next Assembly year.

### The Welsh Government's proposals

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**126.** The Welsh Government's consultation sets out its commitment to continue to apply the 5 ways of working, the SMNR principles, and the 4 EU core principles, "whilst legislation is developed". It does not, however, explain whether, and if so how, it intends to address the governance gaps.

### Evidence from stakeholders

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**127.** We asked stakeholders for their views on the Welsh Government's proposals for transitional arrangements. They reported a lack of clarity about the proposals, in particular for environmental governance, and called for the Welsh Government to make clear its intentions in this regard.

**128.** The Woodland Trust noted the Welsh Government's commitment to continue to apply existing principles contained in Welsh legislation and the four core environmental principles. However, it suggested a lack of clarity "about how [the Welsh Government] proposes to do that". The Woodland Trust pointed out that, unlike the UK Government, the Welsh Government had yet to set out proposals for transitional governance arrangements.<sup>79</sup>

**129.** The UK Government has outlined proposals for a "shadow body" to receive complaints about breaches of environmental law until such time as the proposed Office for Environmental Protection is established. The body would not carry out investigations. There is limited detail available about the scope of the body or how it would operate in practice. However, the UK Government has committed to providing an interim secretariat to support the body's work.

**130.** While stakeholders highlighted weaknesses in these proposals, there was some support for establishing a comparable body in Wales to provide a clear route for complaints during transition to a new governance system. However,

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<sup>79</sup> RoP, para 154, 26 June 2019

WWF Cymru suggested that a mechanism that was limited to receiving complaints would be unsatisfactory over an extended period. It stated:

“...if that’s the best we can do in the short term, okay, but actually not investigating complaints – for how long? How long is that transition before we get a new body? Realistically....you’re looking at having several years where there is no oversight.”<sup>80</sup>

## Our view

In our first report, we highlighted the potential for governance gaps to arise in the event that new governance arrangements were not in place by the time the UK leaves the EU. We called on the Welsh Government to explore the potential for transitional arrangements to be put in place until such time as a suitable governance body could be established. In response, the Welsh Government told us that it would consider the need for transitional arrangements and would continue to engage with stakeholders on how best to address the governance gaps until legislation could be introduced.

We are concerned that over a year on from our report, proposals for transitional arrangements are no further forward. Reports from the Welsh Government that the recently established stakeholder task group will be discussing transitional arrangements have done nothing to allay our concern. The stark reality is that, in the absence of suitable transitional arrangements, governance gaps will occur after the UK leaves the EU.

The Welsh Government maintains that after the UK leaves the EU, there will be governance arrangements in Wales, given that existing domestic governance mechanisms will continue to operate. We do not dispute this. The fact remains, however, that domestic mechanisms are not an appropriate substitute for the current EU governance arrangements, even in the short term. This is clearly demonstrated by the Welsh Government’s gap analysis set out in its consultation document.

We note the Welsh Government’s comment that it has “chosen to take a considered and collaborative approach to how we address these gaps in a way, which transcends immediate needs”. We are concerned that focussing efforts in this way is not without risk and could come at the expense of environmental

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<sup>80</sup> Para 158, 26 June 2019

protection in the immediate post-Brexit period. In order to mitigate this, suitable transitional arrangements will be required.

Given that the Welsh Government does not plan to legislate to address the gaps in governance during the next Assembly year, a new environmental governance structure is unlikely to be in place for some time. We believe this serves only to strengthen the case for robust transitional arrangements.

**Recommendation 25.** The Welsh Government should set out a timeline for the development and implementation of its preferred transitional arrangements. In addition, it should report back to the Committee, within three weeks of the publication of this report, on the work of the stakeholder group tasked with considering proposals for transitional arrangements.

**Recommendation 26.** As soon as practicable after it has determined its preferred approach to transitional arrangements, and before developing final proposals, the Welsh Government should report back to the Committee. This report should include a comprehensive impact assessment of approaches considered, including details of the associated costs, and the rationale for its preferred approach.

## Annex: Oral evidence

The following witnesses provided oral evidence to the Committee on the dates noted below. Transcripts of all oral evidence sessions can be viewed in full at:

[Transcripts](#)

Date	Name and organisation
12 June 2019	Professor Richard Cowell, Cardiff University Dr Mary Dobbs, Queens University Belfast Dr Ludivine Petetin, Cardiff University Dr Victoria Jenkins, UK Environmental Law Association Wales Working Party
20 June 2019	Alan Hunt, Natural Resources Wales Ruth Jenkins, Natural Resources Wales Ruth Chambers, Green Alliance Dr Tom West, Client Earth Rebecca Williams, Country Land and Business Administration Huw Thomas, National Farmers Union Cymru Charlotte Priddy, Farmers' Union of Wales
26 June 2019	Anne Meikle, World Wild Fund for Nature (WWF) Cymru Llinos Price, Woodland Trust Annie Smith, Royal Society for the protection of Birds (RSPB Cymru)