Environmental principles and governance in Wales post European Union exit

Environmental principles

Q1. Question 1: Do you agree the following principles should be included within legislation for Wales?

Yndw yn sicr, rhaid i bobl a swyddogion Cymru wneud penderfyniadau ar egwyddorion deddfwriaethol Cymru

Q2. Question 2: Do you think there are other principles, which may also need to be included?

Yndw

Q3. Question 3: Do you agree the duty to pursue sustainable management of natural resources and the application of the SMNR principles should be extended?

Yndw

Q4. Question 4: On which Welsh public bodies, within devolved competence, do you consider a duty to pursue SMNR should apply?

Cyfoeth Naturiol Cymru

Accountability

Q5. Question 5: Do you agree with the gaps identified, or do you consider there are other gaps, which need to be considered?

Yndw cytuno ac estynnu

Q6. Question 6: What role should existing accountability bodies provide in a new environmental governance structure for Wales?

Dangos cynnydd a chanlyniadau, bod yn agored ac atebol.Cyfathrebu eglur a chyson gyda tir feddiannwyr Cymru

Q7. Question 7: Is the outlined role and objective appropriate for a body responsible for overseeing the implementation of environmental law in Wales?

Yndi

Q8. Question 8: Which policy areas should be included within the scope of new governance arrangements?

Amaeth ar amgylchedd a choedwigaeth

Q9. Question 9: Do you consider the proposed list of bodies to be appropriate?

Galler ychwanegu

Q10. Question 10: Do you consider there are other Welsh bodies, which should also fall within the remit of an oversight body?

Ynde

Q11. Question 11: What should be the status, form and constitution of an oversight body?

No Response

Q12. Question 12: Should an oversight body be able to act in an advisory capacity?

Dylai

Q13. Question 13: Should an oversight body be able to scrutinise implementation of environmental legislation?

Dylai

Q14. Question 14: What should be the extent of this function?

No Response

Q15. 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?

Ymchwiliadau a chynnig atebion

Q16. 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?

Rhewi sefyllfaoedd hyd bod atebion mewn lle

Q17. Question 17: What enforcement actions do you consider need to be available?
1.Gosod amser i ddatrys 2.Gosod dirwyon

Other

Q18. Question 18: Would there be advantages in having a shared core set of common environmental principles?
Na

Q19. Question 19: What potential governance structures do you consider are needed to enable collaboration and collective decision-making to enable interface between administrations?
Digidol

Submit your response

Anonymous

Environmental principles and governance in Wales post European Union exit

Environmental principles

Q1. Question 1: Do you agree the following principles should be included within legislation for Wales?

Yes the missing principles from EU policy need to be included such as 'polluter pays' and 'rectification at source'

Q2. Question 2: Do you think there are other principles, which may also need to be included?

ensuring that we deliver the Aarhus convention fully on environmental decisions. Wider adoption of the Macrory principles would create greater fairness/local justice and help deliver rectification, as well as take some of the burden from the lower courts.

Q3. Question 3: Do you agree the duty to pursue sustainable management of natural resources and the application of the SMNR principles should be extended?

yes

Q4. Question 4: On which Welsh public bodies, within devolved competence, do you consider a duty to pursue SMNR should apply?

Certainly local government.

Accountability

Q5. Question 5: Do you agree with the gaps identified, or do you consider there are other gaps, which need to be considered?

Yes

Q6. Question 6: What role should existing accountability bodies provide in a new environmental governance structure for Wales?

There maybe a role for the ombudsman but a new body would still be needed to deal with cross cutting or multi agency issues

Q7. Question 7: Is the outlined role and objective appropriate for a body responsible for overseeing the implementation of environmental law in Wales?

yes

Q8. Question 8: Which policy areas should be included within the scope of new governance arrangements?

Water Companies have a major impact and NRW have increasingly limited their response on some threats. Should we consider a limited governance arrangement but a similar scope for water PLCs? Clearly it would create legal complications if the new governance body had extra regulatory controls over water companies, however it would be useful for them to hold water companies to account publicly for the environmental issues within the general scope.

Q9. Question 9: Do you consider the proposed list of bodies to be appropriate?

yes with the additional comments made above for Q8

Q10. Question 10: Do you consider there are other Welsh bodies, which should also fall within the remit of an oversight body?

see above

Q11. Question 11 : What should be the status, form and constitution of an oversight body?

This should not be another Commissioner, as that will simply create confusion. It needs to be funded properly and should be able to act in a similar style to the old RCEP. It will need an independent appointment structure but should be clearly at an arm's-length from Welsh government. It should be able to summon any party to give evidence (perhaps in a similar style to a select committee). It should be able to take advice or questions from any party, both in an ad hoc fashion and in a targeted or focused process about a specific aspect of the scope.

Q12. Question 12: Should an oversight body be able to act in an advisory capacity?

there will be occasions when this aspect is important and useful, however the body must have teeth and the ability to penalise serious failures otherwise it will be seen as just another public body. Clearly there is an argument to say that litigation could be seen as a waste of public funds in certain circumstances, so it's advisory role will be critical to head off unnecessary confrontations.

Q13. Question 13: Should an oversight body be able to scrutinise implementation of environmental legislation?

this is essential and has been one of the most useful functions of the European commission. Most legislative bodies have good intentions but serious failures occur because of poor implementation. Many examples exist such as air-quality, bathing water, contaminated land et cetera.

Q14. Question 14: What should be the extent of this function?

for the body to be able to scrutinise adequately, it would need to be able to demand data and information on how the various agencies or departments were delivering their statutory duty. This should include a period of examination in detail and for the sake of transparency and fairness a period of open hearings where these issues can be discussed and defended.

Q15. 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?

any member of the public should be able to trigger a response, but it would be up to the new body to determine the level of appropriate response.

Q16. 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?

informal activity should be limited to helpful background research and foresight work with useful experts and academics. Enforcement must be transparent and therefore most of this would probably have to be formal. It seems unlikely that informal activity would be seen as helpful by any aggrieved party? Historically commissions have been helpful at using their advisory role to pressure ministers into action, but that work was always open to public scrutiny.

Q17. Question 17: What enforcement actions do you consider need to be available?

clearly we are trying to plug a gap where the EC made a huge difference in forcing governments to deliver, but they had the ability to threaten large fines by using the infraction process. It seems that the new body would have to have the ability to take the matter to an appropriate court even though this would have significant resource implications on all parties.

Other

Q18. Question 18: Would there be advantages in having a shared core set of common environmental principles?

this would create a clearer set of ground rules, however it should not rule out investigations of any failure to deliver statutory standards.

Q19. Question 19: What potential governance structures do you consider are needed to enable collaboration and collective decision-making to enable interface between administrations?

having observed very significant differences between good practice and poor practice in different administrations, it would seem to be preferential to have the ability for any of the governance structures to overlap in a collaborative fashion when dealing with similar matters in different parts of the UK. There is much to be gained by learning from the different approaches taken, but retaining a core Welsh role.

Submit your response

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Name

Organisation (if applicable)

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Email address

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No Response

Environmental principles and governance in Wales post European Union exit

Environmental principles

Q1. Question 1: Do you agree the following principles should be included within legislation for Wales?

Yes, I agree that 1) Rectification at Source, and 2) Polluter-pays should be included within legislation for Wales

Q2. Question 2: Do you think there are other principles, which may also need to be included?

I think that now that both Welsh Assembly and UK Parliament have voted to declare climate emergency that one or more additional principles should be included to make clear and convey that we are now in an emergency situation

Q3. Question 3: Do you agree the duty to pursue sustainable management of natural resources and the application of the SMNR principles should be extended?

Yes

Q4. Question 4: On which Welsh public bodies, within devolved competence, do you consider a duty to pursue SMNR should apply?

All Welsh public bodies

Accountability

Q5. Question 5: Do you agree with the gaps identified, or do you consider there are other gaps, which need to be considered?

I do agree with the gaps identified. In my opinion, you also need to strengthen the provisions by reference to climate emergency

Q6. Question 6: What role should existing accountability bodies provide in a new environmental governance structure for Wales?

I think you need a new independent body accountable to the Welsh Assemby in addition to the existing accountability bodies. It needs to reflect the emergency situation we are now recognised as being in and have appropriately strong powers in respect of investigating complaints and enforcement.

Q7. Question 7: Is the outlined role and objective appropriate for a body responsible for overseeing the implementation of environmental law in Wales?

The objectives listed are good but should be strengthened. According to our legislators, we are now in a 'climate emergency' situation and have 12 years to make the Welsh contribution towards preventing catastrophic climate change. Any new body needs this written into its constitution and should have commensurate powers enabling it to set legal targets for the sustainable management of natural resources.

Q8. Question 8: Which policy areas should be included within the scope of new governance arrangements?

The entire range of policy affected by climate change and biodiversity loss

Q9. Question 9: Do you consider the proposed list of bodies to be appropriate?

No

Q10. Question 10: Do you consider there are other Welsh bodies, which should also fall within the remit of an oversight body?

Should be extended to all Welsh public bodies

Q11. Question 11 : What should be the status, form and constitution of an oversight body?

Whichever is most effective, as long as well enough resourced, constituted to have as broad a scope as possible, given sufficient legal powers and teeth, and shot through with a sense or urgency

Q12. Question 12: Should an oversight body be able to act in an advisory capacity?

Yes

Q13. Question 13: Should an oversight body be able to scrutinise implementation of environmental legislation?

Yes

Q14. Question 14: What should be the extent of this function?

As broad as possible, in view of the 'climate emergency' situation it should have the authority to scrutinise all aspects of adhering to environmental legislation in Wales. It should also have a promotion function; the Natura 2000 network established under the EU's habitats and bird directives has never been effectively promoted in Wales and consequently, is under appreciated

Q15. 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?

At a minimum, the same powers as currently available through the European Commission and Court of Justice

Q16. 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?

Courts; fine and/or imprisonment, nothing else really works. Fines should be commensurate with the ability of the offending party to pay and sufficient to act as a real deterrent

Q17. Question 17: What enforcement actions do you consider need to be available?

As above

Other

Q18. Question 18: Would there be advantages in having a shared core set of common environmental principles?

Yes, on a UK wide basis it would make sense to have harmonisation

Q19. Question 19: What potential governance structures do you consider are needed to enable collaboration and collective decision-making to enable interface between administrations?

As much as possible, retain powers in Wales

Submit your response

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Q22. Responses to consultations may be made public. To keep your response anonymous (including email addresses) tick the box.

No Response

Environmental principles and governance in Wales post European Union exit

Environmental principles

Q1. Question 1: Do you agree the following principles should be included within legislation for Wales?

Yes

Q2. Question 2: Do you think there are other principles, which may also need to be included?

The precautionary principle needs to be explicitly defined rather than implicit within the existing SNMR principles. The EU definition of the precautionary principle does raise the question on how risk is to be better identified within devolved administrations.

Q3. Question 3: Do you agree the duty to pursue sustainable management of natural resources and the application of the SMNR principles should be extended?

Yes

Q4. Question 4: On which Welsh public bodies, within devolved competence, do you consider a duty to pursue SMNR should apply?

Presently NRW appears to be the only body with competence to fully pursue the principles of SMNR.

Accountability

Q5. Question 5: Do you agree with the gaps identified, or do you consider there are other gaps, which need to be considered?

Annex 6 provides a good analysis of existing EU provided governance and areas where devolved administrations lack either the expertise or resource to fully implement and maintain an equivalent governance structure.

Q6. Question 6: What role should existing accountability bodies provide in a new environmental governance structure for Wales?

The principles of sustainable development implemented through target setting, monitoring and reporting appear to be relatively well covered within the existing structure. However where failure or contravention to meet environmental law is identified, remedies through existing bodies is not well defined. On this basis is there a case for a UK approach to both informal and formal approaches to environmental law, including fines.

Q7. Question 7: Is the outlined role and objective appropriate for a body responsible for overseeing the implementation of environmental law in Wales?

The requirements of the body with regard expertise in environmental law would be considerable - the Environment Act and Well Being Act at present do not encompass the EU governance principles fully. For example taking the polluter pays principle and how this manifests itself practically through producer responsibility schemes is outside of existing legislation in Wales - it is covered through UK government. Therefore Welsh environmental law should be consistent with UK law and should be subject to oversight from an independent UK wide body that has effective recourse to sanctions imposed through courts.

Q8. Question 8: Which policy areas should be included within the scope of new governance arrangements?

Health, climate, air, water, land, waste, development, diversity, enforcement.

Q9. Question 9: Do you consider the proposed list of bodies to be appropriate?

No

Q10. Question 10: Do you consider there are other Welsh bodies, which should also fall within the remit of an oversight body?

Health boards should also be included

Q11. Question 11 : What should be the status, form and constitution of an oversight body?

The creation of an environment commissioner similar in form and constitution to existing information and equalities bodies would produce a comprehensive and overarching structure.

Q12. Question 12: Should an oversight body be able to act in an advisory capacity?

Yes

Q13. Question 13: Should an oversight body be able to scrutinise implementation of environmental legislation?

Yes

Q14. Question 14: What should be the extent of this function?

The body should have the power to take action, including the imposition of fines.

Q15. 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?

Viewed that similar powers to the information commissioner would be appropriate - making a complaint or reporting a breach of legislation should be both available options to members of the public.

Q16. 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?

Taking the ICO as an example the oversight body could adopt a similar approach for informal & formal methods of enforcement. So where a concern or complaint is justified against an individual, organisation or public body, the oversight body could proceed with providing advice and instruction on how to remedy the contravention of environmental legislation. As with the ICO this can be supported through:

1. monetary penalties
2. enforcement notices
3. undertakings
4. prosecutions

For more informal routes

Q17. Question 17: What enforcement actions do you consider need to be available?

See response to Q16

Other

Q18. Question 18: Would there be advantages in having a shared core set of common environmental principles?

Agree strongly that having a common approach on environmental principles is in the best interests of devolved administrations.

Q19. Question 19: What potential governance structures do you consider are needed to enable collaboration and collective decision-making to enable interface between administrations?

Existing governance structures are in place, for example information & equalities. The way in which each is integrated with a UK wide approach, but respecting the devolved administrations' right to achieve a 'best fit' to suit unique and particular aspirations does appear to provide a road map.

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Name

Organisation (if applicable) Marlin Industries Ltd

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No Response

Environmental principles and governance in Wales post European Union exit

Environmental principles

Q1. Question 1: Do you agree the following principles should be included within legislation for Wales?

They are so vague and it is easy not to implement them. Legislation may be a waste of effort/cost for principles it is easy to ignore through interpretation. They can be incorporated into functional laws with unequivocable impacts.

Q2. Question 2: Do you think there are other principles, which may also need to be included?

All the goals are dependant on stopping global heating and change to a destructive climate. This cannot be achieved without ceasing to extract fossil fuels. We must enshrine in law cessation of extraction of fossil fuels (hydrocarbons to be burnt)

Q3. Question 3: Do you agree the duty to pursue sustainable management of natural resources and the application of the SMNR principles should be extended?

No Response

Q4. Question 4: On which Welsh public bodies, within devolved competence, do you consider a duty to pursue SMNR should apply?

No Response

Accountability

Q5. Question 5: Do you agree with the gaps identified, or do you consider there are other gaps, which need to be considered?

No Response

Q6. Question 6: What role should existing accountability bodies provide in a new environmental governance structure for Wales?

No Response

Q7. Question 7: Is the outlined role and objective appropriate for a body responsible for overseeing the implementation of environmental law in Wales?

No Response

Q8. Question 8: Which policy areas should be included within the scope of new governance arrangements?

Legislation to ensure all entities in Wales improve the SMNR, All means businesses, citizens, UK organisations including governmental bodies. Planning needs root and branch transformation to meet the principles. At present it is top down, commercial developer driven, abusive to citizens, leading to social and environmental destruction for shortterm gain for a minority.

Q9. Question 9: Do you consider the proposed list of bodies to be appropriate?

No Response

Q10. Question 10: Do you consider there are other Welsh bodies, which should also fall within the remit of an oversight body?

No Response

Q11. Question 11 : What should be the status, form and constitution of an oversight body?

No Response

Q12. Question 12: Should an oversight body be able to act in an advisory capacity?

No Response

Q13. Question 13: Should an oversight body be able to scrutinise implementation of environmental legislation?

yes public meetings of all citizens, organised effectively to ensure participants are trained and informed and their thoughts and conclusions are reached through participative consensual processes not mainly through divisive mechanismes like simple majority voting.

Q14. Question 14: What should be the extent of this function?

No Response

Q15. 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?

No Response

Q16. 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?

No Response

Q17. Question 17: What enforcement actions do you consider need to be available?

No Response

Other

Q18. Question 18: Would there be advantages in having a shared core set of common environmental principles?

No Response

Q19. Question 19: What potential governance structures do you consider are needed to enable collaboration and collective decision-making to enable interface between administrations?

No Response

Submit your response

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Organisation (if applicable) -

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No Response

Environmental principles and governance in Wales post European Union exit

Environmental principles

Q1. Question 1: Do you agree the following principles should be included within legislation for Wales?

Where are the principles? They should include for good of all species, for the betterment of renewable power and for the end of the use of plastics.

Q2. Question 2: Do you think there are other principles, which may also need to be included?

Yes the ending of non recyclable waste and the end of thinking people should stop thinking the earth belongs to us and assume that we can make the rules and move to the idea that we are part of the whole of the sea, sky and the earth.

Q3. Question 3: Do you agree the duty to pursue sustainable management of natural resources and the application of the SMNR principles should be extended?

Where it creates a growth in the understanding of our stewardship and not our ownership.

Q4. Question 4: On which Welsh public bodies, within devolved competence, do you consider a duty to pursue SMNR should apply?

Every single one. No public body can be excluded as they all impact the whole

Accountability

Q5. Question 5: Do you agree with the gaps identified, or do you consider there are other gaps, which need to be considered?

No Response

Q6. Question 6: What role should existing accountability bodies provide in a new environmental governance structure for Wales?

Dependant on-their success in creating a long term improvement in our relationship with nature and support of "rewinding", etc.,

Q7. Question 7: Is the outlined role and objective appropriate for a body responsible for overseeing the implementation of environmental law in Wales?

Nothing human made will ever be entirely appropriate. As long as good checks and balances are in place it may do.

Q8. Question 8: Which policy areas should be included within the scope of new governance arrangements?

No Response

Q9. Question 9: Do you consider the proposed list of bodies to be appropriate?

No Response

Q10. Question 10: Do you consider there are other Welsh bodies, which should also fall within the remit of an oversight body?

No Response

Q11. Question 11 : What should be the status, form and constitution of an oversight body?

Cyd-weithwyr

Q12. Question 12: Should an oversight body be able to act in an advisory capacity?

Possibly but it does need to be accountable

Q13. Question 13: Should an oversight body be able to scrutinise implementation of environmental legislation?

Yes but again it should be accountable to a group of people chosen for their expertise such as David Woodfall - Rewilding and Iolo Williams etc.,

Q14. Question 14: What should be the extent of this function?

3 years

Q15. 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?

It should have the power to investigate and hold miscreants accountable

Q16. 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?

Informal should entail a consultation and grievance procedure. Formal should include the law enforcement body

Q17. Question 17: What enforcement actions do you consider need to be available?

Fines, working to put things right and paying for it

Other

Q18. Question 18: Would there be advantages in having a shared core set of common environmental principles?

Yes but I cannot see it working unless you adopt something from Friends of the Earth or Greenpeace

Q19. Question 19: What potential governance structures do you consider are needed to enable collaboration and collective decision-making to enable interface between administrations?

Low numbers of people involved so that it works and works quickly. We are losing species so fast we need to move quickly.

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Email address

Q22. Responses to consultations may be made public. To keep your response anonymous (including email addresses) tick the box.

No Response

Environmental principles and governance in Wales post European Union exit

Environmental principles

Q1. Question 1: Do you agree the following principles should be included within legislation for Wales?

Both principles of "rectification at source" and the "polluter pays" principle should be included in legislation for Wales. Within the farming sector, the Welsh Government has indicated a desire to support farmers to deliver public goods. To implement this vision of a sustainable future, farmers or food businesses that are causing very significant damage through intensive practices should be made financially responsible for the damage that they cause. Our recent report The Hidden Cost of UK Food found that for each £1 spent on food in the shops in the UK, consumers incur extra hidden costs of £1. In addition to the £120 billion spent annually on food by consumers in the UK as a whole, the UK food system generates further costs of £120 billion in external costs. These extra costs are currently not paid by the food businesses that cause them, nor are they included within the retail price of food, but instead they are passed on to society. Mindful of the negative environmental (and public health) externalities from industrial food production, we would encourage the Welsh Government to consider the introduction of both the principles of "rectification at source" and the "polluter pays". Introducing these principles would help to tackle the damage done by industrial food production and intensive farming methods to waterways, air pollution, biodiversity loss, and GHG emissions, amongst others.

Q2. Question 2: Do you think there are other principles, which may also need to be included?

Yes, both the precautionary principle and the principle of animal sentience should be enshrined in Welsh law after we leave the European Union.

Animal sentience is an essential principle that needs to be transferred over from European law into Welsh law. This principle holds that animals are able to experience genuine emotions such as pain, fear, frustration and therefore are deserving of compassion and consideration. The principle legally protects the way that they should be treated. By adopting such a principle, Wales can become a nation where all animals are guaranteed a "good life" with access to the outdoors, humane treatment and the ability to express natural instincts. The value of adopting such a principle would also help to ensure that livestock produced to a lower animal-welfare standard (such as in the US) would not be able to gain access to the market in case of future trade deal and potentially undercut Welsh farmers who produce meat of a higher quality. Given the strength of the Welsh livestock industry, animal sentience is an essential legal provision.

Furthermore, the "precautionary principle" should also be enshrined in Welsh law in order to protect the Welsh environment and the future of the ecosystem. The precautionary principle is valuable since it embraces a cautious and responsible approach to technology, recognising that there is not always a simple technological fix to systemic issues. Often times, even with the best intentions, technologies have unintended consequences and if a new innovation has been rolled out, it is impossible to backtrack and correct any damage caused. The precautionary principle is increasingly under threat by industry that are looking to bring new technologies and products to market more quickly. To this end, industry have been actively promoting the innovation principle, which the Sustainable Food Trust would strongly oppose. By adopting the precautionary principle, it would legalise an understanding that the lack of evidence of harm is not the same thing as evidence of lack of harm. In other words, the crux of precaution lies in the rigour of avoiding the chance of scientific error occurring by mistakenly assuming safety.

Q3. Question 3: Do you agree the duty to pursue sustainable management of natural resources and the application of the SMNR principles should be extended?

Yes. Around the world, natural resources are being progressively eroded and systematically destroyed, and once they are gone, it will be impossible (in most instances) to repair the damage. Wales, and the wider UK, is no different. Aware of the deleterious impact that the industrialisation of Welsh farming has had on the national ecosystem, the Sustainable Food Trust has long advocated for a more environmentally sustainable approach to food production across Wales with practices that maintain and enhance natural resources and human capital. To achieve this vision of sustainable land management, there needs to be stronger oversight of natural resources in Wales so that they can be better protected for future generations. Consequently, the Welsh Government would be well-placed to extend the concept of sustainable management of natural resources in order to protect the natural Welsh environment from further damage.

Q4. Question 4: On which Welsh public bodies, within devolved competence, do you consider a duty to pursue SMNR should apply?

N/A

Accountability

Q5. Question 5: Do you agree with the gaps identified, or do you consider there are other gaps, which need to be considered?

N/A

Q6. Question 6: What role should existing accountability bodies provide in a new environmental governance structure for Wales?

N/A

Q7. Question 7: Is the outlined role and objective appropriate for a body responsible for overseeing the implementation of environmental law in Wales?

N/A

Q8. Question 8: Which policy areas should be included within the scope of new governance arrangements?

N/A

Q9. Question 9: Do you consider the proposed list of bodies to be appropriate?

N/A

Q10. Question 10: Do you consider there are other Welsh bodies, which should also fall within the remit of an oversight body?

N/A

Q11. Question 11 : What should be the status, form and constitution of an oversight body?

N/A

Q12. Question 12: Should an oversight body be able to act in an advisory capacity?

N/A

Q13. Question 13: Should an oversight body be able to scrutinise implementation of environmental legislation?

N/A

Q14. Question 14: What should be the extent of this function?

N/A

Q15. 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?

N/A

Q16. 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?

N/A

Q17. Question 17: What enforcement actions do you consider need to be available?

N/A

Other

Q18. Question 18: Would there be advantages in having a shared core set of common environmental principles?

Yes, there would be an advantage of the Welsh Government adopting shared core principles. By identifying a core set of principles, stakeholders across Wales will have a clear picture of what they are aiming towards. By identifying the objectives, the targets are more likely to be reached because all relevant stakeholders and the public at large will be pulling in the same direction with a clearly defined target. By clearly stating a set of common goals and then working collectively towards their delivery, it is more likely that these objectives will be achieved. This is the logic behind the Paris Agreement on Climate Change since if we are to meet the challenge of the climate crisis and keep the planet within the 1,5degree limit of global warming, the entire world needs to be working together to achieve common objectives. Closer to home, the UK as a whole need to agree common principles across the devolved nations in order to deliver a sustainable future for the entire union.

This vision of shared environmental objectives is at the core of the Sustainable Food Trust's harmonised farm—level sustainability assessment. We believe that, in order to eligible for the receipt of public money, farmers should be required to complete a sustainability assessment (based on a harmonised framework of indicators and metrics) each year in order to demonstrate how their farming methods are impacting the local environment, whether positively or negatively. The benefit of the assessment would be that it would allow the Welsh Government to have a better understanding of the national situation for each specific public good, such as biodiversity and net carbon emissions. This data would then allow for more targeted interventions to help to meet the stated goal. Additionally, farmers could benchmark themselves to show that they are delivering on their commitments and provide evidence of the improvement. Farmers should be encouraged to progressively increase their environmental commitments since all farms can become more sustainable, and the annual sustainability assessment would provide the necessary information to improve. For the assessment to be comprehensive, there needs to be a blend of specific targets, proxies and hard data collection methods. These would include (but not limited to) monitoring:

- Soil organic carbon levels and microbial life
- Air and water quality
- Levels of on-farm biodiversity
- Energy and resource use efficiency
- High welfare management of livestock
- Climate change mitigation
- Social and cultural benefits

Q19. Question 19: What potential governance structures do you consider are needed to enable collaboration and collective decision-making to enable interface between administrations?

N/A

Submit your response

Q20. You are about to submit your response. Please ensure you are satisfied with the answers you have provided before sending.

Name

Organisation (if applicable) Sustainable Food Trust

Q21. If you want to receive a receipt of your response, please provide an email address.
Email address

Q22. Responses to consultations may be made public. To keep your response anonymous (including email addresses) tick the box.

No Response

Welsh Government

Environmental Principles and Governance in Wales Post European Union Exit

Background to CIWEM

CIWEM is the leading independent Chartered professional body for water and environmental professionals, promoting excellence within the sector. The Institution provides independent commentary on a wide range of issues related to water and environmental management, environmental resilience and sustainable development.

CIWEM welcomes the opportunity to respond to the Welsh Government on its consultation on Environmental Principles and Governance in Wales Post European Union Exit. This response has been compiled with the assistance of members from our Welsh branch.

Response to consultation questions

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

- Rectification at Source Yes
- Polluter pays Yes

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?

CIWEM is pleased that the Welsh Government is committed to transferring the environmental principles into domestic law, and that they will continue to shape domestic environmental policy after the UK leaves the European Union. The environmental principles have underpinned and informed the development of our environmental legislation and are a fundamental reason behind improvements to our environment and natural habitats in recent decades. Wales' legislative framework is progressive and differs from the rest of the UK and several environmental principles have already been enshrined into domestic law, such as the sustainable development principle and public participation through the Well-being of Future Generations (Wales) Act and the preventative principle and precautionary principle through the Environment Act. However, although their elements are included, they are not explicitly specified, and we would advocate that all of those principles as proposed in the draft Environment (Principles and Governance) Bill and not currently enshrined in Welsh legislation should be included specifically. These are all currently enshrined in EU law or international treaties and the complete list is as follows:

(a) the precautionary principle, so far as relating to the environment,

(b) the principle of preventative action to avert environmental damage,

(c) the principle that environmental damage should as a priority be rectified at source,

(d) the polluter pays principle,

(e) the principle of sustainable development,

(f) the principle that environmental protection requirements must be integrated into the definition and implementation of policies and activities,

(g) the principle of public access to environmental information,

(h) the principle of public participation in environmental decision-making, and

(i) the principle of access to justice in relation to environmental matters

These principles have driven progress in the management and improvement of our environment in recent decades. They should be viewed as a suite which should be transferred to domestic legislation to ensure the continued protection and enhancement of our natural environment.

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

We support the duty to pursue sustainable management of natural resources and the application of the SMNR principles being extended to Welsh public bodies falling within devolved competence. We agree that this would ensure the public bodies, which may fall under the remit of new governance arrangements, have the same objectives and consistent basis for managing Wales' natural resources.

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

A duty to pursue SMNR should apply to all Welsh public bodies with an authority over environmental matters and a role in implementing environmental legislation.

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

We agree with the identified gaps – independent accountability, public access to justice, and enforcement. Natural Resources Wales (NRW) and the Future Generations Commissioner play a valuable role in regulating and reporting on environmental performance but neither adequately replicate the functions of the European Commission (EC) and Courts of Justice of the European Union (CJEU) in scrutiny, monitoring and enforcement. We advocate a UK-wide approach to governance.

The EC and CJEU provide independent oversight and monitoring of implementation of environmental law, an enforcement function to hold those who commit failures to implement environmental law to account with significant fines and recourse, and a vehicle for citizens to

make complaints free of charge. These roles would not be replaced by any existing body in the Welsh framework and should be filled by UK-wide body which is compatible with the existing Welsh legal framework and monitoring and reporting functions. The environment does not respect political borders and boundaries, and neither should efforts to protect it.

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

Existing bodies should continue their roles as they currently function, as they are effective and progressive, but none is focused on or capable of enforcing environmental law, or scrutiny or monitoring of its implementation. The new UK-wide body should fulfil this role but should not replicate or overlap existing functions.

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

We agree that outline role and objectives are appropriate and should lead to effective protection of the environment and continued sustainable development in Wales.

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

The policy areas outlined in the consultation paper should be included within the scope – water, air, nature conservation, soils, forestry, chemicals, pesticides, waste, circular economy and climate change, in so far as they are consistent with the devolution framework. All of these policy areas have the potential to have significant impacts on the environment. The Committee on Climate Change already provides specific functions for Wales but crucially does not hold enforcement powers which we would advocate for a new governance body to hold or risk leaving a governance gap in this crucial environmental issue.

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

The list of bodies should include any public body with an authority over environmental law and policy.

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

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

An oversight body should be independent, impartial, transparent and adequately resourced. A body similar to that of the National Audit Office at Westminster would be an appropriate model.

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

We would advocate an advisory role a new oversight body, to enable sharing of best practice, contribute to environmental protection and enhancement, and sustainable management of natural resources. A well-resourced body of experts would enable best practice to be

implemented from an early stage, and potentially reduce breaches of environmental law in future.

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

The system of scrutiny currently provided by the European Commission (EC) and the Court of Justice of the European Union (CJEU) will not be transferred across to the UK post-Brexit. It is this system which has repeatedly held the government to account on environmental compliance matters. European law and this third-party scrutiny has led to improved air and water quality, and increased environmental standards. The new oversight body must have at least the same scrutiny powers as the existing arrangements to meet the ambition for a 'world-leading body' and to ensure increased standards of environmental protection can be achieved.

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

This function of the new oversight body should not replicate or replace existing scrutiny and monitoring undertaken by existing bodies in Wales such as NRW. It should, however, scrutinise the implementation of environmental law, using reports published by other bodies as well as undertaking its own investigations and analysis, with the power to require the provision of information from other parties.

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?

Public access to justice is extremely important and we strongly advocate that members of the public have the power to submit complaints to the new oversight body free of charge, as is permitted under the current arrangements with the European Union. We suggest that it would then be for the body to consider whether these complaints are reasonable, and whether they warrant further investigation and escalation, and that its funding should be proportionate for this remit.

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?

The new body should hold a range of effective enforcement powers in a system of escalation to use at its discretion, starting with informal discussions with relevant ministers, governmental departments and public authorities as appropriate, leading to advisory notices, binding notices, legal action and ultimately a fine. In order to replicate the existing system, the new environmental body must have the power to levy fines at those who have been found in breach of environmental law. The risk of reputational damage is not enough of a deterrent to encourage sound implementation of environmental law, economic sanctions are required to give the new body adequate authority. Any funds collected should be ringfenced and used for environmental enhancement projects. It is envisaged that fines would be levied rarely, and only as a last resort once a system of escalation had been exhausted and unsuccessful.

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

As detailed in response to Q16, the new oversight body should hold a range of enforcement actions in a system of escalation, which are equivalent to the full suite available to the EC and CJEU under the current system.

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

A core set of principles would be advantageous as the environment does not respect political borders and boundaries. Environmental issues transcend borders in the UK and therefore so should efforts to protect the environment. We support a UK-wide collaborative approach which respects the devolution framework.

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

A collaborative and collective UK-wide approach to governance is the most appropriate way to ensure long term environmental protection across the UK for the benefit of future generations. The governance structure of the new oversight body with regards devolved matters could mirror that of the Committee on Climate Change which provides specific functions for Wales.

Leaving the European Union should be used as an opportunity to design a world-leading framework of advice, scrutiny and enforcement which will protect our environment, biodiversity and natural habitats for future generations, whilst respecting the devolved frameworks.

Hybu Cig Cymru
Meat Promotion Wales

Our ref: GH/KH/WGConsultations

5 June 2019

Environmental Governance
EU Exit and Strategy Division
Welsh Government
Cathays Park
Cardiff
CF10 3NQ

Email: Environmental.Governance@gov.wales

Dear Sirs

Environmental Principles and Governance in Wales Post European Union Exit

Thank you for the opportunity to respond to the above consultation.

Hybu Cig Cymru - Meat Promotion Wales (HCC) is the statutory industry-led organisation responsible for the development, promotion and marketing of red meat from Wales.

HCC is supportive of the approach to introduce a framework for environmental governance to ensure that environmental standards are maintained once the UK withdraws from the EU. High environmental standards are crucial for Wales to maintain our worldwide reputation for quality and as the EU is an important export market for Welsh red meat, retained access to the EU market is critical and therefore equivalence of standards between the UK and the EU is essential in a post Brexit era.

Upon exit from the EU, we understand that the current arrangements for implementing environmental law and holding Members States to account will cease; and that a framework for environmental governance will need to be introduced at a Wales and UK level. We are however concerned that there will be a gap in environmental governance arrangements during the period between the date of Brexit and the date by when new arrangements are in place, and as such maintenance of high environmental standards and citizens' rights in terms of appeals would be affected.

Hybu Cig Cymru – Meat Promotion Wales (HCC)
Tŷ Rheidol, Parc Merlin,
Llanbadarn Fawr, Aberystwyth
SY23 3FF

Tel: 01970625050
Fax: 01970615148

www.hccmpw.org.uk

Background

Agricultural production plays a major role in contributing to delivery against all seven goals in the Wellbeing of Future Generations Act. As outlined by the Energy, Planning and Rural Affairs' Evidence and Scenario Planning Roundtable Working Group, *"the social and economic well-being of Wales depends on maintaining Wales' high-quality natural resources which will ensure that we have a healthy, diverse and resilient natural environment which provides us with everything we need to survive"*. As agricultural production accounts for nearly 90 percent of the landuse in Wales it clearly plays a major role in contributing to the wider management of Wales' natural resources.

Environmental principles

Given the fact that the EU principles that have guided the development of EU policies and legislation will no longer be applicable in the UK after Brexit, we agree that there is a need to ensure the principles (prevention, precautionary, polluter pays and rectification at source) are captured in Welsh and UK legislation to ensure continuity in the environmental standards post-Brexit.

In terms of Welsh public bodies and pursuing sustainable management of natural resources principles, we believe the duty to pursue the principles should rest with Welsh Ministers, Natural Resources Wales, Welsh local authorities, and Ministers of the Crown.

Accountability mechanisms

We are content that existing structures such as the National Assembly for Wales, the Public Services Ombudsman and the Future Generations Commissioner operate in holding public bodies to account and that judicial reviews can challenge failures in the implementation of environmental law. However, there is a need to enhance Welsh and UK governance arrangements to encompass the current role of the European Commission and the European Court of Justice upon the UK's exit from the EU. Mechanisms for independent accountability, opportunities to raise complaints and means to seek recourse are necessary at a Wales and UK level. We do not however believe that an oversight body should include an advisory capacity within its constitution, as this remit should rest with the public bodies. An oversight body must remain independent in order to carry out their functions of scrutinising implementation of environmental legislation effectively.

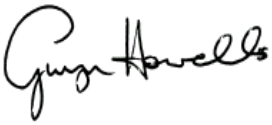
Working across the UK

Whilst the starting point for addressing the gaps in environmental principles, as a result of Brexit, varies across the UK; there is a need for collaborative working to ensure equivalence of standards across the UK (where possible and appropriate) and to

maximise resources. It is also important that accountability mechanisms should take account of devolution and whilst also working within an infrastructure that allows Government decisions to be made jointly with devolved Governments where appropriate.

We hope that these comments are useful in your deliberations and would appreciate being kept informed of any further developments in this area.

Yours faithfully



Gwyn Howells
Chief Executive

Environmental Principles and Governance in Wales Post European Union Exit

Consultation response form

Your name: Adrian Crompton, Auditor General for Wales

Organisation (if applicable):

e-mail/telephone number:

Your address:

Responses should be returned by **9 June 2019** to

EU Exit & Strategy Unit
Department for Energy, Planning and Rural Affairs
Welsh Government
1st Floor East, Cathays Park 2
Cardiff
CF10 3NQ

or completed electronically and sent to:

e-mail: Environmental.Governance@gov.wales

Environmental Principles

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

If the Welsh Government wishes to have Welsh arrangements that provide governance that approaches the standard currently provided by the EU Commission (which would seem appropriate), then I consider these principles need to be included in legislation for Wales.

Question 2: Do you think there are other principles, which may also need to be included?

Again, if the Welsh Government wishes to have Welsh arrangements that provide governance that approaches the standard currently provided by the EU Commission, then the Precautionary principle should be included explicitly (and, to ensure consistency, with reference to EU Commission interpretation). I am not convinced by the Welsh Government's analysis that the Precautionary principle is already covered in Welsh legislation. I recognise that there are some similarities between the Sustainable Management of Natural Resources (SMNR) principles (set out in section 4 of the Environment (Wales) Act 2016) and the Precautionary principle (set out in Art 191 of the Treaty on the Functioning of the European Union (TFEU) and explained in Communication (COM 2000)—for example, the mention of uncertainty. However, there are also significant differences. For example, COM 2000 sets out a specific preliminary condition of identification of potential adverse effects. It also sets out specific informing principles, including risk evaluation, and it provides a clear emphasis on determination of the degree of scientific uncertainty.

It appears that the Precautionary principle will be explicitly covered in UK legislation. Section 16 of the European Union (Withdrawal) Act 2018 already requires the Secretary of State to introduce legislation providing for maintenance of the Precautionary principle. It would, therefore, be unfortunate if Welsh legislation were to be less clear and rigorous than UK legislation.

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

Ensuring application of the principles set out in Art 191 of TFEU would seem appropriate. As mentioned in response to Q2, I am not convinced that application SMNR principles quite has that effect.

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

Please see responses to Qs 2 and 3. As I understand it, Art 191 of the TFEU applies to all public bodies as emanations of the state. If the intention is to provide comparable arrangements, this will need to be replicated.

Accountability

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

Essentially, yes, I agree with the gaps identified. As I understand it, the gaps reflect the role of the EU Commission.

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

While it might be ancillary to environmental governance, I consider that it would be appropriate for the Auditor General for Wales to audit the accounts of any new Welsh public body. The Auditor General's functions in respect of the body should include consideration of arrangements for securing economy, efficiency and effectiveness, and consideration of the regularity of expenditure. I also think it would be appropriate for the Auditor General to have a power to undertake examinations of economy, efficiency and effectiveness. The Auditor General should report to Assembly in respect of all of these functions, so as to enable the Assembly to be assured of the proper stewardship of resources.

Those functions, however, relate to the use of public financial resources, especially resources provided by the Assembly, rather than matters of environmental governance *per se*. The assessment at para 3.20 of the consultation document that the Auditor General and the Public Services Ombudsman are not responsible for scrutinising implementation of environmental law is correct. Likewise, the the Future Generations Commissioner (FGC) is not responsible for scrutinising implementation of environmental law. This should perhaps be more clearly recognised, along with the overall nature of the Well-being of Future Generations (Wales) Act 2015, as has been underlined in the Cymer Afan case.

I should note that I agree with the views reflected in para 15 of the Climate Change, Environment and Rural Affairs Committee's report that the NRW and FGC are not appropriate bodies to fill the gaps left by exit from the EU—that fundamental change to their functions would be required, and that they lacked resources. My predecessor's report, *The development of Natural Resources Wales*, February 2016, noted that NRW faced challenges of lacking capacity and capability for the functions it was given (see

page 16). Subsequent audit work has found that NRW has struggled with regularity issues in the exercise of its forestry functions.

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

Generally, I think the outlined role is appropriate, but with the significant exception of acting in an advisory capacity. 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 actual, conflicts of interest and reduces confidence in the review functions. This is evident from the crisis in commercial audit where advisory work is widely seen as having detracted from statutory audit work, or has actually undermined the rigour of such audit work. (See, for example, https://www.theguardian.com/news/2018/may/29/the-financial-scandal-no-one-is-talking-about-big-four-accountancy-firms.)

As I understand its activities, the EU Commission sets strategy and provides interpretation of its principles, but it does not actually act in an advisory capacity to public bodies.

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

The list given in the consultation document, as per section 2 of Environment (Wales) Act 2016 seems a sensible starting point. There may be merit in making clear that the scope includes the interaction of the listed items with other items, such as noise, radiation, waste, emissions, discharges and other releases into the environment. It may also be useful to make clear that the interaction of public policies with the environment is in scope.

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

The list seems practically reasonable in itself, but please see answer to Q4. In addition to the general point of it being appropriate for all public bodies to be covered, I would suggest that if a selected list is used, consideration be given to the inclusion of national park authorities and Transport for Wales.

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

Yes. See answer to Q4

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

I agree with the suggestion that the body should be accountable to the National Assembly rather than the Welsh Government. This is analogous with the arrangements for public audit, which is required for the sake of objectivity to be independent of the Welsh Government.

I also agree, as indicated at Q6, that the body should be audited by Auditor General. Furthermore, I agree that the body should have independent appointment arrangements and independent funding (independent from the Welsh Government).

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

As indicated above at Q7, no.

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

Yes. No other existing body (other than the EU Commission) lends itself to this function.

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

Audit experience shows that the function needs to be supported with good access rights, as indicated in the consultation document.

As for thematic reviews, I think it is important that such a function is clearly defined so that it substantively supports the setting and enforcement of environmental standards. Too wide a thematic review function would risk overlap with, for example, the functions of the FGC, and it may risk dilution of focus on monitoring and enforcing environmental standards.

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 suggestions of powers to conduct investigations etc set out in the consultation document seem to be reasonable ways of addressing the gap left by not having the EU Commission operating in respect of Wales. While it seems appropriate that a new body should be required to give existing public bodies' complaints procedures a reasonable amount of time to operate and provide resolution, I do not think such procedures should be able to significantly delay the new body's investigations.

By analogy, I think the Freedom of Information Act 2000, together with Information Commissioner guidance, provides a sensible model in that the Commissioner normally expects complainants to exhaust public bodies' review procedures first, but generally limits the amount of time for such procedures to 20 or 40 working days. (Those timescales are probably too short for many environmental matters, but I think the principle is appropriate.) This contrasts with the arrangements provided for the Welsh Language Commissioner, whose legislation requires an investigation regardless of existing public bodies' complaints procedures. In my view, that model tends to lead to excessive duplication, yet does not lead to speedier resolution.

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?

I consider that emulating the informal and formal mechanisms operated by EU Commission, insofar as that is possible, is a sensible approach. I think, however, that it is important not to hamstring the body by imposing a duty to work collaboratively, without such a duty being made subject to the body's discretion to achieve enforcement by what it considers the most appropriate means. Omitting such prioritisation of duties would risk the body becoming toothless.

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

Again, the Freedom of Information Act 2000 may provide a useful model. Under that Act, the Information Commissioner reviews cases and issues decision notices, which may, for example, order disclosure of information. Those notices can be appealed by either party to the Information Tribunal. Tribunal decisions can be appealed to the High Court, but only on points of law. This model seems to provide a reasonably accessible and cost-effective means of dealing with alleged breaches of FOIA. An environmental law tribunal would of course have a cost, but it would be means of getting expert consideration of alleged breaches, without the very considerable cost of judicial review (in most cases).

Other

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

I think that there would be considerable advantages in having a shared core set of common environmental principles. Common principles should, for example, enable business to readily understand requirements in each territory. This would be particularly helpful for businesses that operate across the border. (Similarly, having a shared set of principles across not only Wales and England, but also with the EU, would also have strong advantages in terms of business understanding of compliance requirements.)

I think it is important not to overstate or misunderstand the existing differences in Welsh environmental governance. The difference are not ones that necessitate the establishment of differing core principles. In particular, as indicated at Q6, the Well-being of Future Generations (Wales) Act 2015 does not concern enforcement of environmental standards. Instead, it is a framework for aspirational corporate planning and governance. In essence, it operates by encouraging improvement rather than enforcement of standards.

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

Not in a position to answer this question.

ico.
Information Commissioner's Office
Swyddfa'r Comisiynydd Gwybodaeth

Upholding information rights Cynnal hawliau gwybodaeth

2nd Floor, Churchill House, Churchill Way, Cardiff, CF10 2HH
Ail Lawr, Tŷ Churchill, Ffordd Churchill, Caerdydd, CF10 2HH
T. 0330 414 6421 E. wales@ico.org.uk
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5 June 2019

Response to WG Consultation on *Environmental Principles and Governance in Wales Post European Union Exit*

The Information Commissioner (the Commissioner) is pleased to respond to the consultation on *Environmental Principles and Governance in Wales Post European Union Exit.*

In addition to her regulatory responsibilities for data protection legislation and the Freedom of Information Act, the Commissioner also promotes and regulates the Environmental Information Regulations 2004 (EIR), which are particularly relevant to your consultation.

The Commissioner is independent of government and upholds information rights in the public interest, promoting openness by public bodies and data privacy for individuals. The Commissioner does this by providing guidance to individuals and organisations, solving problems where she can, and taking appropriate action where the law is broken.

Public Participation & Accessibility of Environmental Information

The Commissioner acknowledges and supports the centrality of public participation to both sustainable development and management of natural resources, as set out in the various international and national level principles listed. Ensuring public rights of access to environmental information from all parts of the state is a vital foundation to public engagement. The EIR meet this need by providing a public right of access to environmental information held by public bodies, unless an exemption applies.

The EIR are derived from European law. They implement the European Council Directive 2003/4/CE on public access to environmental information (the EC Directive) in the UK. The principle behind the law is that giving the public access to environmental information will encourage greater awareness of issues that affect the environment. Greater awareness helps increase public participation in decision-making; it makes public bodies more accountable and transparent and it builds public confidence and trust in them.

The source of the EC Directive is the UN Convention on *Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998*, more commonly known as 'the Aarhus Convention'. The EU and

the UK have separately signed the Convention, so it will continue to apply in the event of the UK exiting the EU.

Article 1 of the Aarhus Convention states:

> "In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each party shall guarantee the rights of access to information, public participation in decision-making, and access to justice on environmental matters in accordance with the provisions of this Convention."

The EIR provide the public with a right to request environmental information from public bodies, as well as a duty on those public bodies to proactively publish certain environmental information. In the Regulations, 'environmental information' is defined as any information on:

- the state of the elements of the environment and the interaction among these elements;
- factors affecting or likely to affect those elements;
- measures or activities affecting or likely to affect those factors or elements, or designed to protect those elements;
- reports on the implementation of environmental legislation;
- cost–benefit and other economic analyses and assumptions used within the framework of those measures and activities; and
- the state of human health and safety, conditions of human life, cultural sites and built structures in as much as they are or may be affected by those elements.

The Commissioner has a general duty to investigate complaints from members of the public who believe that a public authority has failed to respond correctly to their request for information. If the complaint is not resolved informally, she will issue a decision notice. If she finds that an organisation has breached the EIR, the decision notice will tell the organisation what they need to do to put things right.

The Commissioner also has powers to enforce compliance where public bodies have failed to proactively provide environmental information in line with the Regulations, whether or not she has received a complaint about this.

The ICO website guide on the EIR can be accessed here.

Information Commissioner's Office
Swyddfa'r Comisiynydd Gwybodaeth

Annex 5

The entry relating to the Information Commissioner is out of date with regard to data protection laws as the 1998 Act was replaced in 2018 by the General Data Protection Regulation and the Data Protection Act 2018. But most importantly for the current consultation, your description does not include the Commissioner's EIR or other public access to information functions.

The Information Commissioner is the UK's independent regulator for Data Protection and Freedom of Information, with key responsibilities under the Data Protection Act 2018 an
d Freedom of Information Act 2000. The Commissioner also has a number of additional regulatory and legislative duties under other pieces of legislation. Of particular relevance to environmental issues are:

- The Environmental Information Regulations 2004 provide a means of access to environmental information. The Regulations cover more organisations than the Freedom of Information Act, including some private sector bodies, and have fewer exceptions.
- The Infrastructure for Spatial Information in the European Community Regulations 2009 (INSPIRE) give the Information Commissioner enforcement powers in relation to the pro-active provision by public authorities of geographical or location based information.
- The Re-use of Public Sector Information Regulations 2015 gives the public the right to request the re-use of public sector information and details how public sector bodies can charge for re-use and license the information. The ICO deals with complaints about how public sector bodies have dealt with requests to re-use information.

Please contact our Cardiff office if you would like to discuss any aspects of this response.

Environmental Principles and Governance in Wales Post European Union Exit

Consultation response form

Your name:

Organisation (if applicable): Countryside Alliance

e-mail/telephone number:

Your address:

Responses should be returned by **9 June 2019** to

EU Exit & Strategy Unit
Department for Energy, Planning and Rural Affairs
Welsh Government
1st Floor East, Cathays Park 2
Cardiff
CF10 3NQ

or completed electronically and sent to:

e-mail: Environmental.Governance@gov.wales

Environmental Principles

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

The Alliance agrees that, in addition to those environmental principles already incorporated into Wales's environmental law and which are also part of EU law, the additional principles of rectification at source and polluter-pays should be included in law, post Brexit.

Question 2: Do you think there are other principles, which may also need to be included?

The Alliance believes that both the innovation principle and principle of net-gain would merit inclusion.

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

Yes

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

It would seem to make sense that the duty to pursue SMNR applies to those bodies that are listed in the Well-being of Future Generations (Wales) Act. There should, however, be an ability to amend the list of bodies, were this to be necessary in the future.

Accountability

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

The Alliance agrees with the gaps identified.

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

Those existing bodies identified in the consultation perform a valuable role in ensuring accountability, but generally lack any real powers of enforcement. They should continue to perform their respective roles. However, any new body must have the enforcement powers missing elsewhere, while ensuring that its role and powers are sufficiently clear to avoid duplication of the work of other accountability bodies, or overlaps in areas of competence/jurisdiction. We do not think that there

should be artificial ‘red lines’ or no-go areas for the new body, as this may hamper the effectiveness of the oversight body and prevent constructive working with other public bodies.

The new body must be able to investigate breaches of environmental law on its own initiative or as a result of a complaint from individuals. There may also be a case for some existing bodies, where they lack enforcement powers, to refer a finding to the new oversight body to review and enforce.

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

The Alliance believes that the role and objectives outlined are appropriate. However, the absence of any reference to an enforcement role is an omission which should be rectified.

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

The Alliance believes the policy areas identified in the consultation document and derived from the definition of ‘natural resources’ provided in section 2 of the Environment (Wales) Act 2016 are sufficiently broad to enable the proposed oversight body to deliver on its objectives. What matters more is that the body is constituted with sufficient independence to be able to act as it sees fit. As the consultation notes, policy areas within the remit of the body would include areas of overlap such as where water intersects with agriculture. Other areas of overlap might include aspects of planning or transport policy.

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

Yes. There should, however, be an ability to amend the list of bodies, were this to be necessary in the future.

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

No, but the ability to add other bodies in the future should be possible without requiring primary legislation.

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

The Alliance believes that what matters most is not the precise constitution of an oversight body, but rather that, however it is constituted, it enjoys total independence both in terms of membership and funding. As such we are fully supportive of the key elements of the constitution identified at 3.35 of the consultation. One of the weaknesses we identified in what has been consulted on in England regarding the proposed Office for Environmental Protection (OEP) is the lack of independence.

We would suggest consideration is given to underpinning any such body with a Royal Charter. We would draw attention the robust independence of the Press Recognition Panel, established under Royal Charter, compared to NDGBs like the Parole Board or Legal Services Commission, both of which have seen their chairs forced to resign as a result of clashes with government. There is also the example of the Charity Commission, where the Government appointed a new chair despite the DCMS Committee being unanimous in its opposition to that appointment.

Given the scope of the body's remit, and the issues for which it will have oversight, it will need to be able to have a membership with sufficient expertise. It should also have the power to co-opt experts to advise in specialist areas, as well as seeking opinions from other bodies, such as the UK Climate Change Committee.

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

Yes.

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

Yes.

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

It should be able to offer advice and scrutinise both when requested and on its own initiative. Its remit should include the ability to identify areas where ministers need to act but have not done so and to advise course of action as appropriate. It should also be able to take enforcement action when necessary, particularly for breaches of environmental law. Enforcement should again be either on its own initiative or following a complaint from a third party.

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 Alliance recognises that it is not necessarily appropriate to try to replicate exactly the powers of the European Commission, given that complaints to the Commission are treated as complaints against the UK as a member state and not a specific public body within the state. However, we believe that the distinction between informal and formal sanctions, as set out in the consultation reflects to some extent the way in which the Commission currently operates.

The body should have the power to issue advisory/warning notices, compliance notices and must have the ultimate sanction of taking the offending public body to court. There should be a series of stages enabling a ratcheting up of sanctions, or the threat of sanctions, and with court action as a last resort.

We are pleased to see a recognition that the consultation acknowledges that "in line with the current system" the system should be "simple and free".

However, as discussed below we have serious reservations as to whether the judicial review process, as it is currently understood by the courts, is appropriate.

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?

As the consultation notes "complaints raised to the EU Commission and heard by the CJEU are not restricted to the scope of what can be heard and are not limited to considering due process but whether or not a breach has occurred". By contrast judicial review in UK law is largely restricted to the lawfulness of a decision in terms of process, not whether the decision is in fact the right one. The courts are reluctant to look in detail at the evidence, which means that even if a decision is contrary to the evidence, it is still possible for the court to find the decision was taken lawfully.

Currently the domestic courts can refer to the CJEU for a preliminary interpretive ruling where an interpretation or validity of an EU law is in question. It is not clear whether a similar judicial mechanism will exist after Brexit and whether the lower courts, the new oversight body or others can seek clarity of interpretation of the law to assist in their enforcement function. Whether such a request would be to the Supreme Court or some other body, some thought should be given to replicating this helpful feature of the current EU process.

There is also the question as to whether the environmental principles, and therefore their application, are in fact justiciable. In refusing the application for judicial review of Natural Resources Wales's decision not to renew shooting leases, Mrs Justice Lambert described the environmental principles and well-being goals as being of a "general and aspirational nature". Her ruling suggests that the question of whether these principles and goals can be enforced by the courts, in the context of the way in which public bodies implement or apply them in public policy decisions, is uncertain. It was an observation repeated by Mr Justice Baker when hearing the appeal against Mrs Justice Lambert's ruling.
If there is to be reliance on judicial review, as the ultimate sanction, then the use and operation of the judicial review process in this area needs to be reconsidered,

incorporating some of the distinctive features of the CJEU. The Aarhus Convention Art. 9(4) states that procedures for environmental cases must be "fair, equitable, timely and not prohibitively expensive".

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

There are a range of existing enforcement mechanisms already deployed by environmental bodies such as Natural England, the Environment Agency and Natural Resources Wales. Some of all of these could be available to the new oversight body. For example:

Warning or Advisory Notices – These could be the equivalent of the reasoned opinion stage of the EU process.

Stop Orders – Some mechanism is needed to prevent continuing environmental damage in emergencies, and where not stopping the activity complained of while the oversight body investigates would result in damage that was permanent and irreversible.

Enforcement/Compliance Notices – These could be legally binding requiring public bodies to comply with environmental law where they have either breached the law or failed to take action required.

Restoration Orders – These would allow the oversight body to require a public body to rectify damage resulting from breaching environmental law or failing to take the required action.

Fines - Under the current EU arrangements, the power to issue fines has proved remarkably effective in bringing about compliance where a breach of environmental law has been established, and in deterring government's from ignoring or breaching environmental law. Defra in England have proposed an enforcement process in three stages involving information notices, decision notices and ultimately a review application to the High Court for judicial review. We have welcomed this staged approach but noted that the proposed Office for Environmental Protection in England should be able to issue fines. We believe the Wales oversight body should also have the power to issue fines and that any fines resulting from enforcement action should, as the House of Commons Environmental Audit Committee suggested, "*be ring-fenced and used for an environmental fund for remediation works"*

Judicial Review/Referral to an appropriate tribunal – We have expressed our concern about the way in which the judicial review process works at present and therefore the suitability of judicial review as the ultimate mechanism for enforcement. We would draw attention to the Law Society's comments in response to the consultation ahead of the publication of the draft Environment Bill in England. The Society noted that the court must be able to *"determine matters in a fair , equitable, timely and cost-efficient manner"* and that the *"possible orders the court may make should reflect the sanctions available under s.31(1) of the Senior Courts Act 1981 i.e. a mandatory, prohibiting or quashing order, a declaration or an injunction and the options to impose a fines, award damages if appropriate…the scope and remit of the new body should not be limited by restricting access to the courts and or limiting the scope of the judicial remedy available".* We also note the

House of Commons Environment Committees report on that draft Bill recommends a role for the First Tier (Environmental) Tribunal, with strengthened powers. This is something which should be explored in relation to a new oversight body in Wales.

Other

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

Yes

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

We would suggest the establishment of protocols or memorandums of understanding between the various bodies. There could also be a combined steering group to ensure proper sharing of info and co-ordination of work and enforcement. Ensuring that the various bodies work well together could also be assisted by the role of the First Tier (Environmental) Tribunal leading to a consistency of legal interpretation and the precedent set by previous judgements. It is essential that whether in the tribunal system or under a form of judicial review that it is possible for there to be a thorough examination of the evidence, similar to the type of scrutiny applies currently by the CJEU.

NFU Cymru Consultation Response

To: environmental.governance@gov.wales

Date: June 2019

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Circulation:

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NFU Cymru Response-

Welsh Government Consultation - Environmental Principles and Governance in Wales Post European Union Exit

NFU Cymru welcomes the opportunity to respond to the Welsh Government Consultation - Environmental Principles and Governance in Wales Post European Union Exit which seeks views on proposals to address the gaps in environmental principles and governance in Wales.

NFU Cymru champions Welsh farming and represents farmers throughout Wales and across all sectors. Our vision is for a productive, profitable and progressive Welsh agricultural industry and our aim is to establish the background conditions in which farm businesses can be profitable and develop.

The importance of the farming industry in rural Wales cannot be over-stated. Welsh farming businesses are the backbone of the Welsh rural economy, the axis around which rural communities turn. The raw ingredients that we produce are the cornerstone of the multi billion pound Welsh food and drink industry which is Wales' largest employer employing over 222,400 people.

Welsh farmers also play a key role maintaining and enhancing our natural environment - Wales' key asset. Farming activity supports a diverse range of species, habitats and ecosystems, provides a range of ecosystem services including flood alleviation, carbon sequestration, climate change mitigation; and delivers the significant backdrop for Wales' tourism and recreation sector worth an estimated £2.8bn annually.

Overall Welsh farming makes a unique contribution to the social, economic, environmental and cultural well-being of Wales in line with the Well-Being of Future Generations Act summarised in Annex 1.

We note the consultation seeks views on gaps in environmental governance, some of which arise as a result of the UK ceasing to be a member of the EU, and on how Welsh Government can address these gaps in a way which provides a coherent framework for enabling the long-term improvement of our environment.

Farming has a daily interest in managing and protecting environmental resources alongside the practical challenges of food production. The agriculture sector manages over 80% of land in Wales playing an integral part in protecting, maintaining and enhancing our countryside but also producing high quality, safe and affordable food. 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.

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Our interests in this new body and policy principles will be in 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 ELI 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.

Environmental Principles

Q1 Do you agree the following principles should be included within legislation for Wales?

NFU Cymru notes the consultation is seeking views on proposals to introduce primary legislation to add EU environmental principles that would not continue to be in place post EU exit, namely rectification at source and polluter pays. We would first highlight that before importing additional principles into legislation for Wales, as a starting point we need to have mutually agreed definition of what these principles are. We believe that if additional principles are to be added, the principles concerned must be modified to make them workable in a Welsh context.

We would further highlight that the 'new' legislative framework established through the Well-Being of Future Generations and Environment Acts is in its infancy in terms of implementation through policy and practice. The introduction of primary legislation to add additional environmental policy principles at this stage may add to an already complex landscape. At this stage it is also difficult to be definitive about whether legislation may be needed to underpin various environmental principles, as much will depend on the terms of the UK's exit from the EU.

With respect to the precautionary principle which Welsh Government identifies is encapsulated within SMNR principles, NFU Cymru would highlight concerns about the way in which the precautionary principle has been misused or misapplied in the European context. The precautionary principle has been used to justify an approach to potentially harmful activity that considers only its hazard without sufficient consideration to balancing the actual risks of harm against the potential benefits that a development or innovation might offer. NFU Cymru has been firmly and consistently of the view that sound science must be at the heart of the decision making process, and populist and sensationalist campaigning must not be allowed to cloud and stifle decision making.

This has been a particular issue for farmers in terms of the availability of crop protection products. We highlight that agri-tech companies need legal certainty and an enabling legislative environment to invest in R&D. The precautionary principle also presents practical issues in relation to farmers near designated sites; proving a negative (i.e that there will not be harm to a protected site) is often virtually impossible and disproportionately expensive, meaning that farming activity is stifled.

NFU Cymru does not dispute the fact that important natural habitats and species should be protected, there needs to be an appropriate balance which properly reflects the degree of risk posed by a particular activity, to allow businesses to continue to operate effectively whilst providing an adequate level of environmental protection.

We identify the precautionary principle has proven difficult to define leading to different understandings of what it means. The over-zealous application of the precautionary principle has also been one of the means by which the EU's decision making has become increasingly politicised and unwieldy. It should be remembered that the strict application of the precautionary principle does not come without a price, and opportunity cost (i.e. the loss of an opportunity or innovation which

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would otherwise have become available or arisen) is an example of where the overzealous application of the precautionary principle carries a penalty.

The import of the precautionary principle into Welsh environmental governance does therefore carry with it the risk that we will replicate some of the problems linked to its application, after Brexit. In our view, Brexit presents the opportunity for Wales to adopt a different approach and improve the application of the precautionary principle through SMNR. Clearer guidance is needed as to how and when it is deployed, this must be clearly underpinned by risk, rather than a hazard-based approach.

Whilst we understand that overarching principles such as polluter pays may appear as gaps in the principles in existing Welsh legislation, we would highlight, that these overarching principles such as polluter pays are referred to in Directives such as WFD which will be maintained as part of our domestic legal framework through the ELI Withdrawal Bill.

Further, existing case law, which references those principles, will also continue to be part of UK law following Brexit. This means that, even without further action to bring them across, the key over-arching principles of EU law will continue to apply to that law following Brexit.

With respect to the polluter pays principles, this principle also has effect through regimes such as Environmental Permitting, where operators of businesses have to bear the costs of obtaining and complying with permits. It also applies to other legislation such as contaminated land, where the clean-up costs fall on the person responsible or the landowner, and other pollution related legislation which puts the clean-up costs on the person responsible. There are also other areas where farmers have to bear the costs of complying with environmental protection measures, such as implementing the requirements in a Nitrate Vulnerable Zone (NVZ). These regimes are expected to continue even after we leave the EU.

As such we believe it is unlikely to be a controversial point that today the polluter pays principle is used in a broad sense, becoming an overarching principle of environmental responsibility. Whilst we accept that the polluter pays principle may be included it should be clearly defined and much more targeted and underpinned by the five principles of good regulation, namely proportionality, accountability, consistency, transparency and targeting. Those principles would make a far better basis for the regulatory baseline.

Q2 *Do you think there are other principles which may also need to be included?*

NFU Cymru would support the addition of the proportionality principle, taking account of factors such as severity of risk and importance of an environmental issue. We would highlight that the principle of proportionality is also a fundamental principle overarching EU law, NFU Cymru believes that the proportionality principle has an important role to play in ensuring that the severity of risk and the relative importance of the environmental issue can be taken into account as part of the decision making process.

Losing this overarching principle whilst copying across other principles from EU law would risk creating an unbalanced set of principles which then operate without some of the checks and balances that were always intended to be part of the equation at an EU level. Proportionality also has a key role to play in ensuring the appropriate distribution of a limited pot of resources, ensuring that resources can be targeted towards those issues of greatest importance.

NFU Cymru believes that should additional principles be introduced through primary legislation then the adoption of an innovation principle as part of a pragmatic, risk-based regulatory system should be included. Essentially the innovation principle sets out to provide a way of ensuring that policy makers fully recognise social and economic needs for both precaution and innovation and is intended to be used to improve the quality and application of environmental legislation and as a result to stimulate

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confidence, investment and innovation. The inclusion of the innovation principle should help to balance the precautionary principle, ensuring that an appropriate balance is struck between protecting the environment and allowing business expansion and the development of new technology.

Should Welsh Government decide to introduce primary legislation to include additional ELI environmental principles, careful consideration will be needed on how this can be achieved so that there is clarity and long-term certainty for our members. The introduction of new principles must be accompanied with guidance explaining how these principles can be interpreted and used to avoid unnecessary litigation in the future. The draft guidance would need to be subject of consultation. Any guidance should also be subject to amendment to respond to the latest scientific and economic developments.

Q3 Do you agree the duty to pursue sustainable management of natural resources and the application of the SMNR principles should be extended?

No. NFU Cymru would highlight that public bodies have a duty under the Well-Being of Future Generations Act to enhance the economic, environmental, social and cultural well-being of Wales. At a local level, Public Service Boards have been established to pursue the Well-Being goals. Natural Resources Wales, on whom the duty to pursue SMNR already applies, are represented on all Public Service Boards and SMNR objectives should as a result be reflected through the Well-Being Plans.

The case for extending the requirement to apply the principles and pursue the sustainable management of natural resources to other public bodies has not been made through the consultation and, in our view, it would add an additional and unnecessary layer of complexity.

Q4 On which Welsh public bodies, within devolved competence, do you consider a duty to pursue SMNR should apply?

Refer to Q3 above.

Accountability

Q5 *Do you agree with the gaps identified, or do you consider there are other gaps, which need to be considered?*

NFU Cymru recognises the current role of the European Commission includes reporting on the implementation of legislation, monitoring the effectiveness of legislation, ensuring compliance with or enforcement of legislation and providing a mechanism for citizens to report non-compliances of legislation.

NFU Cymru broadly agrees with the list of gaps which have been identified. 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.

Whilst the consultation identifies other apparent gaps in environmental governance architecture, it is important to note that these do not arise by dint of our EU departure. These gaps identified by Welsh Government relate 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) and have not been subject to the control of the European Commission

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What Welsh Government appear to be proposing may well end up going above and beyond merely closing the current governance gap that will be lost upon our anticipated ELI departure. This is because, as proposed it would appear that the new oversight body will have within its remit not only compliance with ELI derived law, but also compliance with domestically inspired environmental law which was never the purview of the European Commission in the first place.

Q6 *What role should existing accountability bodies provide in a new environmental governance structure for Wales?*

There is a comprehensive list of existing committees, bodies and organisations including Welsh Assembly Committees and Natural Resources Wales (NRW) that already fulfil a number of the functions that the EU currently provides. There is probably a case to be made for Welsh Government to conduct a thorough review of which bodies hold which powers and the extent of those powers and any accompanying enforcement provisions in order to better inform discussion around future environmental governance.

NFU Cymru does have some concerns that creating a role for existing accountability bodies in the new environmental governance structure could lead to confusion about functions (both between the bodies themselves and in the minds of stakeholders and the public) as to which body is responsible for which functions. It would also appear to be the case that enforcement powers currently exercised by existing accountability bodies are a mixture of hard and soft law, with different reporting lines. Additionally, it may prove difficult to reconfigure and re-orientate the functions of a number of bodies who have never been established to provide environmental governance, towards that end.

Based on our current understanding it would appear sensible and clearer for all concerned if responsibility for environmental governance were rationalised and consolidated within one body, rather than be distributed across a number of bodies, although the ongoing cost of establishing and operating an oversight body is an important consideration.

The role of the National Assembly for Wales in holding the Welsh Government to account is constitutionally fundamental and for the avoidance of any doubt, NFU Cymru would make the point 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.

Q7 *Is the outlined role and objective appropriate for a body responsible for overseeing the implementation of environmental law in Wales?*

We note that any new body would be able to provide independent oversight of the implementation of legislation in relation to Wales's natural resources in a way that is aligned to Welsh primary legislation. The body would ensure policy and legislation are developed in accordance with the principles of the Environment (Wales) Act; ensure legislation is implemented effectively; act in an advisory capacity to public bodies on SMNR; act impartially in assessing the effective implementation of Welsh legislation relating to the environment and; act impartially in receiving complaints from citizens.

NFU Cymru believes that any powers for the new body to 'hold government to account' for non-compliance should apply to central government. In our view extending this further to organisations such as NRW and local authorities would undermine the rights and responsibilities of Welsh Ministers. In relation to enforcement powers, we note proposals for any new body to issue advisory notices. We do not believe that it should be given powers to take legal proceedings against government.

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NFU Cymru would question whether creating an objective for the body to act in an advisory capacity can be compatible with the body's enforcement role, and we have expanded further on this point under Question 12.

NFU Cymru believes any new body should not be given a policy-making function, we believe this should remain within the appropriate government department. It is important that the elected government retains its discretion to formulate policy, which may involve balancing competing needs and interests.

As we have said under Question 15, there are existing mechanisms for members of the public to raise concerns relating to compliance with environmental governance arrangements including with the relevant organisation in the first instance, via the relevant ombudsman, with elected representatives and through to judicial review of the actions of a public body. We do not believe that it is necessary to give the new body a remit or powers to respond to or investigate complaints from members of the public. At the very minimum any new body would require a screening process through which complaints from the public are considered.

Q8 Which policy areas should be included within the scope of new governance arrangements?

Q9 Do you consider the proposed list of bodies to be appropriate?

We do not agree that the proposed list of bodies is appropriate. We disagree with the suggestion that the powers of an oversight body should be extended to the relevant activities of local authorities.

Q10 Do you consider there are other Welsh bodies, which should also fall within the remit of an oversight body?

NFU Cymru does not believe there to be any other bodies which should fall within the remit of the oversight body at the present moment, although we reserve our position with regards to any Welsh bodies which may be created in future and whether they should fall under the remit of the oversight body.

Q11 What should be the status, form and constitution of an oversight body?

The role of any new body responsible for overseeing the implementation of environmental law in Wales should be designed to suit Wales's own constitutional framework and legislation.

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. The suggestion of political interference in the banning of pheasant shooting on the Welsh Government estate is one recent instance of what can undermine the confidence of stakeholders in the actions of a body (NRW) which is to a greater or lesser extent under the control of Welsh Government.

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, have an independent appointment structure and independent sources of funding.

NFU Cymru would expect any new body's decisions to be susceptible to judicial review.

Q12 Should an oversight body be able to act in an advisory capacity?

NFU Cymru would not be comfortable with the oversight body acting in an advisory capacity. It is the Union's view that there is an inherent tension in a body having concurrent responsibility for the provision of advice around environmental legislation and enforcement around any breaches of

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environmental legislation. A situation could easily arise under which the advice of the oversight body is 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 that public body has breached its environmental duties. This then 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.

We, therefore, have serious reservations about the prospect of an oversight body, ultimately responsible for upholding the application of environmental law also being in the position of providing advice around the operation and application of environmental law.

Q13 Should an oversight body be able to scrutinise implementation of environmental legislation?

If the purpose of the oversight body is to replicate some of the functions which will be lost upon ELI exit (including those of the European Commission) then it would follow that the new oversight body should be able to scrutinise the implementation of environmental legislation.

We however note that we do not consider this duty to monitor and scrutinise to be compatible with an advisory role (as per our answer to question 12). We also take the view that the new oversight body should not have any sort of policy making function, which we believe should remain the domain of government and its agencies.

Q14 What should be the extent of this function?

If the purpose of the oversight body is to replace the role of the European Commission and the CJEU, then 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.

We would for example take the view that the new body should not have powers to levy fines, we believe that the power to levy fines should rest with the Courts. Such an arrangement would be consonant with the relationship that currently exists between the European Commission and the CJEU.

NFU Cymru believes that the oversight body's role must also be subject to the control of the courts, with its determinations susceptible to judicial review. We also presume that the new oversight body, as a public body will also 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.

Q15 What powers should a body have in order to investigate complaints from members of the public about the alleged failure to implement environmental law?

NFU Cymru sees the primary function of the body as being the oversight of the public bodies with regard to the performance of their environmental obligations and functions, rather than the investigation of complaints from members of the public about alleged failures to implement environmental law.

There are already existing routes by which members of the public can raise complaints. In the first instance concerns held by members of the public should be directed to the relevant organisation that they have a concern about and the complaint investigated internally. There are also ombudsmen to whom complaints can be directed as well as recourse to elected representatives such as AMs and MPs, whilst the option of judicial review also remains open.

NFU Cymru is opposed to members of the public being able to raise complaints directly with the oversight body. If the Welsh Government do however decide to give the oversight body a role in

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receiving complaints from the public then we would expect this to be confined exclusively to vertical effect against a limited number of bodies. We would certainly not want to see a horizontal effect established giving individuals a route to making claims against other private individuals.

As well as being able to scrutinise the implementation of environmental legislation, any new body, if it is charged with investigating complaints from the public needs to be equipped with sufficient latitude and discretion to screen out frivolous or vexatious complaints. Without such latitude then there is a real risk that the body could become inundated with complaints lacking in merit, leaving it unable to discharge its functions properly.

Q16 What informal and formal methods of enforcement do you consider an oversight body should operate in order to deliver on its role and objectives?

There is a strong case to be made for the new body to adopt informal methods of enforcement as a first resort, particularly when the failure in respect of environmental law can be said to be minor or technical in nature, or an isolated occurrence. Informal methods could include the issuing of its opinion and recommendations as well as warnings.

Q17 What enforcement actions do you consider need to be available?

The new body will need to be equipped with powers of enforcement which could include the issuing of stop notices and order remedial actions. If it is envisaged that the issuing of fines ought to be part of the environmental governance enforcement mechanisms, then NFU Cymru is of the view that the imposition of fines ought to be reserved to the Courts in much the same way that the CJEU can impose fines when instances of breaches of community law have been referred to it by the European Commission.

Other

Q18 Would there be advantages in having a shared core set of common environmental principles?

NFU Cymru does not take a strong view on whether a set of shared environmental principles across the UK is desirable or not. We would for example recognise that having a shared set of principles might be helpful in terms of delivering a level playing field across the four home nations for farmers, and ensuring consistency, as well as presumably being administratively easier.

It is of course the case that the England/Wales border is well integrated in terms of the number of farm businesses which straddle the border, and are consequently impacted by policy decisions taken both in England and Wales. Having a set of common principles would go some way to providing farmers who straddle the border with a greater degree of certainty when it comes to the operation of environmental principles.

Set against this is the fact that a collaborative approach would inevitably lead to a degree of surrender of control on the part of Welsh Government. There is therefore a strong political dimension to any decision around whether or not to adopt a shared set of common environmental principles

Q19 What potential governance structures do you consider are needed to enable collaboration and collective decision-making to enable interface between administrations?

We note that the Defra consultation on Environmental Governance opened the door on the prospect of an England and Wales structure. NFU Cymru can see there being some advantages to having an England and Wales body, including helping ensure greater consistency and a more level playing field across the UK, as well as administrative ease.

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NFU Cymru believes that there will have to be at least some degree of collaboration and interface between administrations for purely pragmatic reasons. It may be that such collaboration could be achieved via one of the existing Joint Ministerial Committee structures or if necessary a new one set up. NFU Cymru would expect to see decisions taken on the basis of mutual agreement, between parties who have chosen to collaborate or to share decision making responsibilities.

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Annex 1 - The Contribution of Agriculture to the Well-Being of Wales

The Welsh Government Well-Being of Future Generations (Wales) Act 2015 is designed to improve the social, economic, environmental and cultural well-being of Wales. The Act establishes seven goals that all public bodies, including Welsh Ministers, must work to achieve. The contribution that farming makes to achievement of all seven goals is unparalleled by any other industry, as highlighted in the following below:

Well Being of Future Generations Act: **Well-being Goals**	**NFU Cymru: Agriculture is the Answer**
A prosperous Wales	• 60,000 employed full or part time in farming in Wales • £1,5bn Gross Output • Farming underpins a food supply chain worth over £6bn • Over 220, 000 people in Wales are employed in the agri-food sectors - that's 17% of the workforce and Wales's biggest employer • The Welsh countryside managed by farmers provides the backdrop for the tourism industry worth over £2.5bn • **The Welsh agricultural industry is a key generator of wealth and employment for the people of Wales**
A resilient Wales	• Farmers care for 81 % of total land area of Wales - that's over 1,84m hectares • 600,000 ha of environmentally designated areas • Almost 560,000 ha managed under Glastir Entry Sustainable Land Management Scheme designed to combat climate change, improve water management and maintain and enhance biodiversity • Farming supports a diverse range of species, habitats and ecosystems • Farmers provide a range of ecosystem services including carbon sequestration and management, water quality and water quantity management for flood alleviation • Low carbon, local energy installations have the potential to meet 57% of Wales's electricity consumption and the evidence shows a large proportion of projects are located within Wales's rural local authorities • GHG emissions from agriculture have declined by 20% since 1990 and further decreases are being achieved through production efficiency measures • **Welsh farmers play a key role maintaining and enhancing our natural environment and supporting the provision of a full range of ecosystem services**
A healthier Wales	• Welsh agriculture is a key provider of safe, nutritious, high quality Welsh food which plays a fundamental contribution in supporting the physical and mental well-being of the people of Wales • Welsh farmers are known to operate to some of the highest standards of welfare and production in the whole world • Welsh farming also delivers a significant proportion of Wales's access provision which includes 16000 miles of footpaths, 3000 miles bridleways, 1200 miles of cycle network, and 460,000 ha of open access land • **Welsh farming makes a key contribution to the physical and mental well-being of the people of Wales**
A more equal Wales	• Rural Wales is home to 33% of the Welsh population. • The vitality and potential of rural areas is closely linked to the presence of a competitive and dynamic farming sector. The

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	NFU Cymru 'Why farming Matters to the Welsh Economy' shows that each family farm is typically economically linked to some 40-80 other businesses in the region • **Through direct and indirect employment in rural communities, Welsh farming underpins the rural economy and contributes to a more equal Wales**
A Wales of cohesive communities	• Local communities in rural Wales are heavily dependent on agriculture for financial and social prosperity. • Leadership and voluntary roles in rural communities • **Welsh farmers make a key contribution towards the provision of attractive, viable, safe communities in rural areas**
A Wales of vibrant culture and thriving Welsh language	• Agriculture has the highest proportion of Welsh speakers of any sector. • Farming is the bedrock of rural communities across Wales which have been shaped by farming activity spanning hundreds of years. Farmers continue to maintain these traditions, preserving rural culture and sense of place • **Welsh farmers are key promoters and protectors of our culture, heritage and the Welsh language**
A globally responsible Wales	• Current levels of self-sufficiency at a UK level are at 62% • Future challenges to our global food production system include climate change, a growing UK and global population, water scarcity. Given its climate and rainfall, Wales is predicted to be an area of favoured production in the future • **Welsh farmers have a key role to play feeding the people of Wales and in contributing to global food security now and in the future.**

Although every effort has been made to ensure accuracy, nei her the NFU nor he author can accept liability for errors and or omissions. © NFU

yn rhoi cartref i fyd natur giving nature a home

Environmental Principles and Governance in Wales Post European Union Exit Response from RSPB Cymru

RSPB Cymru is part of the RSPB - the UK's largest nature conservation charity, inspiring everyone to give nature a home. Together with our partners, we protect threatened birds and wildlife so our towns, coast and countryside will teem with life once again. We play a leading role in BirdLife International, a worldwide partnership of nature conservation organisations.

Overview

The RSPB is pleased to have the opportunity to contribute to this consultation, and we are committed to continuing to work with Welsh Government and other partners in the further development of this policy area.

We welcome the approach taken in the consultation document to setting out the role and application of environmental principles under the Treaty on the Functioning of the European Union (TFEU) as well as other international agreements. We recognise that Wales has already taken steps to bring many of these principles through into domestic legislation, and appreciate and value the approach taken, with the overarching sustainable development context provided by the Well-being of Future Generations Act 2015 (WFGA), within which the sustainable management of natural resources nests. While implementation is, in many ways, still in its infancy we recognise the legislative framework has had an important impact on the Welsh Government's approach to policy development around sustainable land and sea management, as well as in this week's seminal decision on the M4.

It is important to reflect, however, that Wales' legislation was developed beneath the umbrella of EU membership, and the application of the core principles through the Treaties. While we welcome the positive intent demonstrated in the consultation document to enshrine the principles in Welsh legislation with a meaningful duty on all public bodies, we consider more than the proposed amendments to the SMNR duty and principles will be needed to secure equivalence to those principles' current role. We also welcome Welsh Government's recognition that a governance gap will arise after we leave the EU, and its commitment to ensuring access to justice (via a citizen complaints procedure) and to designing truly independent oversight arrangements.

Securing the environmental principles, along with robust and independent governance, is vital to ensure that our environmental protections and standards are not weakened. However, the evidence – including the recent IPBES report – shows us that simply maintaining existing standards is not enough. We need a more ambitious approach to tackle the catastrophic declines in nature that we are seeing in Wales and across the world. We consider targets for nature's recovery, with legislative underpinning, are needed to drive forward effective implementation of the iterative approach enshrined in the Environment (Wales) Act (EWA), to achieve a Wales that is richer in nature to the benefit of all.

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

- **Rectification at source**
- **Polluter pays**

Yes, but this will not be sufficient to address the gap that will arise when the UK leaves the EU and is no longer bound by the Treaties, as explained 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?

We consider that the precautionary principle and the prevention principle should be articulated, along with the rectification at source and polluter pays principles, as overarching principles, along with the objective of securing a high level of environmental protection.

We recognise that in developing the principles of sustainable management of natural resources (SMNR) the Welsh Government sought to create a set of environmental principles that are practically applicable – this was necessary because they are intended to guide Natural Resources Wales (NRW) in the delivery of its breadth of functions, from nature conservation delivery through regulation, forestry and flood risk management (*inter alia*). The EWA is not the only piece of legislation which seeks to operationalise environmental principles. For example, the requirements of the Environmental Permitting (England and Wales) Regulations 2016 bring in the polluter pays principle and the Conservation of Habitats and Species Regulations 2017 specifically include the precautionary principle in the requirements around assessment of plans and projects.

However, the approach taken to the precautionary principle within SMNR is not sufficient to convey its over-arching impact. The Welsh Government argues that the key components of EU guidance of the application of the precautionary principle are reflected in SMNR principles a, e, g and h. We have taken legal advice, which does agree that these SMNR principles reflect the EU guidance, but we have concerns about the specific wording of principle h (take action to prevent significant damage to ecosystems): namely, that it suggests significant damage must be shown to require action to be taken. The precautionary principle, in contrast, requires action in response to 'potentially dangerous' effects. Furthermore, there is nothing within the EWA which explains that the precautionary principle must be applied, and that these individual principles should be treated as amounting to this. The precautionary principle is internationally recognised, and a critical component of environmental protection; we therefore consider it to be vital that it is set out plainly, as a principle in its own right, on the face of legislation.

Within Article 191(2) of the TFEU the four core principles are set out with the aim/overarching objective of securing *a high level of environmental protection*. We consider that this objective must also be brought into Welsh legislation to maintain the clarity and impact of the core principles. This is discussed further in our answer to question 3.

In considering whether other principles need to be included we have considered the list of principles included at section 16 of the Withdrawal Act:

<u>Sustainable development</u> – we agree that this is an overarching objective rather than a principle, and that it is already enshrined in Welsh law via the Well-being of Future Generations Act.

Integration – the EU principle that environmental protection should be integrated across all policy areas is vital to ensure policies do not have a detrimental impact. The inclusion of Integration as one of the 'ways of working' under the Sustainable Development Principle in the WFGA is welcomed, but, in our view, insufficient to replicate the impact of the principle at EU level. Currently the application of the Sustainable Development principle is required in relation to specific processes under the WFGA and therefore even for Sustainable Development it is not being applied across *all* relevant functions and there is no specific mention of other environmental protections, meaning the full possible application of the Integration principle is potentially restricted.

However, we do acknowledge that the construction of the SMNR duty has the potential to ensure that the SMNR objective is considered in relation to the breadth of activities undertaken by public bodies, and as such is a vehicle for integration. As set out below we believe the SMNR duty, and duty to apply the SMNR principles, will not be a sufficient approach to securing equivalence post Brexit but they could provide a model approach on which to build in order to achieve this.

Procedural rights- access to justice, access to information and public participation are vital obligations arising from the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998 (the Aarhus Convention). Whilst we recognise that public participation is included within the SMNR principles, the Welsh Government should give serious consideration to ensuring the complete implementation of obligations under this Convention. Specifically, replacement governance functions must consider how best to ensure citizen's access to justice on environmental matters is secured, recognising the crucial role that the current EU citizen's complaints process plays, as well as wider public participation in environmental decision making.

Non-regression – We have welcomed the Welsh Government' commitment to maintain and improve environmental standards after Brexit, but we do not accept that it is effectively secured through the 'maintain and enhance' wording of the SMNR objective. The principle of non-regression requires

> '*that there should not be a roll-back in environmental standards, promoting a ratcheting up of ambition in subsequent law reform and policy and preventing any lowering of ambition or protection'*.[1]

This principle is now receiving global recognition as an important mechanism for protecting our natural environment and has been included in the UNFCCC's Paris Agreement.

We welcome the Welsh Government's view that non-regression (as referred to in relation to the UK's Withdrawal Agreement) is not enough, and that the UK should agree to progressive alignment[2] with the EU in relation to environmental standards and workers' rights. We note, on similar lines, that the Scottish Government has recently announced it will legislate for a 'keeping pace' power. We would strongly encourage Welsh Government to consider a similar approach.

In addition, we are concerned that the wording of the SMNR objective, specifically 'maintain and enhance' does not adequately express the challenge facing our natural world. We are facing catastrophic declines in biodiversity and there is an urgent need for action to address this problem, in particular as ecosystems across Wales are currently not resilient. This wording should be

[1] ClientEarth 2018, Environmental Principles in UK Law after Brexit
[2] Assembly debate on the Withdrawal Agreement, 4 December 2018: http://record.assembly.wales/Plenary/5369#A47258

strengthened to reflect protection, restoration and recovery of our natural world, to ensure we are able to tackle the biodiversity crisis head on.

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

We do agree that these duties should be extended, but we consider the content of any duty/duties on public bodies also needs to include the application of the four core principles with the aim of securing a high level of environmental protection. As outlined below, we do not accept that extending the SMNR duty will be sufficient, on its own, to secure equivalence post Brexit.

Within the TFEU (as set out above) the four core principles are set out with the aim/overarching objective of securing *a high level of environmental protection*. We consider that this objective must also be brought into Welsh legislation to maintain the clarity and impact of the core principles.

As described in the consultation document, the principles are implemented through environmental law and policy, and they, and their overarching objective, guide interpretation by the courts. We do not agree that the equivalent impact will be achieved domestically by bringing the principles into Welsh legislation under the banner of the Sustainable Management of Natural Resources, for the following reasons.

The SMNR principles are couched (obviously) within the construct of the Sustainable Management of Natural Resources. We recognise that natural resources are very broadly defined (so as to include features of the environment like geological and climatic features and processes, as well as biodiversity), and also that the duty to pursue SMNR centres on the objective to *maintain and enhance the resilience of ecosystems and the benefits they provide*. We appreciate that the intended impact of the duty, in section 3(a) of the EWA is that this objective is central to all activities NRW undertakes. Nevertheless, the objective encompasses not only ecosystems but the benefits people derive from ecosystems; this is further underlined by reference to *opportunities* in sections 9 and 11 of the Act (Natural Resources Policy (NRP) and Area Statements). The national priorities, based on the objective, set out in the NRP to drive delivery through Area Statements, are clearly focused on the benefits we obtain from natural resources (nature-based solutions; renewable energy; and a place-based approach to maximise community benefits).

We therefore do not consider that SMNR is *equivalent to* an objective to secure a high level of environmental protection, and nor does it adequately *encompass* the objective of protecting the environment in its own right. (Incidentally we are disappointed to note that intrinsic value is not listed as a part of our existing principles in this consultation document; an omission which often occurs). Even if it is intended to do the latter, we do not consider this to be sufficiently clear and explicit in the legislation, to ensure there is no potential for some areas to be excluded. For clarity and to ensure full coverage, we strongly advocate utilising a definition of the environment which will ensure all environmental legislation and requirements are included. We recommend that the existing, regularly used and well-understood definition within the Environmental Information Regulations 2004 (originating from the Aarhus Convention) is used to ensure time or resources are not spent on defining what is in or out of scope[3].

[3] Regulation 2(1) includes a definition of environmental information – and although parts are of course not relevant its definition for the environment is –
2(1) "environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information… on –

The need to make legal provision for new principles in Wales comes directly from the loss of their current influence, and that of their overarching objective, under the EU Treaties. We believe this will be best provided through explicitly including the core principles and the objective on the face of the legislation and placing a duty on all public bodies to apply them (for relevant functions). This could be done through amendments to the EWA, such as:

- Amending section 1 of the Act, e.g. *The purpose of this Part is to enshrine the core environmental principles* [listed] *with the aim of securing a high level of environmental protection and to promote the sustainable management of natural resources*
- Creating a new duty on public bodies that encompasses the SMNR duty (with the SMNR principles) *and* a duty to apply the core principles to secure a high level of environmental protection.

The proposal to extend the SMNR duty to other public bodies shows commitment to applying a strong duty on the principles, namely '*must apply*' rather than the weaker alternative of '*have regard to*', and to a wide group of bodies – thus distinguishing the Welsh Government's approach from those taken either in Westminster or in Scotland to date. We warmly welcome this commitment. We advocate that the new duty/duties are have an extended content (as we set out above) as well as scope and are designed in a similar way.

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

An extended version of the SMNR duty, or a set of duties which include the application of high level principles with the aim of securing a high level of environmental protection, should be applied to all Welsh public bodies as a minimum (i.e. those set out in s6 of the WFGA but without exclusion of future Welsh public bodies) and other public bodies performing functions within Wales[1]. While we recognise the Welsh Government will need to obtain the agreement of the UK Government for this, we would advocate the inclusion of all *public authorities* as defined s6(9) of the EWA (which includes bodies performing public functions e.g. water companies – it is important that these bodies should ensure consideration of the principles is had when performing those functions).

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;
(d) reports on the implementation of environmental legislation;
(e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c).

[1] Although it is hoped that those non Welsh public bodies will have this requirement already due to e.g. the Westminster Environment Bill or Scottish equivalent, for clarity we recommend that any role or function exercised in Wales be specifically included in Welsh legislation.

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

We agree with the gaps identified.

With regard to 'A simple and inexpensive mechanism to raise complaints' we would also add that the current system is also liability-free for any complainant. This enables them to make complaints without the fear that they will be subject to future action by those they complain against, or would face costs should the complaint not proceed, or be ruled against.

In relation to 'enforcement mechanisms' we would add that the EU's powers also include the rectification of damage caused by the offence. This is a vital aspect of the EU's enforcement mechanisms and its loss would be a significant regression.

In addition to the above we would also add the extensive monitoring and data collection activities of the EU. 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. The Commission's role in providing strategic advice and guidance to support compliance with the law and delivery of environmental objectives should also be considered.

We also note the potential for losing access to the forums that the EU and its institutions provide for information sharing between Member States and other stakeholders, particularly through the European Environment Agency (EEA). We advocate that the Welsh Government should:

- Explore ways for Wales to remain a member of the EEA, whether individually or by pressing the UK Government to join as a non-EU member.
- Promote continued engagement with EU academic and stakeholder networks and organisations to be able to share the vital expertise and information they can provide; and
- Support eNGO networks and engagement at the EU level, such as through the European Environmental Bureau.

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

We recognise that it is important to ensure clarity between any new arrangements for environmental governance and the existing bodies in Wales that provide both environmental functions and accountability functions. However, it is critical to be clear that none of the existing bodies currently provides equivalent environmental governance to that provided by the EU institutions. New arrangements are required because leaving the EU, as identified in the consultation document, will create a governance gap.

We do not consider that this gap can be adequately addressed by any existing body, for example:

- Natural Resources Wales plays a critical role in environmental delivery, advice and regulation - including of itself and Welsh Government. The nature of its functions mean it could not possibly take on an overarching governance role.

- The Future Generations Commissioner would need to be substantively amended – not only to make the appointment of the post and funding of the Office fully independent of government, but also to significantly increase environmental remit and expertise which

could impact on the cross-cutting nature of the role. In addition, the Commissioner does not possess robust enforcement powers, and the current consultation only considers introducing new accountability and enforcement powers over environmental matters.

- The Public Services Ombudsman only deals with issues of maladministration. It covers a broad range of topics thereby lacking the capacity and expertise necessary to deal with complex environmental cases and can only employ soft power to encourage compliance with its recommendations.

Neither do we consider that amending the structure and functions of any of these bodies would be an appropriate solution; to take this approach would be more complicated than to design a bespoke body to fill the specific gap identified.

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

Not entirely. In line with our response to questions 2 and 3, we do not believe the construct of SMNR is an adequate all-encompassing objective for the ongoing development and delivery of environmental law and policy in Wales. Much of our existing legislation pre-dates the EWA, and as we will no longer be subject to the EU Treaties it is imperative that the EU objective of a high level of environmental protection, to which this existing legislation contributes, is clearly articulated in relation to the remit of any new governance body. While it will undoubtedly be an added benefit for a body to scrutinise the implementation of the SMNR framework, it is imperative that retained EU law (for example) that was developed in the context of the EU treaties is not re-purposed 'by the back door' under the SMNR banner.

We would argue strongly that retained EU law, such as the Habitats Regulations for example, is essential if the objective of SMNR is to be delivered. However, we are not confident that these Regulations would have been developed to be as rigorous as they are had they been developed with SMNR as the overarching context, rather than the EU Treaties, with the objective of a high level of environmental protection underpinned by core environmental principles.

Therefore we consider that the aim of the body should be to act as a guardian of Wales' environment and natural resources in ensuring that policy and legislation is developed and implemented in accordance with the principles set out in the EWA (assuming this is amended to clearly set out the four core principles) and with the aim of securing a high level of environmental protection as well as achieving the objective of SMNR (which, as suggested in our answer to question 2 should be strengthened to reflect the need to protect, restore and recover nature for a healthier, more resilient environment.

We would wish to see some changes to the objectives set out, for example:

- Ensure policy and legislation is developed in way which *secures a high level of environmental protection and restores and recovers* Wales' natural resources…
- Ensure legislation is implemented effectively and delivery is in line with the aim of *securing a high level of environmental protection and* restoring and recovering Wales' natural resources.
- Act impartially in assessing the effective implementation of Welsh *(including UK/Wales and England/retained EU)* legislation.

We welcome the inclusion of the objective to 'act impartially in receiving complaints from citizens'; a further objective is necessary, to respond to *potential* breaches of environmental law by working with public bodies to address compliance/implementation issues, and taking enforcement action where necessary. As referenced in our answer to question 11, the independence and impartiality of any governance body is vital to ensure it is apolitical and able to carry out this important role without political interference.

We see the value of a governance body acting in an advisory capacity, but this advisory role must be clearly distinguished from NRW's advisory role, or that of other bodies such as the Committee on Climate Change. It should be further qualified to make clear that the governance body's role would be to provide advice in relation to, e.g., the implementation of environmental law and the need for new or reformed legislation and policy.

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

We recommend that the scope of new governance arrangements should include all policy areas which have an impact upon the environment, including for example economic, transport, social and health policies. We welcome the intent set out in the consultation document for the scope of governance arrangements to include all natural resources (as set out in the EWA) and other policy areas that intersect with them, e.g. climate change, chemicals, and agriculture. We assume the same would apply to land use and marine planning, fisheries management and forestry. Consideration should be given to the need to reflect the definition of 'environment' from the Environment Information Regulations that we have advocated in response to question 3, due it to being tried and tested and found to cover all aspects of the environment.

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

A new governance body should have oversight over all those bodies listed in paragraph 3.34 of the consultation document (Welsh Ministers, NRW, Welsh local authorities and Minister of the Crown). In relation to Ministers of the Crown, it is vital that they are held accountable in relation to any actions they undertake in Wales that may impact on the environment; this would include their delivery against the requirements of the Habitats Regulations, or undertaking environmental impact assessments, for example. Whether this latter responsibility would fall upon a Welsh governance body or the body to be established by the UK Government is not clear, but it is important that citizen complaints made to either be appropriately dealt with (which could include passing them on to the appropriate body in the first place).

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

Yes. All Welsh public bodies should fall within the remit of a governance body operating in Wales.

Also, other non-devolved bodies that undertake statutory functions within Wales should fall within its remit, e.g. the Crown Estate, port authorities and other statutory undertakers which have responsibilities under environmental legislation, and whose functions have potential to impact on the environment. We therefore recommend seeking to include Public Authorities as set out under

s6(9) of the EWA; we recognise Wales cannot do this without UK Government permission.

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

We welcome and support the Welsh Government's view, as set out in the consultation document, that any oversight body should be independent of government, including having independent appointment structures and independent sources of funding. We agree that it should be accountable to the National Assembly for Wales, and be independently audited.

In relation to the UK Government's proposals to create a new 'Office of Environmental Protection' (OEP) the RSPB has strongly advocated that the new body should not be set up (as currently proposed) as a non-departmental public body, but that the Government should explore options to constitute it as a fully independent body corporate, in a similar way that the National Audit Office was set up. We would reiterate this advice in relation to any new governance body for Wales. To ensure the body is truly independent we recommend that

- The Assembly should directly appoint the Chair; the Chair should appoint all other members;
- The body should determine its own strategy and the level of funding it needs to carry out its functions;
- The body should have an agreed, fixed five-year budget; and
- The body's funding should be set and approved directly by the Assembly, rather than the Welsh Government.

The consultation document understandably does not explore the question of whether a new Wales-only governance body would be preferable to a body covering the whole of the UK, or at least covering more than one country within the UK (England and Wales, or England, Northern Ireland and Wales). It is the RSPB's view that there would be benefits to a single UK-wide body that were accountable to the legislature of each country. These include the fact that a body constituted by all legislatures would be less vulnerable to being weakened or disbanded through the action of a single legislature. In addition, with the proviso that the body would have a presence in each country, some efficiency in resourcing would be possible, and each country would benefit from a larger overall resource in terms of expertise. However, risks to this approach would include the body's attention being concentrated where resources are greatest (most likely in England), and this risk could be exacerbated if, rather than being UK-wide, a body were constituted for two or three of the UK countries. We fully recognise that for such a body to be created and operate successfully for each country, it would need to be co-designed by the relevant administrations working together. If a separate body is created for Wales, it is still critical that Welsh Government works with the other governments of the UK to ensure new governance bodies cooperate around shared or cross-border issues and to ensure that citizens' complaints are adequately dealt with no matter where they are raised.

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

Yes, but care must be taken to ensure the advisory functions of existing bodies, e.g. NRW, are not duplicated. Advice should support compliance with the law and delivery of environmental objectives. We agree it makes sense for advice to be targeted where there is a risk of failure to effectively implement legislation or policy – this could relate to individual situations or strategic matters.

The body should be able to advise government on the content of policy, the need for new policy and legislation (or whether changes are needed to improve the effectiveness of legislation in delivering against objectives) and setting standards to enable Wales to deliver against international commitments and domestic objectives. This should include advice on setting nature recovery targets to enhance the iterative framework contained within the EWA.

We also agree that the body should be able to draw upon the expertise and knowledge of other bodies; this should include bodies outside of Wales, recognising the very limited number of experts available in relation to some aspects of the environment, e.g. within the environmental agencies of the other UK countries.

Question 13: Should an oversight body be able to scrutinise implementation of environmental legislation?
Question 14: What should be the extent of this function?

Yes, we consider scrutiny to be an important role of a new governance body. Again, this role would need to be clearly defined and not duplicate the scrutiny functions of existing bodies; it should be focused on issues around implementation of law and policy affecting the environment, and the effectiveness of such law and policy in securing its high-level objectives, such as a high level of environmental protection and promoting SMNR. In this regard we agree it would be appropriate for the body to undertake thematic reviews of the implementation of legislation, including in relation to any complaints received.

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?

We welcome the statement in the consultation document that there should be no reduction in citizens' rights as a result of exiting the EU. As noted in the consultation document, while there are existing bodies with complaints procedures, there is none that serves a role equivalent to that currently provided by the European Commission. In order to serve this role, a governance body would need to be able to undertake investigations. It would need powers to obtain information and it would need to be able to access external expertise if necessary. The body should have powers to investigate matters of its own volition as well as investigate complaints made by members of the public. This complaints process should be offered free to any member of the public and should be as straightforward and burden-free as possible. This is currently an important function of the EU mechanism and has been used on many occasions to identify systemic and/or strategic breaches of environmental law.

When considering a citizen's complaint function, the body should ensure that complaints are considered in a timely manner and that complainants are kept informed and about the status of their complaint at all stages (including if the complaint is not upheld). The EU complaints process currently keeps complainants informed about the status of their complaint, allowing for the opportunity for comment before the case file is closed, helping to ensure transparency and public participation.

Furthermore, consideration should be given to the involvement of complainants in remedy or recourse following a complaint. Complainants, where appropriate could be involved, or their views

sought, at important points in the decision-making process, including identifying any remedy, helping to secure buy-in in the remedy and stakeholder involvement in environmental protection.

Any complaints mechanism should ensure cooperation and collaboration with relevant governance bodies in the other countries of the UK where relevant. For example, if a Wales only governance body were set up, this body should have a duty to pass on complaints made to it which should be considered by an England/UK body (if there is one) or due to cross border issues/competence share with the relevant other UK country, to ensure that no complaint falls between governance bodies.

Question 16: What informal and formal methods of enforcement do you consider an oversight body should operate in order deliver on its role and objectives?
Question 17: What enforcement actions do you consider need to be available?

We welcome the desire expressed in the consultation document to ensure deterrents relating to compliance with environmental law are genuine and effective.

We agree that highlighting problems, advising and working with public bodies to identify solutions will be preferable to taking formal enforcement actions in many cases, although there must be clarity over the changes required and by when they must be delivered in order to ensure that such informal process generate meaningful action leading to improved outcomes.

The use of more formal enforcement mechanisms should be determined by the seriousness of the issue at stake, as well as the success or otherwise of the more informal approach referred to above. A governance body should have the ability to:

- Issue legally binding enforcement notices which could include stop orders and remediation notices, and compel the rescinding of permissions, consents and licences to prevent environmental damage from occurring;
- Refer more complex cases to the courts. The RSPB is advocating that improvements to Judicial Review are necessary to provide EU equivalence and adequate access to justice including improved rules on standing, costs, intensity of review and remedies and the ability to incorporate helpful elements of the Tribunal system (such as technical advisers). One possibility would be to refer cases to the existing Environmental Tribunal rather than the High Court, which could provide a suitable forum for tailored rules and procedures. (We recognise that these actions are not currently in the Welsh Government's gift; we are advocating them at Westminster in our discussions and evidence relating to the proposed OEP. In addition, in Scotland we are advocating the creation of a new Scottish Environmental Court or Tribunal.

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

Yes, we would support a shared set of common environmental principles. Until the UK leaves the EU, the environmental policy of all four jurisdictions in the UK operates within an EU framework. This has allowed the four governments of the UK to develop their own environmental policies within a broader EU environmental framework which has prevented policies from undermining each other, created consistency across the UK and allowed the governments to work together to address shared environmental challenges which do not respect borders. As noted in the consultation document, a

shared set of principles would support joint decision making and legislation and policy making between administrations. They would support the UK's role in giving input and signing up to international agreements which are implemented in country by the UK and devolved governments.

A common set of principles across the four countries of the UK should help:

- Prevent a race to the bottom through competitive deregulation
- Ensure a level playing field, helping to create certainty for businesses operating across the UK
- Allow the four countries of the UK to collaborate on shared issues including the protections of migratory and transboundary species and habitats and air and water pollution.
- To achieve positive environmental change post-Brexit and ensure that commitments are more effective and durable.
- Depending on the outcome of the agreement on the future relationship between the UK and the EU, this will also help to demonstrate commitment within all four countries to maintain environmental standards.

It is our view that the list should include at least the four core principles found in the EU treaties, to be applied with the aim of securing a high level of environmental protection.

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

We recognise that Brexit has exposed new challenges in the way the countries of the UK work together, e.g. on decision making in relation to international environmental agreements. Collaboration between the governments is necessary, particularly in relation to the environment, for reasons outlined above. Adopting the environmental principles and high-level objective as part of the framework for this collaboration would be very positive.

We have noted in our response to question 11 that there are potential advantages in creating a new governance body that is shared between UK countries; however, these advantages may diminish in a model involving only a subset of the countries. Whatever the ultimate institutional arrangements, it is essential that there is co-design of arrangements to ensure that governance bodies are legally required to co-operate with one another. This co-operation should enable sharing of expertise; coming together to consider common or cross border issues (e.g. Invasive non-native species, or cross-border protected sites); and mechanisms to ensure that a complaint made in any country will be considered by the appropriate governance body, with transparent communication with the complainant.

Further comments – interim or transitional arrangements

We welcome Welsh Government's commitment to continue to apply the four core environmental principles whilst legislation is being developed. We recommend this is done in the context of the objective to secure a high level of protection.

We are disappointed, however, that no transitional arrangements are identified for environmental oversight and enforcement. This will be of concern particularly in the event of a 'No Deal' scenario. Even under a 'deal' scenario with a transition period (exiting January 2021), it is unlikely that a new governance body could be fully operational immediately, given the timescales required to pass legislation and set up a new body.

We note that the UK Government was to set up an interim 'green watchdog' until the OEP is fully established, to be made up of a team of civil servants headed by a Professor of Law and legal practitioner - Richard Macrory.[4] Although it may be that these interim arrangements are put on hold for the time being, a substantial amount of work has gone into them. We do not consider (for reasons outlined in response to question 6) that any existing body could step up to fill the governance gap on an interim basis and we urge the Welsh Government to publish its proposals for interim governance arrangements as soon as possible.

[4] https://www.endsreport.com/article/1580690/exclusive-richard-macrory-head-interim-green-watchdog

Environmental Principles and Governance in Wales Post European Union Exit

Consultation response form

Your name:

Organisation (if applicable): Cytûn (Churches Together in Wales)

e-mail/telephone number:

Your address:

Cytûn is the umbrella body for the main Christian denominations and a number of other Christian organisations in Wales. A full membership list can be found at: http://www.cytun.co.uk/hafan/en/who-we-are/ The member denominations have between them around 150,000 adult members in every community in Wales, and meaningful contact with many more children, young people and adults.
This response was prepared by the Wales & Europe Working Party of Cytûn, in which all member churches participate, and agreed at its meeting on 6th June 2019.

Responses should be returned by **9 June 2019** to

EU Exit & Strategy Unit
Department for Energy, Planning and Rural Affairs
Welsh Government
1st Floor East, Cathays Park 2
Cardiff
CF10 3NQ

or completed electronically and sent to:

e-mail: Environmental.Governance@gov.wales

Environmental Principles

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

Yes, we endorse the suggestion of achieving the necessary coherent legal framework post Brexit by building on Wales's progressive Well-being of Future Generations and Environment Acts. However, the full four principles should be included on the face of new legislation. The argument that the Prevention and the Precautionary Principles do not need to be included because they have informed some elements of Welsh environmental legislation does not stand up. There is no single statement of those four foundational principles in Welsh legislation; as Table 1 and paragraph 2.25 of the consultation document acknowledge. New legislation should enshrine all 4 principles in law as founding principles, to which the courts can refer simply and easily. Legislation should aim at a broad inclusion in Welsh law of the goals set out in the EU framework directives, not simply the preservation of specific regulatory steps.

Question 2: Do you think there are other principles, which may also need to be included?

Paragraph 2.15 recognises that the EU (Withdrawal) Act converts and saves existing EU environmental law and paras 1.3 and 1.5 commit the Welsh Government to "non-regression" in this regard. We welcome this, but note that EU standards will almost certainly continue to be raised over time. There should therefore be a principle that Wales will keep in line with improvements in EU standards – as was proposed in the Law Derived from the EU (Wales) Act 2018, subsequently repealed.

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

Yes. The duty to pursue environmental standards and the 4 underlying principles should be extended to all the functions of Welsh Ministers, as many other functions of Welsh Ministers have a direct or indirect impact on the environment eg taxation policy (increasingly important in future), economic development policies, transport and housing policies etc. The duty should not be simply to apply SMNR principles but to apply the 4 founding principles and contribute to meeting the environmental standards that flow from these.

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

On all public bodies receiving funds from Welsh Ministers.

Accountability

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

We agree with the gaps identified.

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

Of the current accountability bodies, only the Auditor General/WAO has the necessary culture of independence; and we agree with para 3.20 that it would not be appropriate for WAO to police environmental standards. The function of the Future Generations Commissioner is, as para 3.17 states, enmeshed in commenting on policy development in Welsh Government, which detracts from the independence needed to enforce environmental standards. The same applies to the UK Climate Change Committee. A new body is needed, which is appointed by and accountable to the National Assembly as a whole, and not to Welsh Ministers alone. We noted in our response to DEFRA's equivalent consultation that there would need to be clear understanding of the respective roles of a new Welsh body and any new UK bodies, and there may be a case for a UK body, appointed by and answerable to all four UK parliaments, provided that it covers all the areas referred to in paras 3.30-3.32 (see Q. 8 below).

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

No. The body should have no role in overseeing the development of policy, or in acting as an advisory capacity (the first and third bullet points in para 3.27), these being covered by NRW and the FG Commissioner, as noted previously. These functions would draw a new body into the trade-offs and dilemmas of policy-making, and gradually undermine its ability independently to enforce environmental standards. The environment needs a body that can be a single-minded and tough enforcer. That is why the current EU system has been so effective (eg in driving progress in Wales on waste, through the threat of massive fines). The detachment of the EU bodies is a key factor that has helped them to be so impartial and robust in enforcement.

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

The scope on environmental matters should be all-encompassing as suggested in paras 3.30 and 3.31. In regards to paragraph 3.32, the demarcation between policy advice and enforcement outlined in our answer to Q. 7 would solve the delineation issue identified here. It would be a nonsense if the scope of the new body did not include climate change, which is the biggest environmental challenge humanity faces. The UK Committee on Climate Change has so far undertaken no enforcement work. The role of that Committee, as set out on their website, is advisory rather than to undertake enforcement work; and as the Committee is composed of Government-appointees, it is hard to see how it could ever take on the enforcement work needed. So a new enforcement body would sit comfortably along side the existing role of the UKCCC in Wales.

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

No. It should include all public bodies funded by Welsh Ministers, for two reasons. First, more bodies than Natural Resources Wales have an impact on the environment in Wales. Second, Ministers will no doubt continue from time to time to change the public bodies that exist in Wales, closing some and creating others. Natural Resources Wales could itself be split up at some point in the future. Who knows? The list of bodies for the proposed legislation should be proof against such changes; the best way to do this is for any body funded by Welsh Ministers, to be within scope of the oversight body, with regard to its impact on the environment.

We also support the inclusion, as in para 3.34, of Ministers of the Crown to the extent that Welsh devolved competence would permit legislation in this regard. If a new UK wide body were established by all four parliaments, then all the functions of Ministers of the Crown would need to be included in its scope. In our response to the DEFRA consultation we objected strongly to the proposed exclusion of some functions of Ministers of the Crown (e.g. relating to national security and the Finance Acts) from its scope.

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

Yes; see answer to question 9.

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

We support the principles in paragraph 3.35; the body must be accountable to the National Assembly for Wales rather than to Welsh Ministers; be independently audited by WAO; have independent appointment structures and have

independent sources of funding. Welsh Ministers should not be responsible for appointing people to the body, or for determining the level of its funding.

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

No. That would compromise the body's capacity to enforce environmental standards effectively. It would draw the body into too close a relationship to Welsh Ministers and civil servants, which would blur the body's responsibilities, and suck it into considering the awkward policies and trade-offs that are intrinsic to government. If that happens, the culture of the body will not be one that is capable of enforcement. In a situation of 'climate and environmental emergency', as declared by the Welsh Government and Assembly, clear and unequivocal enforcement of the responsibilities of public bodies in addressing such an emergency is essential – as in any other kind of emergency.

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

Yes, clearly.

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

This should be a broad function for the reasons already given.

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?

As the consultation document argues, there should be no reduction in the ability of members of the public to raise complaints which the body should have power to investigate, where it judges that would be appropriate. Paragraph 3.49 seems right and para 3.50, regarding the ease of citizens' access, is very important.

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?

The formal powers proposed in the second bullet point of paragraph 3.52 are absolutely necessary, but in addition it is essential that the oversight body should have the power to impose heavy fines. The remarkable progress by local authorities in Wales on waste disposal since devolution began might well not have been made without the threat of punitive fines from the European Union's enforcement machinery.

The informal mechanisms outlined in the first bullet point, while superficially attractive, could prove an insidious trap. If the oversight body gets drawn into

working “to seek a solution” to a particular complaint, it will be compromised, and if the collaborative solution is not satisfactory, the body will then lack the independence needed to undertake robust enforcement action. This way of working will also undermine the distance required to be a robust enforcement body.

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

As in answer to question 16.

Other

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

If the rest of the UK is able to sign up to the 4 foundational principles, and other EU environmental standards, yes (see also our answers to Q. 6 & 8). But if the UK Government, either with regard to reserved matters or with regard to England, wanted to reduce environmental standards (or fail to keep up with rising EU standards – see Q. 2 above), it would be a terrible mistake to compromise Welsh standards to level down to English standards. It would therefore be essential that any UK legislation or bodies be established by and answerable to all four parliaments in the UK, so that the UK Parliament or Government could not reduce standards and enforceability in devolved areas unilaterally. This may be especially important in the current circumstances where the Welsh Government and Assembly has declared a ‘climate and environmental emergency’ (a long-term situation), but the UK Government has not unambiguously done so.

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

Cytûn has consistently supported the development of coherent UK wide governance mechanisms in all devolved policy areas, including those repatriated from the EU, with a strong oversight role for the national parliaments as well as for the governments concerned. The continued failure to develop these is a cause of concern. Any future arrangements should be publicly transparent and accountable and, with regard to environmental and climate change impact, be subject to scrutiny by the proposed new Welsh body and its equivalents across the UK. The risks of not getting this right are a driving down of standards or a straight-jacketing of ambition.

Ombudsman
Ombwdsmon
PUBLIC SERVICES OMBUDSMAN FOR WALES
OMBWDSMON GWASANAETHAU CYHOEDDUS CYMRU

Our ref: NB/MM

Ask for:

Date: 7 June 2019

EU Exit & Strategy Unit
Department for Energy, Planning & Rural Affairs
Welsh Government

By email only:
Environmental.Governance@gov.wales

Dear Minister

I refer to the consultation document issued on 18 March and I am pleased to provide my comments.

I will provide a number of detailed comments on the consultation, as there appears to be some misunderstanding of the role of the PSOW. However, having appraised myself of the consultation, I am sure that any steps to protect and enhance environmental governance in Wales post-Brexit are to be welcomed. I am also glad that the consultation refers to established governance structures, including my office.

In principle, I agree that there is a regulatory gap resulting from Brexit. However, in respect of individual complaints about personal injustice affecting a citizen of Wales, my office will remain the appropriate body to consider complaints about Natural Resources Wales (NRW), local authorities or the Welsh Government.

Should Welsh Government establish a new body in this field then our vires will also be affected, as Welsh Government is in our jurisdiction and I would expect any new body to be listed in Schedule 3 of the PSOW Act, as the NRW and Welsh Government currently are. I am aware that the proposed Office for Environmental Protection (OEP) in England includes provisions for the new body to be in the Parliamentary Commissioner's jurisdiction and that there has been ongoing dialogue between DEFRA and the PHSO.

The broader issue relating to Brexit and governance arrangements in policy fields, which currently have a split competence between the EU commission and Member States/ Devolved Governments, is something that is discussed regularly with the

Public Services Ombudsman For Wales | Ombwdsmon Gwasanaethau Cyhoeddus Cymru, 1 Ffordd yr Hen Gae, Pencoed CF35 5LJ
www.ombudsman-wales.org.uk | www.ombwdsmon-cymru.org.uk
01656 641150 01656 641199 ask@ombudsman-wales.org.uk | holwch@ombwdsmon-cymru.org.uk

All calls are recorded for training and reference purposes | Bydd pob galwad yn cael ei recordio ar gyfer dibenion hyfforddi a chyfeirio

Public Service Ombudsman Group in the UK and also with the European Ombudsman. Whilst post-Brexit accountability mechanisms are a matter for government/s, we have a joint interest in ensuring that whatever mechanisms that are in place post-Brexit are as clear as possible to the citizen.

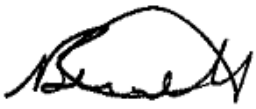
I think it is important that any reforms in this area fill any emergent environmental regulation gap, but do not duplicate existing complaint systems or create confusion for the citizen. I note that the consultation paper suggests (p59) that my office is not specifically focused on environmental issues (which is correct) and that we may not have the technical expertise for complex environmental issues. My office considers complaints about a wide range of complex issues, including health and environmental issues and my staff are absolutely able to deal with such technical complex cases.

The Consultation document suggests that my office may have a general “oversight” and “scrutiny” role of public bodies in Wales. As indicated above, my role is to consider complaints of personal injustice arising from maladministration or service failure on the part of a public body in Wales. Where I find fault on the part of a public body which has caused injustice to an individual (or groups of individuals), I make recommendations to remedy any injustice. I do not therefore have a regulatory role. This, coupled with the fact that my role is to consider personal injustice, perhaps reinforces the need for a regulator in this area to deal with wider environmental concerns – e.g. by a lobbying group.

My office will happily collaborate with Welsh Government officials so that, should Brexit/these proposals proceed, we can ensure that any emergent complaints system in this policy area is as citizen focused as possible.

Thank you again for seeking my views.

Yours sincerely



Nick Bennett
Ombudsman

EU Exit & Strategy Unit
Department for Energy, Planning and Rural Affairs
Welsh Government
1st Floor East, Cathays Park 2
Cardiff
CF10 3NQ

7 June 2019

Dear Sir / Madam,

ENVIRONMENTAL PRINCIPLES AND GOVERNANCE IN WALES POST EUROPEAN UNION EXIT

We thank you for the opportunity to respond to the above Consultation.

ScottishPower is a major UK energy company with renewable generation, retail supply and network interests; we are a leading developer of wind power in the UK, and part of the Iberdrola Group, the world's leading renewables developer. As such, we have extensive experience of environmental matters under a range of legislative controls.

We welcome the Welsh Government's aim of ensuring that there is suitable governance in place to manage and regulate environmental matters which are currently overseen by the EU and will need to be managed by another body. We also note that Wales benefits from existing legislation which will help in a smooth transfer of powers from the EU on environmental matters.

In considering our position on this matter, we refer to the Energy UK response to this consultation, which ScottishPower fully supports.

If you would like to discuss in more detail or require any further information, please do not hesitate to contact me.

ScottishPower 320 St. Vincent Street, Glasgow, G2 5AD
Tel: 0141 614 0000
www.scottishpower.com

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Environmental Principles and Governance in Wales Post European Union Exit

Consultation response form

Your name: Future Generations Commissioner for Wales (Sophie Howe)

Organisation (if applicable):

e-mail/telephone number:

Your address:

Responses should be returned by **9 June 2019** to

EU Exit & Strategy Unit
Department for Energy, Planning and Rural Affairs
Welsh Government
1st Floor East, Cathays Park 2
Cardiff
CF10 3NQ

or completed electronically and sent to:

E-mail : Environmental.Governance@gov.wales

Environmental Principles

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

I agree that the potential environment governance gap post-Brexit needs to be addressed. We need to ensure that we do not lose any protection we currently have from the EU framework but also from Welsh law and we should take this as an opportunity to even raise the current level of protection whenever possible.

Contents of the law

It is important that post-Brexit we have arrangements in place which ensure that we are not losing any of the overarching principles currently in place (for example the EU precautionary principle or the sustainable development principle in Wales) in addition to the operating principles used every day in Wales through SMNR and the five ways of working as set out in the Environment (Wales) Act and the Well-being of Future Generations (Wales) Act, for example.

I am concerned that the government in England places the sustainable development principle on an equal footing within their 'environmental principles' listed in Draft Clause 2 of the Draft Environment (Principles and Governance) Bill.

> *Draft Clause 2 states:*
> *In this Act "environmental principles" means the following principles—*
> *(a) the precautionary principle, so far as relating to the environment,*
> *(b) the principle of preventative action to avert environmental damage,*
> *(c) the principle that environmental damage should as a priority be rectified at source,*
> *(d) the polluter pays principle,*
> *(e) the principle of sustainable development,*
> *(f) the principle that environmental protection requirements must be integrated into the definition and implementation of policies and activities,*
> *(g) the principle of public access to environmental information,*
> *(h) the principle of public participation in environmental decision-making, and*
> *(i) the principle of access to justice in relation to environmental matters.*

In Wales, the Sustainable Development Principle is overarching. Our concept of well-being is holistic. It brings together the economy, society, environment and culture. Focusing only on the environment and having principles only applying to the environment or treating the environment separately is not in line with our concept of well-being in Wales. It is important to continue to look at wider and cross-cutting issues because all things impacting on the environment are not necessarily environmental e.g. human mobility has a huge impact on the natural environment. Equally, we already have protective operating principles such as SMNR and 5 ways of working including prevention, integration, etc. in Welsh Law and any new (UK) principles should not go against them or diminish their scope and depth. Equally some of the Welsh legal concepts might need amending as the consultation points. For example, the precautionary principle does not appear as such in Welsh law but SMNR principles 'capture the key components' of it as the consultation document states however, SMNR only applies to Welsh Government and NRW and not to all public bodies nor to the private or third sector. This is why great care needs to be taken to ensure the current level of protection is maintained and enhanced.

I understand that devolution is complex, but it is important that Wales does not operate post Brexit to any principles which would dilute both the overarching and operating principles we currently enjoy now in Wales within any post-Brexit UK, England and Wales or Wales only setting.

The principles set out in the Well-being of Future Generations Act should be used to design the new governance system.

Governance

I am clear that whatever structure replaces the EU ones, they will need to be well-resourced, expert, independent body which enjoys full enforcement powers which are no less that those currently available through the EU institutions and the Court of Justice of the European Union.

It is important to continue to have a structure which can hold to account and sanction governments, public bodies and ideally private companies too in cases of environmental law breaches. But it is essential that the holistic concept of well-being with its four pillars is considered and protected here.

The new system must ensure that the different functions of advising on policy, monitoring progress and sanctioning are still undertaken but this must be done in a way which takes into account the duties including advising and supporting and monitoring and assessing of the Future Generations Commissioner.

I do not have particular views as to which organisation(s) or structure(s) is to be used or created it is essential that it enhances rather than contradict existing structure, is expert, appropriately resourced, independent, easily accessible by citizens.

I believe any new body or reformed body, or bodies should be more than a regulator and it must be able to handle individual complains and be detached from government. I agree with the Public Services Ombudsman that any proposed system should be citizen centred and of easy access. It is important once more that we do not lose what we can currently enjoy within the EU framework and Welsh framework and seek to enhance the protection given to the environment and the access to justice given to current and future generations.

I believe it is important to consider whether all the public bodies listed in the Well-being of Future Generations Act should fall under the remit of new body and not only some of them.

Finally, the natural environment does not stop at human borders and it is important that the post-Brexit arrangements work in the UK context made of several devolved nations and for the longer-term for both current and future generations.

Question 2: Do you think there are other principles, which may also need to be included?

I agree that the potential environment governance gap post-Brexit needs to be addressed. We need to ensure that we do not lose any protection we currently have from the EU framework but

also from Welsh law and we should take this as an opportunity to even raise the current level of protection whenever possible.

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> *(h) the principle of public participation in environmental decision-making, and*
> *(i) the principle of access to justice in relation to environmental matters.*

In Wales, the Sustainable Development Principle is overarching. Our concept of well-being is holistic. It brings together the economy, society, environment and culture. Focusing only on the environment and having principles only applying to the environment or treating the environment separately is not in line with our concept of well-being in Wales. It is important to continue to look at wider and cross-cutting issues because all things impacting on the environment are not necessarily environmental e.g. human mobility has a huge impact on the natural environment. Equally, we already have protective operating principles such as SMNR and 5 ways of working including prevention, integration, etc. in Welsh Law and any new (UK) principles should not go against them or diminish their scope and depth. Equally some of the Welsh legal concepts might need amending as the consultation points. For example, the precautionary principle does not appear as such in Welsh law but SMNR principles 'capture the key components' of it as the consultation document states however, SMNR only applies to Welsh Government and NRW and not to all public bodies nor to the private or third sector. This is why great care needs to be taken to ensure the current level of protection is maintained and enhanced.

I understand that devolution is complex, but it is important that Wales does not operate post Brexit to any principles which would dilute both the overarching and operating principles we currently enjoy now in Wales within any post-Brexit UK, England and Wales or Wales only setting.

The principles set out in the Well-being of Future Generations Act should be used to design the new governance system.

<u>Governance</u>

I am clear that whatever structure replaces the EU ones, they will need to be well-resourced, expert, independent body which enjoys full enforcement powers which are no less

that those currently available through the EU institutions and the Court of Justice of the European Union.

It is important to continue to have a structure which can hold to account and sanction governments, public bodies and ideally private companies too in cases of environmental law breaches. But it is essential that the holistic concept of well-being with its four pillars is considered and protected here.

The new system must ensure that the different functions of advising on policy, monitoring progress and sanctioning are still undertaken but this must be done in a way which takes into account the duties including advising and supporting and monitoring and assessing of the Future Generations Commissioner.

I do not have particular views as to which organisation(s) or structure(s) is to be used or created it is essential that it enhances rather than contradict existing structure, is expert, appropriately resourced, independent, easily accessible by citizens.

I believe any new body or reformed body, or bodies should be more than a regulator and it must be able to handle individual complains and be detached from government. I agree with the Public Services Ombudsman that any proposed system should be citizen centred and of easy access. It is important once more that we do not lose what we can currently enjoy within the EU framework and Welsh framework and seek to enhance the protection given to the environment and the access to justice given to current and future generations.

I believe it is important to consider whether all the public bodies listed in the Well-being of Future Generations Act should fall under the remit of new body and not only some of them.

Finally, the natural environment does not stop at human borders and it is important that the post-Brexit arrangements work in the UK context made of several devolved nations and for the longer-term for both current and future generations.

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

I agree that the potential environment governance gap post-Brexit needs to be addressed. We need to ensure that we do not lose any protection we currently have from the EU framework but also from Welsh law and we should take this as an opportunity to even raise the current level of protection whenever possible.

<u>Contents of the law</u>

It is important that post-Brexit we have arrangements in place which ensure that we are not losing any of the overarching principles currently in place (for example the EU precautionary principle or the sustainable development principle in Wales) in addition to the operating principles used every day in Wales through SMNR and the five ways of working as set out in the Environment (Wales) Act and the Well-being of Future Generations (Wales) Act, for example.

I am concerned that the government in England places the sustainable development principle on an equal footing within their 'environmental principles' listed in Draft Clause 2 of the Draft Environment (Principles and Governance) Bill.

> *Draft Clause 2 states:*
> *In this Act "environmental principles" means the following principles—*
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> *(e) the principle of sustainable development,*
> *(f) the principle that environmental protection requirements must be integrated into the definition and implementation of policies and activities,*
> *(g) the principle of public access to environmental information,*
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It is important to continue to have a structure which can hold to account and sanction governments, public bodies and ideally private companies too in cases of environmental law

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Finally, the natural environment does not stop at human borders and it is important that the post-Brexit arrangements work in the UK context made of several devolved nations and for the longer-term for both current and future generations.

Accountability

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

I agree that the potential environment governance gap post-Brexit needs to be addressed. We need to ensure that we do not lose any protection we currently have from the EU framework but also from Welsh law and we should take this as an opportunity to even raise the current level of protection whenever possible.

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Finally, the natural environment does not stop at human borders and it is important that the post-Brexit arrangements work in the UK context made of several devolved nations and for the longer-term for both current and future generations.

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

I agree that the potential environment governance gap post-Brexit needs to be addressed. We need to ensure that we do not lose any protection we currently have from the EU framework but also from Welsh law and we should take this as an opportunity to even raise the current level of protection whenever possible.

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

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

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

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

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> *(i) the principle of access to justice in relation to environmental matters.*

In Wales, the Sustainable Development Principle is overarching. Our concept of well-being is holistic. It brings together the economy, society, environment and culture. Focusing only on the environment and having principles only applying to the environment or treating the environment separately is not in line with our concept of well-being in Wales. It is important to continue to look at wider and cross-cutting issues because all things impacting on the environment are not necessarily environmental e.g. human mobility has a huge impact on the natural environment. Equally, we already have protective operating principles such as SMNR and 5 ways of working including prevention, integration, etc. in Welsh Law and any new (UK) principles should not go against them or diminish their scope and depth. Equally some of the Welsh legal concepts might need amending as the consultation points. For example, the precautionary principle does not appear as such in Welsh law but SMNR principles 'capture the key components' of it as the consultation document states however, SMNR only applies to Welsh Government and NRW and not to all public bodies nor to the private or third sector. This is why great care needs to be taken to ensure the current level of protection is maintained and enhanced.

I understand that devolution is complex, but it is important that Wales does not operate post Brexit to any principles which would dilute both the overarching and operating principles we currently enjoy now in Wales within any post-Brexit UK, England and Wales or Wales only setting.

The principles set out in the Well-being of Future Generations Act should be used to design the new governance system.

<u>Governance</u>

I am clear that whatever structure replaces the EU ones, they will need to be well-resourced, expert, independent body which enjoys full enforcement powers which are no less that those currently available through the EU institutions and the Court of Justice of the European Union.

It is important to continue to have a structure which can hold to account and sanction governments, public bodies and ideally private companies too in cases of environmental law breaches. But it is essential that the holistic concept of well-being with its four pillars is considered and protected here.

The new system must ensure that the different functions of advising on policy, monitoring progress and sanctioning are still undertaken but this must be done in a way which takes into account the duties including advising and supporting and monitoring and assessing of the Future Generations Commissioner.

I do not have particular views as to which organisation(s) or structure(s) is to be used or created it is essential that it enhances rather than contradict existing structure, is expert, appropriately resourced, independent, easily accessible by citizens.

I believe any new body or reformed body, or bodies should be more than a regulator and it must be able to handle individual complains and be detached from government. I agree with the Public Services Ombudsman that any proposed system should be citizen centred and of easy access. It is important once more that we do not lose what we can currently enjoy within the EU framework and Welsh framework and seek to enhance the protection given to the environment and the access to justice given to current and future generations.

I believe it is important to consider whether all the public bodies listed in the Well-being of Future Generations Act should fall under the remit of new body and not only some of them.

Finally, the natural environment does not stop at human borders and it is important that the post-Brexit arrangements work in the UK context made of several devolved nations and for the longer-term for both current and future generations.

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

I agree that the potential environment governance gap post-Brexit needs to be addressed. We need to ensure that we do not lose any protection we currently have from the EU framework but also from Welsh law and we should take this as an opportunity to even raise the current level of protection whenever possible.

<u>Contents of the law</u>

It is important that post-Brexit we have arrangements in place which ensure that we are not losing any of the overarching principles currently in place (for example the EU precautionary principle or the sustainable development principle in Wales) in addition to the operating principles used every day in Wales through SMNR and the five ways of working as set out in the Environment (Wales) Act and the Well-being of Future Generations (Wales) Act, for example.

I am concerned that the government in England places the sustainable development principle on an equal footing within their 'environmental principles' listed in Draft Clause 2 of the Draft Environment (Principles and Governance) Bill.

> *Draft Clause 2 states:*
> *In this Act "environmental principles" means the following principles—*
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<u>Governance</u>

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It is important to continue to have a structure which can hold to account and sanction governments, public bodies and ideally private companies too in cases of environmental law

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Finally, the natural environment does not stop at human borders and it is important that the post-Brexit arrangements work in the UK context made of several devolved nations and for the longer-term for both current and future generations.

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

I agree that the potential environment governance gap post-Brexit needs to be addressed. We need to ensure that we do not lose any protection we currently have from the EU framework but also from Welsh law and we should take this as an opportunity to even raise the current level of protection whenever possible.

<u>Contents of the law</u>

It is important that post-Brexit we have arrangements in place which ensure that we are not losing any of the overarching principles currently in place (for example the EU precautionary principle or the sustainable development principle in Wales) in addition to the operating principles used every day in Wales through SMNR and the five ways of working as set out in the Environment (Wales) Act and the Well-being of Future Generations (Wales) Act, for example.

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Governance

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It is important to continue to have a structure which can hold to account and sanction governments, public bodies and ideally private companies too in cases of environmental law breaches. But it is essential that the holistic concept of well-being with its four pillars is considered and protected here.

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Finally, the natural environment does not stop at human borders and it is important that the post-Brexit arrangements work in the UK context made of several devolved nations and for the longer-term for both current and future generations.

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

I agree that the potential environment governance gap post-Brexit needs to be addressed. We need to ensure that we do not lose any protection we currently have from the EU framework but also from Welsh law and we should take this as an opportunity to even raise the current level of protection whenever possible.

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Finally, the natural environment does not stop at human borders and it is important that the post-Brexit arrangements work in the UK context made of several devolved nations and for the longer-term for both current and future generations.

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

I agree that the potential environment governance gap post-Brexit needs to be addressed. We need to ensure that we do not lose any protection we currently have from the EU framework but also from Welsh law and we should take this as an opportunity to even raise the current level of protection whenever possible.

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It is important that post-Brexit we have arrangements in place which ensure that we are not losing any of the overarching principles currently in place (for example the EU precautionary principle or the sustainable development principle in Wales) in addition to the operating principles used every day in Wales through SMNR and the five ways of working as set out in the Environment (Wales) Act and the Well-being of Future Generations (Wales) Act, for example.

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Governance

I am clear that whatever structure replaces the EU ones, they will need to be well-resourced, expert, independent body which enjoys full enforcement powers which are no less that those currently available through the EU institutions and the Court of Justice of the European Union.

It is important to continue to have a structure which can hold to account and sanction governments, public bodies and ideally private companies too in cases of environmental law breaches. But it is essential that the holistic concept of well-being with its four pillars is considered and protected here.

The new system must ensure that the different functions of advising on policy, monitoring progress and sanctioning are still undertaken but this must be done in a way which takes into account the duties including advising and supporting and monitoring and assessing of the Future Generations Commissioner.

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Finally, the natural environment does not stop at human borders and it is important that the post-Brexit arrangements work in the UK context made of several devolved nations and for the longer-term for both current and future generations.

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?

I agree that the potential environment governance gap post-Brexit needs to be addressed. We need to ensure that we do not lose any protection we currently have from the EU framework but also from Welsh law and we should take this as an opportunity to even raise the current level of protection whenever possible.

Contents of the law

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Finally, the natural environment does not stop at human borders and it is important that the post-Brexit arrangements work in the UK context made of several devolved nations and for the longer-term for both current and future generations.

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?

I agree that the potential environment governance gap post-Brexit needs to be addressed. We need to ensure that we do not lose any protection we currently have from the EU framework but also from Welsh law and we should take this as an opportunity to even raise the current level of protection whenever possible.

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Governance

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Finally, the natural environment does not stop at human borders and it is important that the post-Brexit arrangements work in the UK context made of several devolved nations and for the longer-term for both current and future generations.

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

I agree that the potential environment governance gap post-Brexit needs to be addressed. We need to ensure that we do not lose any protection we currently have from the EU framework but also from Welsh law and we should take this as an opportunity to even raise the current level of protection whenever possible.

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> *(i) the principle of access to justice in relation to environmental matters.*

In Wales, the Sustainable Development Principle is overarching. Our concept of well-being is holistic. It brings together the economy, society, environment and culture. Focusing only on the environment and having principles only applying to the environment or treating the environment separately is not in line with our concept of well-being in Wales. It is important to continue to look at wider and cross-cutting issues because all things impacting on the environment are not necessarily environmental e.g. human mobility has a huge impact on the natural environment. Equally, we already have protective operating principles such as SMNR and 5 ways of working including prevention, integration, etc. in Welsh Law and any new (UK) principles should not go against them or diminish their scope and depth. Equally some of the Welsh legal concepts might need amending as the consultation points. For example, the precautionary principle does not appear as such in Welsh law but SMNR principles 'capture the key components' of it as the consultation document states however, SMNR only applies to Welsh Government and NRW and not to all public bodies nor to the private or third sector. This is why great care needs to be taken to ensure the current level of protection is maintained and enhanced.

I understand that devolution is complex, but it is important that Wales does not operate post Brexit to any principles which would dilute both the overarching and operating principles we currently enjoy now in Wales within any post-Brexit UK, England and Wales or Wales only setting.

The principles set out in the Well-being of Future Generations Act should be used to design the new governance system.

<u>Governance</u>

I am clear that whatever structure replaces the EU ones, they will need to be well-resourced, expert, independent body which enjoys full enforcement powers which are no less that those currently available through the EU institutions and the Court of Justice of the European Union.

It is important to continue to have a structure which can hold to account and sanction governments, public bodies and ideally private companies too in cases of environmental law breaches. But it is essential that the holistic concept of well-being with its four pillars is considered and protected here.

The new system must ensure that the different functions of advising on policy, monitoring progress and sanctioning are still undertaken but this must be done in a way which takes into account the duties including advising and supporting and monitoring and assessing of the Future Generations Commissioner.

I do not have particular views as to which organisation(s) or structure(s) is to be used or created it is essential that it enhances rather than contradict existing structure, is expert, appropriately resourced, independent, easily accessible by citizens.

I believe any new body or reformed body, or bodies should be more than a regulator and it must be able to handle individual complains and be detached from government. I agree with the Public Services Ombudsman that any proposed system should be citizen centred and of easy access. It is important once more that we do not lose what we can currently enjoy within the EU framework and Welsh framework and seek to enhance the protection given to the environment and the access to justice given to current and future generations.

I believe it is important to consider whether all the public bodies listed in the Well-being of Future Generations Act should fall under the remit of new body and not only some of them.

Finally, the natural environment does not stop at human borders and it is important that the post-Brexit arrangements work in the UK context made of several devolved nations and for the longer-term for both current and future generations.

Other

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

I agree that the potential environment governance gap post-Brexit needs to be addressed. We need to ensure that we do not lose any protection we currently have from the EU framework but also from Welsh law and we should take this as an opportunity to even raise the current level of protection whenever possible.

Contents of the law

It is important that post-Brexit we have arrangements in place which ensure that we are not losing any of the overarching principles currently in place (for example the EU precautionary principle or the sustainable development principle in Wales) in addition to the operating principles used every day in Wales through SMNR and the five ways of working as set out in

the Environment (Wales) Act and the Well-being of Future Generations (Wales) Act, for example.

I am concerned that the government in England places the sustainable development principle on an equal footing within their 'environmental principles' listed in Draft Clause 2 of the Draft Environment (Principles and Governance) Bill.

> *Draft Clause 2 states:*
> *In this Act "environmental principles" means the following principles—*
> *(a) the precautionary principle, so far as relating to the environment,*
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> *(f) the principle that environmental protection requirements must be integrated into the definition and implementation of policies and activities,*
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Question 19: What potential governance structures do you consider are needed to enable collaboration and collective decision-making to enable interface between administrations?

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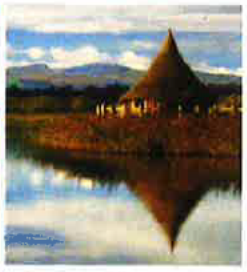

NATIONAL PARKS WALES
Britain's breathing spaces

EU Exit and Strategy Unit
Department for Energy, Planning and Rural Affairs
Welsh Government
1st Floor East, Cathays Park 2
Cardiff
CF10 3NQ

By email only to: Environmental.Governance@gov.wales

June 6th 2019

National Park Wales Response to Welsh Government Consultation: Environmental Principles and Governance in Wales Post European Union Exit

National Parks Wales represents Wales' three National Park Authorities: Snowdonia, Pembrokeshire Coast and Brecon Beacons. We work in partnership to respond collectively to policy issues that have the potential to influence the management of Wales' National Parks. We welcome the opportunity to respond to this timely and important consultation and answer the questions in order, offering recommendations and additional comments of importance.

1. **Do you agree the following principles (rectification at source, polluter-pays) should be included within legislation for Wales?** Yes; we recommend that these concepts need to be defined clearly and some indication made about who these principles apply to if they differ from existing principles. We welcome the inclusion and adoption of existing EU environmental principles into Welsh policy and legislation and the reinforcement of SMNR principles as defined in the Environment (Wales) Act 2016.

   It is important that flexibility is incorporated into these principles. The environmental, political, social and economic landscape is constantly shifting and we need to adjust to these changes as they occur. In the National Parks, flexibility is integral to promoting opportunities to understand and enjoy the Parks' special qualities, which vary in time and space.

   The May 2019 UK Climate Change Committee report and the May 2019 Global Assessment on Biodiversity published by the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), underline the urgent need for transformative change. Declaring Climate Emergencies will only be effective if words are met by fresh action and commensurate resources. We are hopeful therefore that these principles and the WG's legislative intentions will enable NPAs to play a leading role for 20% of Wales and adjacent areas.

   For paragraph 2.25 we recommend that the precautionary principle is stated explicitly because this remains fundamental to environmental protection. We recommend that the principles of avoidance, mitigation, compensation and enhancement are emphasised.

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2. **Do you think there are other principles, which may also need to be included?** To complement the SMNR principles, we recommend that recovering or retaining ecosystem functionality is included. Though it is difficult to measure, ecosystem function is critical to achieving resilience and delivering SMNR.

3. **Do you agree the duty to pursue sustainable management of natural resources and the application of the SMNR principles should be extended?** Yes, with a clearer articulation of how restoring and valuing higher environmental quality delivers enhanced well-being. Measuring the latter forces us to measure non-material wealth as a gauge of societal progress and fairness and this is linked inextricably to the quality of the environment.

4. **On which Welsh public bodies, within devolved competence, do you consider a duty to pursue SMNR should apply?** We welcome the commitment by the Welsh Government in Valued and Resilient to "*introduce legislation at the earliest opportunity to require a National Park Authority to pursue the sustainable management of natural resources in the exercise of its functions. A similar duty will be applied to the constituent authorities of AONBs relating to their duty to prepare the management plan for the area*." This will strengthen our ability to conserve and enhance in ways that underpin social and economic well-being. The intent through SMNR must be to transform public service delivery in response to the Climate and Nature Emergencies; for example by adding SMNR to National Park Purposes and by placing a duty on unitary authorities to delivery SMNR and to complement the functions of National Parks.

   The UK Government, Welsh Government, and a growing number of Welsh unitary authorities have each declared their Climate Emergencies. No such emergencies have been declared for health, housing or social care yet these dominate public expenditure in Wales. Given the emergencies declared, Wales' public sector environmental organisations and specialists are **Wales' fourth emergency service** and must be resourced accordingly.

5. **Do you agree with the gaps identified, or do you consider there are other gaps, which need to be considered?** We welcome the changes suggested in Section 3 and emphasise the need to resource appropriately in response to the scale of the emergencies.

6. **What role should existing accountability bodies provide in a new environmental governance structure for Wales?** Existing roles must not be undermined or weakened. Delivery needs strengthening through better resource allocation. Wales needs to avoid further environmental degradation being caused by contradictory policy and decision making in pursuit of development. The latest WG proposals for increasing access to the countryside on public rights of way and access land risk causing an adverse environmental impact and must therefore be subject to rigorous impact assessment.

   National Park Management Plans and Area Statements frame accountability for all public bodies in pursuit of Park purposes, and public bodies are already required to have regard to Park purposes in the pursuance of their functions. Whilst Valued and Resilient addresses the latter by asking us to pursue wider collaboration and engagement, this is different from the mandatory requirement for public bodies to support National Parks. Such support is essential

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through Public Service Boards to create real traction and deliver change.

7. **Is the outlined role and objective appropriate for a body responsible for overseeing the implementation of environmental law in Wales?** We welcome the proposal for a natural resources legislative watchdog. We believe there is scope here to set standards for environmental outcomes that apply equally to the public (Annex 2 list) and private sectors (land owners and managers) and privatised utilities so that greater alliances and mutual objective setting are possible, and so that everyone is subject to the same levels of public scrutiny and accountability.

   We recommend that the WG draws the public's attention to the public sector requirement to deliver the resilience of ecosystems and the benefits they provide. Every Welsh resident should be entitled to enjoy flourishing nature and resilient ecosystems wherever they are in Wales, and the public's understanding of this duty will help to engender a sense of public accountability.

8. **Which policy areas should be included within the scope of new governance arrangements?** We welcome the comments in paragraph 3.32 and have no additions to the scope of the governance arrangements beyond those above.

9. **Do you consider the proposed list of bodies to be appropriate?** See our answer to question 7.

10. **Do you consider there are other Welsh bodies, which should also fall within the remit of an oversight body?** See our answer to question 7.

11. **What should be the status, form and constitution of an oversight body?** See our answer to question 7. Additionally, we welcome the proposals outlined in paragraph 3.35 with the caveat that this new watchdog should be free to hold the WG and National Assembly for Wales to account. Without the EU, who else will do this?

12. **Should an oversight body be able to act in an advisory capacity?** Yes, the body should have an advisory role but consideration will be required on how this distinguishes from NRW's advisory role. The new body will still need some level of regulatory power in case the circumstances outlined in 3.40 are not effective or other circumstances arise.

13. **Should an oversight body be able to scrutinise implementation of environmental legislation?** Yes, as noted above, recognising the potential for existing conflicts in relation to sheer volume of existing legislation, policies, guidance and/or decision making that risks undermining environmental quality and resilient ecosystems.

14. **What should be the extent of this function?** Together with our recommendations and observations herein, we welcome the recommendations made in paragraphs 3.46-3.50 as suitable replacement for existing EU functions. As a domestic arrangement, this would have the advantage of being higher profile and, provided it is resourced effectively, responding more

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swiftly.

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?** With respect to enforcement, this body would need to liaise with police forces, Natural Resources Wales and local authorities over relevant potentially criminal environmental matters, to share information and increase awareness of relevant issues. Police forces would also need to be resourced effectively to address environmental and wildlife crime matters, otherwise these will remain inadequately resourced and at risk of being dropped from policing priorities.

16. **What informal and formal methods of enforcement do you consider an oversight body should operate in order to deliver on its role and objectives?** Paragraph 3.52 already provides some of the answers to this. Other methods should include the carrot and stick approach, reward and recognition, e.g., for private landowners, farmers and foresters. By widening the range of organisations affected by the watchdog (see our answer to question 7), this might mitigate or at least limit the requirement for formal enforcement because everyone would be measured and scrutinised equally.

17. **What enforcement actions do you consider need to be available?** See our answer to question 16. Given the high, and increasing public interest that must be achieved through integrated land management and environmental recovery, a sliding scale of measures, including fines, rectification orders, licence revocations, public accountability measures, and recourse to the high court at the top, seems appropriate.

18. **Would there be advantages in having a shared core set of common environmental principles?** Yes, not least where public and private sectors and privatised utilities are made equally accountable.

19. **What potential governance structures do you consider are needed to enable collaboration and collective decision-making to enable interface between administrations?** Relevant watchdogs for each of the UK and devolved administrations might be effective.

Yours faithfully

Julian Atkins
CEO Brecon Beacons National Park Authority
For and on behalf of National Parks Wales.

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Environmental Principles and Governance in Wales Post European Union Exit

Consultation response form

Your name:

Organisation (if applicable): WWF Cymru

e-mail/telephone number:

Your address:

Responses should be returned by **9 April 2019** to

EU Exit & Strategy Unit
Department for Energy, Planning and Rural Affairs
Welsh Government
1st Floor East, Cathays Park 2
Cardiff
CF10 3NQ

or completed electronically and sent to:

E-mail: Environmental.Governance@gov.wales

Environmental Principles

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

WWF Cymru strongly agree that the listed principles of 'Rectification at Source' and 'Polluter-pays' should be included within primary legislation for Wales.

Nonetheless, the situation is more complex than the consultation suggests. At EU level, the principles do not exist in isolation and have a clear legal status, being incorporated under an overarching objective in Article 191 TFEU. To ensure non-regression from the status-quo, it is critical to consider *how* the two additional principles should be included in primary legislation and how they relate to other principles, be they non-environmental principles, or those environmental principles that the Welsh government argues are already incorporated through existing Welsh legislation, although we would disagree that this is the case for the reasons given below.

Limiting our initial thoughts to the four 'core' environmental principles referred to in the consultation, the proposal to simply include rectification and polluter-pays risks an inconsistent approach being taken to the four, as a whole, in Welsh legislation. This is because Welsh legislation does not currently include the principles of 'Prevention' and 'Precaution' in a way which is consistent with their scope and legal strength in the European Union, as neither hold a sufficiently overarching or legally clear status.

When the Well-being of Future Generations and Environment (Wales) Acts were being developed, WWF Cymru argued for the inclusion of these principles. However, at the time we were informed that to do so would be duplication and that the Acts needed to do something different (operationalisation). It is therefore surprising that the contents of those Acts alone are now suggested to be sufficient to ensure non-regression from European Union standards. Clearly with imminent exit from the EU the question of duplication does not arise but the importance of ensuring equivalence does.

There are 2 issues of concern - scope and function of Environment Act (even if amended) and also of the WFG Act (which also includes prevention to some extent) and then the definition etc of the principles themselves.

Firstly, within the Treaty of the Functioning of the European Union, Article 11 states that "Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development". The Government consultation seems to suggest that the approach in our existing Acts provides equivalence. The principles are operationalised in part in both WFG and Environment Acts. We do not believe that the current approaches in either of these Acts applies the principles to all policies, laws and activities. We do not consider the scope of the Ways of Working in the WFG Act, to match this.

Article 191 (2) states that EU environmental policy shall be based on the precautionary, preventive, rectification at source and polluter pays principles.

The SMNR principles (in Environment Act) have been designed to function at an operational level in specific contexts. However, in the EU Treaties the core environmental principles are aimed at an overarching objective of 'a high level of environmental protection'. The SMNR duty is centred on the objective 'to maintain and enhance the resilience of ecosystems and the benefits they provide'. We do not consider this to be equivalent and interpret the SMNR duty to be weaker.

Our view is that for genuine equivalence with existing EU legal protections to be secured, it is essential that all four core principles are specifically named and enshrined in Welsh primary legislation. This can provide legal clarity as to their status and application and ensure that they are applicable to all public bodies.

We also believe to ensure clarity in interpretation of the principles, legislation should replicate the EU approach by providing an overarching environmental objective towards which their application can be assessed.

This has proven to be an effective tool in the European context which has supported the interpretation of environmental principles from policy making through to EUCJ judgements. It is important to highlight that this objective should be couched in broad, overarching terms.

So we believe it is vital that it is clear that the principles *will* guide the development of environmental law (as stated in 2.10).

However, we do not believe that the duty of SMNR as currently legislated means that SMNR (and thus the principles within it) necessarily applies to making of new laws other than laws specifically linked to the implementation of the NRP.

So, it seems likely that amendments will be required to existing primary legislation (likely the Well-being of Future Generations Act, and almost certainly the Environment (Wales) Act).

Secondly, the definition and application of the principles.

- The precautionary principle at EU level clearly encompasses the potential for environmental harm to occur. The heart of the precautionary principle ensures that scientific uncertainty should not be a reason to avoid taking action on a potential harm.
- The Welsh approach under the SMNR principle (h) refers to taking action to prevent *significant* damage to ecosystems. The inclusion of significance narrows the application of the prevention principle so that it is not equivalent to EU definition of the principle in regard to preventing damage to the environment.

We are also doubtful that the reference to *ecosystems* is sufficiently broad to cover all aspects of the environment given that the environment is not defined within Welsh legislation – which instead talks in terms of Natural Resources .

From a perspective of ensuring a consistent approach between any new principles and those already alluded to in Welsh legislation it is important to recognise existing efforts made to 'operationalise' the 'Prevention' and 'Precautionary' principles in Welsh law. By simply including rectification and polluter-pays, two of the four 'core' principles would be explicitly included, but not 'operationalised'; and two would be 'operationalised', but not explicitly included. This risks incoherence.

The Consultation is currently unclear on the extent of the Welsh Government's intentions to 'operationalise' any additional principles, nor is it clear on the extent to which it recognises the need to amend the 'operationalisation' of others to reflect any changes to their definition and scope of application. For the sake of coherence and consistency (and to reflect the desire of paragraph 2.28 in the consultation), it appears logical to WWF Cymru that elements of both will need to occur. The extent to which this will be necessary is not a question for this consultation, however, the Welsh Government should set out its initial thoughts in this area when it outlines its next steps following its assessment of consultation responses.

A further point of complexity is that, at the level of the EU, while principles are stand alone and overarching in meaning, they are not applied in isolation and several non-environmental principles have developed along-side them which are relevant to their application. These include principles such as 'proportionality', which has already been a critical factor in how Natural Resources Wales are applying the precautionary aspects of SMNR for example. There is also the fact that the UK Government are actively legislating for additional principles and rights which are also interconnected with the application of the 'core' four. This is expanded upon in the response to subsequent questions.

Question 2: Do you think there are other principles, which may also need to be included?

The UK Government have included five additional principles in its Draft Environmental (Principles and Governance) Bill. While it is our understanding that the UK Government now recognise that the procedural rights referred to as principles are not in fact such and are considering removing them from the principles part of the Bill, it is disappointing that the Welsh consultation does not address these rights at all. As a result, there is a risk that Wales will fall behind the wider UK in the strength and scope of its environmental ambitions, objectives, principles and rights because of our departure from the EU.

In making this point, WWF Cymru recognises the attempts which previous Welsh Governments have made to go further than other parts of the UK (and the wider EU) in legislating in some of the areas – such as Sustainable Development - now included in the UK Bill. Our concerns in this respect, are primarily driven from a governance perspective, given the well documented weakness and [so far] largely untested structures of the Well-being of Future Generations and Environment (Wales) Acts when compared to the extensive and powerful edifices of the EU.

What has currently been proposed by the UK Government has the potential to deliver a principles and governance structure which could be stronger than that which currently exists in Wales, or that which would be created by adding what has so far been proposed by the Welsh Government – this potentially extends to enforcement of the sustainable development duty, given that the Office of the Future Generations Commissioner lacks 'teeth' and that the possibilities for successful judicial review under the legislation are limited.

These points are expanded upon in subsequent sections of this consultation, however, at this point, we would urge the Welsh Government not to miss this opportunity to continue its role as a leading environmental voice in the UK and to use this process to fully retain and strengthen what we have within the Union.

Furthermore, as previously mentioned, the environmental principles sit alongside other long-standing, and emerging principles. These include:

- Non-Regression
- Progression
- Proportionality
- Subsidiarity
- Integration
-

We would urge the Welsh Government to look closely at the definitions and applications of such principles at EU level - in particular to ensure a minimum of equivalence/non-regression, but also internationally, and to ask how that can be used to add value to our post-Brexit approach. Thus far, Welsh Government have argued that the purpose of SMNR is sufficient to reflect principles such as non-regression. We argue that the very limited scope of the SMNR duty (notably the difference between what is enhancement and what is restoration), and the application framework laid out in the Environment (Wales) Act means that this is not the case. As a way to go further we would suggest consideration is given towards adding a principle of progression which will ensure that we are constantly trying to achieve a higher standard, rather than maintaining and enhancing what we already have.

While we recognise the value of integration being a Way of Working within the Well-being of Future Generations Act, this is insufficient to ensure the environment is being faithfully integrated into all decision making. Section 5 of the Future Generations Act requires public bodies to “take account” of integration and other ways of working- this is not the same as requiring them to be applied. Further, the sustainable development duty primarily relates to setting and “taking reasonable steps” towards meeting well-being objectives and applies to named public bodies only. Added to this is our experience of its implementation which, as the Welsh Government’s own Well-being Objectives demonstrate, has not resulted in sufficient focus on environmental integration into wider priorities and decision making.

Furthermore, the **integration** principle is also a concern, as it occurs within the WFG Act with a specific definition. Further investigation is needed to decide whether this definition and its scope of application give real equivalence to its intention at EU level.

Finally, the WFG Act is limited to specific named public bodies rather than broadly. This list is already out of date as several new Welsh public bodies have been created (such as the Infrastructure commission) but not added to the list of those subject to the Act. The Act’s applicability to public- private partnerships also needs clarifying to ensure equivalence to current EU governance.

Procedural Rights

Returning to the rights of the Aarhus Convention (currently included as principles in the UK Government’s Draft Environmental (Principles and Governance) Bill), we recognise that the UK will not cease to be a signatory of that convention because of leaving the EU. However, we note that this does not prevent the Welsh Government from incorporating these rights into primary legislation. The preamble to the Aarhus Convention makes clear that it aims to integrate sustainable and environmentally sound development with rights to an environment adequate for human health and well-being and the enjoyment of basic human rights. Article 1 of the Convention requires Parties to guarantee the rights of access to information, participation and access to justice in environmental matters “in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being.”

In this way Aarhus rights are complementary to the existing framework in Welsh law, however they extend it by implementing the recognition in Principle 10 of the Rio declaration that “environmental issues are best handled with participation of all concerned citizens at the relevant level.” Welsh legislation enshrines public participation in “ways of working” relating to specific contexts, namely the well-being objectives and SMNR in the WFGA and Welsh Environment Act respectively. However, the Aarhus Convention stresses the importance not simply of public participation in government decision-making but through the enabling of

public action through the guarantee of the three procedural rights in the Convention. Without enshrining these rights into law, true public participation in environmental decision-making and the ability to hold public authorities accountable risks remaining an aspiration rather than a requirement of Welsh law. We encourage the Welsh Government to legally enshrine enforceable rights in Welsh law, and as a statement of our national values. This action has the potential to further strengthen governance arrangements subsequently discussed in this consultation.

The EC's approach, where these rights are given much more substance via guidance under the Directives is also important. WWF argued during the passage of the Environment Wales Act, that the Water Framework Directive guidance on clear expectations on the access to information and type and timing of public participation should form part of our legal framework. Therefore, this is an important opportunity to provide further strength and clarity on the standard to be reached in regard to these rights

Finally, as mentioned in Question 1, we argue that there should be a broad overarching objective For example, Article 37 of the Charter for Fundamental Rights states that "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development." Article 191 of the TFEU refers to preserving, protecting and improving the quality of the environment alongside protecting human health. The Aarhus Convention, as mentioned above, refers to the right of people in present and future generations to an environment adequate to health and well-being. We note in this regard that the Scottish Government's proposals include enshrining a right to a healthy environment, alongside the procedural rights.

Equivalent overarching objectives of this nature do not currently exist in Welsh legislation and it is important to remedy this gap.

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

Subject to our comments in this consultation about the need for clear overarching articulation of EU environmental principles that are currently partially operationalised within SMNR, WWF Cymru agree that the SMNR duty and application of SMNR principles should be extended. Nonetheless we recognise that for this to ensure non-regression and for them to function effectively, the Environment (Wales) Act will need to be amended.

WWF Cymru was proud to work with the Welsh Government to develop the Environment (Wales) Act and has previously argued that the scope of the Act was too limited to achieve its ambition. A notable omission was the limitation of the duty to NRW, and Welsh Ministers in the development of the National Resources Policy. The subsequent implementation of the Act, and the difficulty of being able

to demonstrate progress, have further highlighted the need for change. In making this point we recognise that Welsh Government have always intended the existing Act to be a first step towards wider application.

Brexit, and the changes it requires, offer a much-needed opportunity to revisit SMNR in the context of its extension, based on what is now known about the practicalities of its implementation. One immediate observation is how difficult it has been for Welsh Government and NRW officials to understand its requirements; what successful implementation looks like; and how to demonstrate it. This is largely due to the complex drafting of the Act and the very specific way it was 'operationalised' within its very limited scope of application to NRW and Welsh Ministers in specific circumstances.

As this scope is expanded, it will be vital to make amendments to both. Without such amendments the current drafting will, by design, be unfit for its new scope and will cause great difficulty for any Public Bodies without technical environmental expertise to engage with.

In this context it has previously been suggested that this complexity could be addressed through amendments to, or the publication of additional statutory guidance, to support the Act. WWF Cymru argue that this would be insufficient.

This is because:

- The development of the existing guidance was a lengthy, opaque and complex process which added relatively little to what was on the face of the Act; and
- would not address the structural issues of the Act which are part of the root cause of the problems and would only be added to should new principles be added. This approach would also not address the concerns relating to the legal definitions identified above.

The detail of what changes should be made are, we hope, for a subsequent consultation and discussions, however one approach could be to amend the Act to specify how the principles apply to relevant public bodies for policy setting and operational purposes and the additional requirements on competent public bodies in decision making:

- Relevant bodies could be all Welsh public bodies;
- Competent bodies could be those who make authorisation and enforcement decisions (i.e. Welsh Government/NRW/Local Authorities/National Parks/proposed Welsh Planning Inspectorate/MMO).

This approach is inspired by other environmental regulations, such The Conservation of Habitats and Species Regulations to better operationalise how public bodies (& authorities) implement and interact to deliver an overarching purpose.

In addition, when considering the key issue of equivalence, the SMNR principles adopt a narrower focus than the EU framing of the environment via the Environmental Information Regs, which itself draws from the definition of environment in the Aarhus Convention. Further the Aarhus Convention definition, though detailed, is not exhaustive, allowing for a broader definition if states wish.

We would encourage the Welsh Government to consider these differences carefully with a view to broadening what SMNR encompasses or creating a broader duty relating to environmental protection. For example, the types of activities that the duties in the Environmental Information Regulations relate to include: substances, discharges, emissions and other releases affecting the elements of the environment; measures being taken in relation to elements of the environment; cost-benefit analysis and other economic analyses relating to the environment and the state of human health and safety, including cultural sites and built structures relating to the environment. In our view environmental legal duties should be defined from this broader base rather than the current SMNR definition. The reference to ecosystems and benefits in s3(2) of The Environment (Wales) Act is clearly not broad enough to cover the range of activities covered by the Environmental Information Regulations either. Likewise, the biodiversity duty in s6 of the Act is only geared towards promoting the resilience of ecosystems rather than the environment, broadly defined. It may be that some aspects of the EIR definition of the environment, for example those relating to human health, fall within the remit of the Future Generations Act relating to a healthier Wales, but that piece of legislation is not designed to be applied or interpreted as a piece of environmental legislation and would not plug the gap as currently drafted and structured.

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

The duty should apply to all public bodies operating in Wales including reserved bodies with functions falling within devolved competence, yet it should also apply to public authorities and public-body/private-sector coalitions such as City/Regional Growth Deals.

We stress the importance of including public-body/private-sector coalitions such as City/Regional Growth Deals given the power these have been given to set the strategic direction and significant financial spending decisions across Wales. These coalitions are currently a grey area with regard to the Well-being of Future Generations Act given only some of their partners are covered by the Act. We should ensure they are fully and clearly integrated into any expanded Duty

It is also an opportunity to ensure the principles are applied to new public bodies as they are created in Wales. A gap is opening on the application of the SD principle etc as the WFG Act only names specific bodies. We should avoid this

problem in extending the SMNR duty and perhaps take the opportunity to ensure coherence between the two Acts.

We recognise that only applying the duty to Welsh public bodies would likely cause a regression from the status-quo. We also recognise that the devolved constraints placed on the Welsh Government mean public authorities would not be included unless the Welsh Government ask the Secretary of State for Wales to act on its behalf.

This omission demonstrates that a complete approach which ensures non-regression cannot be achieved without co-operation between the Welsh and UK Governments. We urge both to ensure non-regression.

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Accountability

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

We agree with the gaps identified in paragraph 3.22 with some amendment.

With regard to 'A simple and inexpensive mechanism to raise complaints' we would also add that the current EU system is also liability-free for any complainant. This enables citizens to make complaints without the fear that they will be subject to future action by those they complain against, or would face costs should the complaint not proceed, or be ruled against.

Providing anonymity to complainants should also be considered. There may be instances where complainants feel they might be vulnerable to public bodies against which they are complaining. This has been a matter of debate in the Assembly previously. Enabling honest challenge and whistleblowing should be a key part of the process.

With regard to 'enforcement mechanisms' we would also add that the EU's powers also include the rectification of damage caused by the offence. This is a vital aspect of the Union and its loss would be a significant regression.

In addition to the above we would also add the extensive monitoring and data collection activities of the European Union. 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.

These additions are critical given that if the Welsh Government is going to deliver on its commitment to "ensure there is no reduction in people's rights because of exiting the EU" it is essential that the effect of those rights is maintained. In other words, equivalent rights will not be achieved, if there are not equivalently powerful ways of giving effect to those rights.

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

We are clear that none of Wales' existing public bodies, as identified by the consultation, meet all of our criteria for a successful governance body. These are independence, resourcing, the right environmental expertise and having the 'teeth' to enforce environmental law.

NRW has a particular role in achieving the sustainable management of natural resources and will continue to be required to perform its day to day role of managing land, regulating, permitting and enforcing environmental protections. We still need NRW to perform as a strong, and preferably more independent, environmental body. However, it does not currently have the resources or independence to perform the additional functions that are currently undertaken by the EU. Furthermore, NRW is one of the bodies charged by Government with delivery of Environmental law, therefore it is impossible for them to act as an independent watchdog of their own compliance.

The Office of the Future Generations Commissioner also does not have the level of independence, the resources, the environmental expertise or the teeth to perform the monitoring, enforcement and citizen's complaints functions that are currently provided by the EU. The FG Commission was not designed to provide these functions we are not convinced that it could be retro-fitted to do so. In particular, the environmental expertise of the FG Office would need to be increased enormously, if it were to be able to investigate breaches of environmental law with the same level of detail that the EU Commission is able to do. This would change the entire nature of the body as currently constituted from advisory champion and it could lead to considerable skewing of the focus and resources onto environmental matters. Indeed some might argue that the Commissioner should be explicitly subject to a duty to deliver the overarching objective and principles, in which case, as with NRW they could not be the watchdog.

Whilst, in theory, an existing public body could be given new powers, duties and functions, to do so would be to fundamentally change that body, potentially giving rise to further complications and difficulties. A new and significant governance gap has emerged that will not be plugged by changing our existing bodies, which already have important functions to deliver.

Wales currently lacks a champion for environmental law which ensures that Welsh nature is resilient for future generations. Given the vital role the environment plays as the foundation of social, culture and economic well-being this is a significant gap which needs to be filled.

The simplest way of building this role into existing structures is to make any new body responsible for advising on; investigating; and enforcing compliance with environmental law (to include all law covering the matters discussed above in the context of the SMNR duty as well as the overarching objective and principles) and

require existing bodies to report to it on these matters; any additional matters the new body deem necessary; and for others to abide by its guidance and decisions.

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

The broad role identified in the consultation is largely appropriate. However, we have reservations concerning the limitation to natural resources rather than the environment in a more general sense which echo the points made in relation to SMNR, see above. There is also the issue of public understanding. There is a significant difference between what needs to be understood by a regulator, and what should be understood by the public and those needing to engage with the new body or those covered by the SMNR duty. To address this, in addition to previous responses, it would be beneficial for the body to oversee the implementation of a constitutional-type structure where an overarching objective can guide how the principles are interpreted and applied by those who are subject to them.

We have expanded on its role below to identify in broad terms the functions, duties and powers (within devolved competence) we argue the new body should have:

Overall Functions

Oversee implementation in Wales of all domestic environmental law (adapting the definition from the Environmental Information Regulations), regardless of whether originally domestic or retained EU law, including the environmental principles and rights discussed above

Monitor compliance by the Welsh Ministers; public bodies & authorities in Wales; business and other actors.

Enforce environmental law by initiating investigations into possible breaches and responding to complaints from citizens and civil society organisations.

Identify and act on breaches, with the application of appropriate remedies and sanctions (including legal and financial sanctions).

Review and report information regarding both the state of the natural environment in Wales and performance against policy objectives.

Publish environmental information fully and transparently

Engage with planning decisions that raise issues of a significant and strategic nature.

Play a role in overseeing compliance with international environmental agreements in Wales.

Advisory function

The body will have advisory/scrutiny functions ancillary to its primary role as an enforcement body. These could include producing recommendations/advice to public bodies as to how best to comply with the law. It could also ensure compliance with climate change law and conduct its own investigations on climate change, without replicating the functions of the CCC.

Duties

Statutory duty to take proportionate action against the Welsh Ministers and Welsh public bodies in the public interest for a breach of environmental law

Duty to review (and report to the Welsh Assembly) environmental planning and reporting carried out by Welsh public bodies

Review and report information regarding both the state of the natural environment in Wales and performance against policy objectives

Publish environmental information fully and transparently

Routine scrutiny of implementation of legislation and assessing whether it is on track, challenging apparent failure.

Powers

Investigate potential breaches of environmental law in Wales (even when there has been no public complaint).

Consider and investigate citizen complaints about breaches of environmental law in Wales from members of the public

Issue advisory notices for failure to implement environmental law in Wales, and identify corrective action

Issue binding notices requiring breaches of environmental law in Wales to be remedied and setting out how this is to be done (for example through the publication of action plans, the implementation of certain policies or compensation payments.)

Initiate legal proceedings. Issue (or apply to the High Court/ Specialist Environmental Tribunal) for sanctions if an authority fails to comply with a binding notice/court order. These could include fines or introducing ‘special measures’ or mandatory orders. These could also include structural injunctions setting out the

steps needed to be taken by a public body to comply with a binding notice issued by the new body.

Fund litigation in Wales or related to Wales and other activities by others relating to its functions

Issue interim measures and stop notices to prevent irreversible environmental damage

Accept enforcement undertakings (an offer or promise to carry out certain activities, made by the regulated entity to the regulator in charge of enforcement as an alternative to a criminal charge or other administrative sanctions). The details of such undertakings would be publicly available.

Apply remedies similar to those under the Environmental Liability Directive, such as preventative measures, remedial action and compensatory measures

Undertake formal investigations into potential breaches of environmental law in Wales (including an own-initiative power in keeping with the majority of ombudsman schemes)

Conduct inquiries into systemic problems in particular Welsh policy areas and make recommendations to the Welsh Government, including in relation to any policy changes that may be necessary as a result

Require information from competent bodies where this relates to an issue relating to the Welsh environment, especially where this relates to information that may be commercially sensitive or not in the public domain

Public reports on compliance in Wales with international law and any other matter it thinks is important (respecting the devolution settlement).

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

The body should be overseeing compliance to all environmental law, therefore there should be no policy based restrictions on what is covered. We do not agree that its scope be limited by the Environment (Wales) Act

All policy areas which have an impact upon the environment, e.g. including economic, transport, social and health policies should be covered.

The environment (as the biosphere) is the ultimate foundation of all policy areas so it would be logical for the scope of the body to include all policy areas which have an impact upon the environment.

We note that there is some flexibility in the definition of natural resources contained in Section 2 of the Environment Act,. However, we are less convinced that para 3.30 is correct in its interpretation. A scope limited to natural resources,

rather than the wider environment may be too narrow to effectively govern in a way which respects and maximises the advances already made in the existing Welsh legislation. As a result, the scope should cover all environmental law, as discussed/defined at Question 7 of our response.

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

These bodies alone are not appropriate. The list should be significantly expanded, as detailed in response to Question 10.

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

As previously outlined the new body must be a champion for the environment and one which is responsible for advising on; investigating; and enforcing compliance to environmental law. Given this, its oversight remit should be appropriately extended so it can, at the very least, support all public bodies covered by the proposed extension to the SMNR duty.

The remit should apply to all public bodies operating in Wales including reserved bodies with functions falling within devolved competence, yet it should also apply to public authorities and public-body/private-sector coalitions such as City/Regional Growth Deals.

The remit needs to be worded in such a way that it captures any public bodies which might be created after the passing of the Act.

Further to this there needs to be a clear link to the Office of the Well-being of Future Generations Commissioner. An option to consider is to enable the new body to provide advice to the FGC given the wealth of expertise it will have at its disposal in order to support the FGC's own work. The easiest way to achieve this would be bring the FGC into the new body's remit and appoint an appropriate individual from the new body to the FGC's Advisory Panel.

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

WWF Cymru agrees with the proposal to make a new body transparent; accountable to the National Assembly for Wales; independently audited; independent of Government with regard to appointments; and for it also be independent of Government with regard to funding.

This represents a significant improvement on many bodies in Wales and is welcome. We do not at this time have a strong view on the specifics of how it is constituted in terms of whether to be a Commission, or any other such structure.

Our priority is that it should be able to deliver upon the functions, duties and powers outlined in response to Question 7.

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

Yes. WWF Cymru agree that the body should be able to act in an advisory capacity. However, the extent of the advisory role suggested in para 3.39 and its potential overlap with the role of Welsh Government and NRW needs considered. The restriction to advising on SMNR would be unwelcome. The Environment Wales Act is only one of a suite of environmental laws which would be within the remit of the body.

We agree with the focus on para 3.40 and agree with 3.42 that sharing best practice and learning from investigations or court determinations is an appropriate role.

We would however be concerned if the body was overburdened with being asked for advice (3,41) that would be better sought from NRW etc. All bodies have limitations on their capacity and overlap of functions should be avoided.

This body is of a different nature to existing bodies in wales and should have a different balance of functions with much less resource being expended on advice and much more on compliance and enforcement.

The body will, as part of our suggested escalation process, have dialogues with bodies where there is concern at their effective implementation of the Law and advise on the effectiveness of plans to remedy this. That is entirely appropriate but it should not be seen as primarily an advisory body.

There is also a natural risk in this respect given that the body could be placed in a position where it is taking enforcement action against a body it has previously advised. However, when this concern was raised with regard to NRW the Welsh Government were confident that internal protocols could be developed to prevent any reputational risk. Given this we expect the same protocols to be extended to this body.

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

WWF Cymru agree that the oversight body should be able to scrutinise the implementation of environmental legislation. It should also be able to scrutinise

how the implementation of non-environmental legislation impacts the environment and provide recommendations on how to ensure those impacts are positive.

We would also request that it has the power to be able to conduct investigations into any body within its remit without a complaint being raised. It should also be able to conduct thematic reviews where its sees cause for concern.

As with the proposals in the UK's Environment Bill, it will be necessary to consider some definitions which will effectively capture the necessary scope of the bodies' remit.

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

We agree that the body should be able to undertake thematic reviews. However, we do not think these should be limited to alignment to the Environment (Wales) Act. This is one very important piece of law, however there are others which may give rise to such a review.

Nor should the extent of this scrutiny function be limited to environmental legislation alone. The body needs to be free to make maximum use of its expertise to become a champion for the environment. This includes conducting thematic reviews (and other duties listed in response to Question 7) to evaluate whether a public body, as a whole, is sufficiently contributing to improving the state of the Welsh environment. This function must also not be limited to complaint, or requests.

This is important in that, in order to meet the duty of SMNR, the body may be investigating complaints about how other policies or activities are undermining this delivery. This may give rise to advice in regard to causes of a failure to comply though non- coherence or lack of integration.

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?

We welcome the statement of 3.46 in not reducing citizen's rights and the recognition of the gaps in 3.47. We also agree with the proposals in 3.49 including the discretion to investigate or not.

Consideration needs to be given for complainants to have anonymity from publication of their details, as some will fear repercussions to their complaint.

In addition, it might be sensible to include an ability to refer complaints to another more appropriate body for investigation. This is important if complaints fall in the remit of another body, including potentially an English OEP.

The ability for any new body to receive and investigate public complaints on alleged failure to implement environmental law is a vital function which WWF Cymru strongly support. There is no body in Wales with the powers or remit to replace the EU in this regard so it will need to be created to avoid regression. We also welcome the recognition that in line with the current system, a new Welsh body should also be simple and free for citizens to use. In addition to that it also needs to be free of any civil or financial repercussions for the citizen making the complaint. Enshrining environmental procedural rights as set out above would provide a broader legal framework for this approach.

However, for this complaints mechanism to equivalent to those of the EU (and thereby prevent regression) it must also be accompanied by a strong set of enforcement options – which include the power to compel a guilty party to rectify any damage caused to the environment.

WWF also has concerns at the likely gap in access to such complaints and enforcement when we exit the EU. It seems to us that we could have an immediate gap from October this year, and could even have a gap if there is transition period as these bodies take considerable time to establish.

We note that proposals in England make provision for some interim and shadow bodies to ensure that the environment does not suffer from lack of oversight of Environmental law and for there to be a loss of citizen's rights.

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?

WWF Cymru agree that a new body should have a series of informal and formal enforcement methods akin to those available within the EU. A key improvement which could be made to the status-quo would be to improve the transparency and speed of the informal methods. Under the current system at EU level, informal methods can go on for several years without a public statement on progress. We would recommend a publicly accessible log of the details of all informal processes underway, and frequent updates on work underway in relation to them. Furthermore, given the lower volume of cases received and smaller jurisdiction relative to the EU, we would expect a far speedier resolution than currently occurs.

These processes need to be responsive to the scale and severity of the case at hand, with swift action being taken to stop any damaging action while a longer investigation can be conducted.

We believe it will be for the Body to take a view as to whether an informal approach is sufficient to deal with the issue. There should be no requirement on the Body that it must first seek collaborative resolution.

A key point in the effectiveness of the current structures is the knowledge that the enforcement structures are strong and carry with them a 'stick' (both financial and reputational) which is sufficient to discourage bad behaviour so much so that cases do not arise. This does not currently exist in Wales given the weak environmental enforcement structures and decisions practiced by Welsh Government and NRW.

It is also critical that the body has the power to refer matters to a court or tribunal for a judgment where necessary.

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

WWF Cymru agrees that recourse to the courts/tribunals should be a last resort. We also argue that Judicial Review is significantly weaker than the legal processes available with the Union and welcome recognition in the consultation that a better process is required to prevent regression.

A vital enforcement action which must be retained is the power to require damage to be corrected by the polluter, and for interim measures to be put in place to prevent additional harm while investigations are being conducted.

There is also an additional role for financial penalties to be levelled against guilty parties. While our priority is that damage is protected, experience of the current system has informed us that financial penalties are a significant deterrent (if not the principle deterrent to public bodies) against poor decision making and policy setting. We believe these should be an enforcement action available to any new body.

We have suggested in Question 7 an escalating series of enforcement actions. We consider that there must be recourse to the Courts for failure to comply with these steps.

We consider that it might be useful to legislate to make non- compliance with a binding notice, a criminal offence in Wales. This would then make it possible for Welsh Assembly to legislate for sanctions for non- compliance that suit Welsh circumstances, rather than relying on UK Government.

Other

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

Given that the environment does not respect borders it is logical that a shared set of common environmental principles across the UK brings benefits. We believe this would be enhanced by a common overarching environmental objective for the UK. It would be especially advantageous given the current devolution settlement and the scope of the proposed UK Bill on reserved functions in Wales.

There is a potential scope for a degree of 'dynamic alignment' between the nations of the UK were there to be core principles agreed, and an overarching objective to improve the environment, but at an operational level, each were free to pursue a slightly different approach to achieving that objective.

A way of achieving this in relation to sustainable development could be for a broad sustainable development principle, in line with its genesis in international law i.e. acting in a manner "which seeks to ensure that the needs of the present are met without compromising the ability of future generations to meet their own needs", to be agreed by all the nations of the UK. We appreciate that the Welsh Government does not have control over the application of the Environment Bill in England. However, in our view, to reduce the potential for inconsistency and confusion as between the English and Welsh frameworks, serious consideration should be given to extending the proposed duty under s. 4 of the English Environment Bill to include other bodies whose activities are likely to be relevant to achieving sustainable development, such as a local authorities, and to require all bodies falling within this duty to have regard to sustainable development whenever exercising their functions.

In order to minimize the potential for divergence in environmental standards between England and Wales any shared set of common environmental principles as well as the legislation establishing a Welsh body could put the principle of non-regression from (former) EU law obligations on a statutory footing, reinforcing the non-regression clause in the Withdrawal Agreement between the UK and the EU.

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

There would be considerable advantages to having a UK wide body with oversight of effective delivery of international obligations and UK laws. This might even be functional without one of the devolved countries. The ability to develop common standards, share good practice and, very importantly share resourcing and expertise would be a benefit of this approach. However, it is not without disadvantages for Wales but it is to be hoped that careful development of its

constitution, scope etc could be worded to reflect the necessary sensitivity and accountability for Welsh institutions.

It is crucial that the oversight body or bodies has sufficient expertise and resourcing. This is much more likely to be achieved with a UK body which can share expertise. Indeed, the EC itself employs reference panels and technical expertise capacity to get independent advice. This would be a valuable resource, particularly for Wales where we lack access to expertise such as in the Natural Capital Committee in England.

If this is not feasible, then there must be some collaborative process between the bodies in the 4 countries to ensure effective delivery. A new Welsh oversight body that collaborates closely with its UK counterparts, and which has access to a clear dispute resolution mechanism when dealing with cross-border issues, will be necessary.

However, there will also be a need for political resolution process between governments, in addition to this.

WWF Cymru recognise that this issue is not unique to the environment and that Brexit has exposed the shortcomings in the functioning of the UK. We also recognise the attempts to grapple with these shortcomings by the Welsh Government in Brexit and Devolution: Securing Wales' Future.

WWF Cymru does not have expertise in developing legal frameworks across the nations, however, our view is that there clearly needs to be collaboration between the governments of the UK to ensure non-regression; a complaints procedure which enables dispute resolution function between governments; and a way to collaborate to meet our international commitments.

Consultation on Environmental Principles and Governance in Wales Post European Union Exit

ClientEarth is a charity that uses the power of the law to protect people and the planet. We are international lawyers finding practical solutions for the world's biggest environmental challenges. From our offices in London, Brussels, Warsaw, Berlin, New York City and Beijing, we work on laws throughout their lifetime, from the earliest stages to implementation and enforcement.

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[1] and here.[2]

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.

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

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

- 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 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?

- **Rectification at Source;**
- **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.[3] 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

[3] 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

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.[4]

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 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.

[4] Available at https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/FrameworkPrinciplesReport.aspx

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.[5]

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 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

[5] The key points are available in the following briefing: https://greeneruk.org/sites/default/files/download/2018-07/Greener_UK_Governance_Gap.pdf

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.

Consultation Response

Brexit and our Land

Number:

Response from CLA Cymru

October 2018

Rebecca Williams
Director, Wales

CLA Cymru: The Voice of the Rural Economy in Wales

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 in a post Brexit world. 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, 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 a framework of shared principles to achieve common goals whilst retaining flexibility to implement these in a way that reflects national and domestic priorities. This balance between creating shared 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.

6. With an industry, environment and legal jurisdiction so interlinked between England and Wales, it would seem perverse to pursue different environmental principles and governance arrangements in isolation in Wales as this can only serve to cause confusion and cost for businesses on the ground.

7. With consultation underway in Wales, this is a topic of debate in England the draft Environment Bill introduced in Westminster. The first schedule of this far-reaching bill and the stakeholder working groups supporting it, is looking to address the same concerns and seeking similar solutions. CLA Cymru are a long standing advocate of the need for frameworks as a way for the four nations of the UK to work together on topics of shared concern post-Brexit. Environmental principles and governance is an area we have identified where a framework would be beneficial.

What is needed in Wales?

8. The 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 in the face of leaving the European Union. However, the consultation approaches the exercise from a perspective of recreating the current European Union principles and functions directly to Wales. 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. Whilst perhaps unsurprising in the context of leaving the EU and the sudden immediacy of

the issue, we are in danger of seeking to “plug gaps” as opposed to create a bespoke system or solution that works for Wales.

9. The EU is a global leader in establishing the importance of environmental considerations as a policy issue both in terms of environmental principles but also legal consequence for failing to meet agreed standards. This work derives from and was driven by the need to address big pollution from big business globally and the work on core environmental principles very much reflect the time and situation in which they were created.

10. This is not, however, a stationary policy or issue and subsequent treaties, policy developments as well as new understandings of ecosystems and natural resources mean that the environmental principles in the EU have evolved over time. The most significant, and recent, change on this journey has been the growing awareness and recognition of the concept of sustainable development.

11. In the context of being a member of the EU, Wales is also moving towards a world where the need to deliver sustainable development is central to all policy and public body functions. While this is being promoted in the EU through policy and principles, Wales has enshrined this into legislation through the provisions of the Well Being of Future Generations (Wales) Act.

12. It is worth remembering that the core purpose of sustainable development is to acknowledge that no one pillar of sustainability – environmental, economic or social – is more important than the other. Obviously in Wales, there is also a cultural dimension to sustainability. With this in mind, CLA Cymru question whether pursuing a single issue agenda of Environmental Principles could lead to perverse outcomes and / or detrimental impacts on the others pillars to the detriment of the underpinning concepts of the Well Being of Future Generations (Wales) Act.

13. CLA Cymru would therefore argue that it would be beneficial for Welsh Government to undertake a more fundamental assessment of whether specific environmental principles are needed and what impact this may have on the broader goal of sustainability now and in the future before undertaking further specific developments

The difficulties of law

14. Fundamentally, the legal system of the UK works in a different way to that of the EU. In its simplest sense, EU law, and by extension the treaties, regulations and principles that create them, are designed to be interpretive. Whilst UK law has, to an extent, been influenced by this way of working whilst in EU membership, the common law system that underpins the legal framework of England and Wales is based on following judicial decisions and more rigid, prescriptive interpretation of legislation passed through democratic government structures.

15. In UK law, the choice of words in a statute can be far-reaching. Changing a “should” to a “must” can be the difference between a Government being help to account in the courts for action not completed or outcome not achieved. In UK law, precise language is important and interpretation of that language can me more impactful when challenged in the UK compared to challenge in the EU where interpretation of law and legal language is more defendable.

16. The consultation document does not acknowledge this difference and no attempt is made to assess the potential impact of enshrining interpretive principles into the more rigid UK (or indeed welsh) legal system. This failure to start at the highest level is compounded when moving to consider how to use existing Welsh structures or legislation to fill the gaps of environmental principles and governance. There is little assessment made on the impact that changing existing legislation or governance bodies will have on the ability of that legislation or office to achieve its primary purpose. If the Future Generations Commissar is

given an extended remit to also look at environmental principles and provide governance then by default, the current purpose of the office – to assess public sector delivery of sustainability – will be diluted by the additional emphasis on one pillar is sustainability.

17. Once again, CLA Cymru would suggest that in trying to recreate in Wales what already exists in the EU, we are missing the opportunity to evolve.

Working within the UK

18. As already outlined, one of the strengths of the EU is the ability to work across member states to achieve mutually beneficial outcomes. The four core environmental principles, and the subsequent associated treaties and principles, are interpreted domestically according to circumstance and need but within an overarching framework of ideals and ways of working.

19. The division between Wales and the England does not respect political boundaries. This is especially true of the environment and natural resources. Similarly, devolution to Wales is a developing process and many important policy or decision making powers that are impacted by the environment are currently retained by UK Government. Trade, large infrastructure, transportation, elements of water and sewerage, energy, telecoms: there are many significant and nuanced issues that directly and indirectly interact with environmental principles that make a consultation that is 'Wales only' problematic.

20. This confusion of responsibility will become more acute when viewed through the lens of enforcement and accountability. If environmental principles that underpin understanding of standards are different in England and Wales, with different governance structures, who can be held accountable if a questionable decision is taken. This will become confusing to businesses and individuals. For example, does a new major road development or new trade agreement need to meets the standards of England or those of Wales. If legislation or standards conflict, which takes precedence when the impact in felt is Wales but the decision is within control of the UK Government?

21. For individuals, what is the route to justice? Environmental impacts are often felt 'downstream' from where the decision was taken. If that individual is found not to meet Welsh standards but the cause is an infrastructure project that was signed off by UK, can the impact by mitigated by one administration of the other? Westminster would likely not have the authority to achieve recourse whilst the Welsh Assembly would not be able to enforce based on Westminster standards or policy. For the individual effected, what regulation and standards should they meet and, if failing to meet appropriate standards or effected by something outside their control, to whom can they turn for rectification.

22. As the UK, particularly England and Wales, is so integrated, and if the ambition is to directly transpose EU principles and governance, it would be logical and practical for this to happen at the UK level. CLA Cymru fully support the need to respect the devolutionary settlement, but would suggest that practical considerations and complexities lead us to a conclusion were we call on UK and Welsh Government to pause and work together to develop a fit for purpose solution

Consultation Questions

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

CLA Cymru, as outlined above, suggest that a needs based analysis and a more in-depth gap analysis of environmental principles, sustainable development and natural resources management is needed.

The consultation looks closely at the four "core" environmental principles of EU only and does not look at subsequent additions or complimentary ideas that work with these original principles that create the body of EU environmental policy as we understand it today.

The EU is a global leader in forging environment policy and identified the need for principles to guide this and associated policies. The core environment principles were the starting point but since their inception, the world has become more nuanced and our understanding of the environment, ecosystems and natural resources has developed significantly.

Questions need to be asked whether these four core principles are fit for purpose today. CLA Cymru would agree that Welsh Government through the Environment (Wales) Act and the Well-being of Future Generations (Wales) Act, have indirectly introduced the principles of prevention and precaution into domestic legislation. By default, this asks the question of why the polluter pays or rectification at source principles were not similarly embedded

Presumably, this was because the latter two principles did not compliment the ambition of the Environment (Wales) Act and the Well-being of Future Generations (Wales) Act and the concepts of sustainable development and sustainable management of natural resources. If this is the case, why would Wales seek to introduce them now? It may be useful to reflect on the discussions of the time on this point.

CLA Cymru would suggest that the 'polluter pays' and the 'rectification at source principles' do not sit neatly alongside the ambition of Wales as a country with a goal of sustainable development. The ideology behind both is fairly blunt and is not supported by advances in technological and evidence gathering that show that identifying pollution and causal links is extremely difficult.

From a land use perspective, point source pollution can be identified and potentially rectified if polluters can be identified. Diffuse pollution has become a more pressing concern for water quality and this is not so easily identifiable or rectified. The 'polluter pays' principle, if enshrined into the more rigid legislative structure of the UK, has the potential to create unachievable legislative standards.

Furthermore, before additional principles are added, we need to understand the impact this would have on existing legislation and the originals goals of those laws. If these additional principles are introduced through another legislative avenue, what is the interaction with existing legislation and how would the old and new legislation work together?

Question 2: Do you think there are other principles, which may also need to be included?

It is difficult to answer this question until a fuller needs based analysis of the environmental and EU principles is conducted in relation not just to Wales but also into policy areas retained by the UK Government that will affect communities and economies in Wales.

EU environmental principles function within, and are influenced by, the context of the 'ways of working' principles for the EU as a whole. It is difficult to understand why Wales would

seek to implement principles designed within a specific context outside of that context and within a UK legal system that does not operate in the same way.

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

CLA would not currently agree with this proposal as not enough detail is forthcoming to explore this nor a substantial impact assessment completed to analyse the consequence of such an extension.

The duty to pursue SMNR was created to serve a certain purpose and is, to date, largely untested in delivering this primary function. To change the duty again now before its original purpose is understood and embedded would be confusing for all and could lead to a situation where neither the original purpose, nor the new requirements are being met.

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

SMNR and Part 1 of the Environment (Wales) Act is an operational piece of legislation intended to guide the actions of NRW and Welsh Ministers. It is not set within the same context as the Well-being of Future Generations (Wales) Act and is arguably trying to achieve a complimentary, but slightly different remit to WFG. Whilst the Well Being Act relates to a broader range of public bodies, it is also has a wider remit covering all pillars of sustainability.

Before a decision is made, CLA Cymru would suggest that until more detailed analysis of impact in changing or extending the duty of SMNR is undertaken, the potential adverse impacts would suggest caution.

Accountability

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

CLA Cymru do not agree that an adequate gap analysis has been completed. As already outlined, a gap analysis does not answer the question of need, it does not ask why or even if these environmental standards are needed; it makes this assumption and looks bluntly at the ways to achieve transposition.

Further, by confining the gap analysis to the original core environmental principles and by considering these outside the consideration of complimentary principles and ways of working, only a partial gap analysis has been completed.

There is a need for wider mapping looking at EU principles in the broadest sense. The environment principles work because they sit within a legislative framework that encourages interpretation of principles and because they sit within a ways of working framework that intersects all aspects of EU policy and law. By analysing core environmental principles outside this wider context, it is an incomplete exercise that itself creates a gap.

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

CLA Cymru would suggest that there are no fit for purpose governance bodies that could fulfil the environmental function as described in the consultation at present. This is mainly because none where needed within the context of being members of the EU and the intuitions within it.

The potential bodies suggested in the consultation all have a political element to their office. The Future Generations Commissioner is a political appointment whilst the advisory board for the Public Services Ombudsman is self-regulating and contains public body input.

An essential aspect of governance is the ability to influence and indeed, deliver change where it is deemed necessary. Arguably, the office of Future Generations Commissioner has not been established long enough to understand how impactful the Office could be. Furthermore, whilst the Commissioner covers a wide range of public bodies, significant elements of the role are advisory with little power to achieve change.

Similarly, whilst the office of the Public Services Ombudsman is more longstanding, it too has limited scope to effect practical change.

The Auditor General for Wales has more autonomy as a Crown appointment so could have the appropriate independence. The scope of the role, however, predominately concerns public body finances. Additionally the Office has political cross-over as the independent firm that audits the Wales Audit Office is appointed by the National Assembly of Wales.

For Wales, and indeed the rest of the UK, it is realistically only the judicial system that comes close to providing the access to individual justice aspect of the CJEU and that judicial system operates as England and Wales.

Additionally, there is a need to look at the current and potential tools for holding Government to account. The oft-cited solution of Judicial Review is costly and restrictive in terms of what can be challenged. Judicial solutions could be more robust but would likely require an element of collaboration across England and Wales.

When considering accountability it is also important to understand the impact of different options. Would it be a solution to make existing bodies that are accountable to Welsh Ministers accountable to the Welsh Assembly in the future? Would this be enough to remove political considerations from independence governance arrangements? The judicial system is the most impartial but to reiterate, that comes with it own set of challenges to accomplish.

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

The role and objective of a body responsible for overseeing implementation of environmental law in Wales is being discussed here in isolation from the rest of the UK and in particular the question of whether an oversight body is needed in Wales.

CLA Cymru suggests that there is potential benefit in Welsh Government and UK Government, who are currently developing the proposals for an Office for Environmental Protection, to work together to find a solution what is more fit for purpose as it could recreate the shared standards and ways of working that are so valued in the EU model.

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

CLA Cymru would suggest that until a needs based analysis of environmental principals and governance in Wales in the context of current policy and legislative is completed, there is no way to decide if or what new governance arrangement or their scope are necessary.

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

Again, CLA Cymru would comment that in lieu of a needs based analysis is undertaken, it is impossible to conclude what bodies may be appropriate or not.

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

The fundamental question of whether an oversight body would be more appropriate at a Wales, England and wales or UK level must be answered before this question can be considered.

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

The examples given in the consultation are all political in nature and lack the arms-length credibility that makes the Court of Justice of the European Union so effective in dealing with environmental accountability of government as well as individuals.

Outside of the judicial system, which is not devolved so would require a UK or England and Wales solution, there is currently no body or system within the Wales with the appropriate level of autonomy, or range of enforcement powers that are currently provided by the CJEU in relation to the environment.

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

The range of bodies already acting in an advisory capacity to Government and public bodies is already extensive. Until it is decided at what level within the UK an oversight body should operate, it is difficult to comment on its precise function as devolution may impact on this.

The Committee on Climate Change has been one of the more successful bodies operating at a UK level so suggests an advisory capacity can work but as one of the key aspects Wales is seeking to recreate here is access to justice and accountability, this would suggest a more judicial solution may be preferred and legal opinion and advice has a very different status to that of the Committee on Climate Change.

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

To reiterate, until the question of whether an oversight body should operate across the UK or in Wales alone, is answered, this question cannot be answered.

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

See above.

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 form, function and powers of an oversight body can only be explored once a decision or remit is taken.

One of the elements missing from the judicial system of the UK that is provided by the EU is free access to justice for individuals. Historically, this function of the CJEU has been little used in relation to the UK or the devolved administrations so a cost-benefit analysis would be beneficial to fully understand what it is that Wales would be missing if this function was not brought over form the EU.

There have been many reforms of the tribunal system in recent years to make it more accessible to individuals, also moves to provide trade bodies, such as RICS in the case of agriculture tenancies, with the capability to provide more cost effective, streamlined remedies.

Again, it is not a case of transposing capability from the EU judicial system over to the UK. There is a need to consider how such a function fits within the wider legal system and what alternative legal provision already exist which would make a spate oversight body potential unnecessary.

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?

Please see answer to question 15. This is wholly dependent on the form and remit of any oversight body if it were to be created.

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

Please see answer to question 16.

Other

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

CLA Cymru are supportive of the need to create a framework that operates across the UK with a shared set of environmental principals agreed by the UK Government and devolved administrations.

This would be the most practical solution for businesses on the ground so that the complexities of devolution and different administration competencies would be avoided whilst high environmental standards can be achieved across the UK and we do not enter into a race towards the bottom.

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

CLA Cymru have long advocated the need to create UK frameworks in the post-Brexit to ensure that important policy areas, such as environment, that have so many cross-border considerations are appropriately dealt with in the future.[1]

There are, however, currently questions to be asked around timeframes. The UK Government are working towards a tight timeframe to pass their draft Environment Bill, which contains provision for the Office of Environmental Protection. This timeframe in inly tightening with the current political uncertainty and any UK solution or framework would mean that ideally agreement from the 4 administrations in the UK should be sought and co-design of the solution completed before independent Bills looking at this issue are passed.

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

Environmental Principles and Governance in Wales Post European Union Exit

Consultation response form

Your name:

Organisation (if applicable): PLANED, BRICs project

e-mail/telephone :

Your address:

Responses should be returned by **9 June 2019** to

EU Exit & Strategy Unit
Department for Energy, Planning and Rural Affairs
Welsh Government

1st Floor East, Cathays Park 2
Cardiff
CF10 3NQ

or completed electronically and sent to:

e-mail: Environmental.Governance@gov.wales

Environmental Principles

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

The consultation paper sets out the four EU principles; prevention, precautionary, polluter pays and rectification at source. Although SMNR principles reference the precautionary principle, no guidance is given on the regard given to the evaluation of risk and the balance to be given to conservation in cases of conflict or reasonable doubt.

Future legislation needs to clarify the guidance given in section 62 of the Environment Act 1995 and include existing reference to the operation of the precautionary principle, affording environment protection in cases of conflict and doubt.

Rectification at source and *Polluter pays* are both important but should not, as the first of these questions implies, be treated independently outside a wider suite of principles., Moreover, there may be instances where better outcomes may be achieved by mitigation or compensation. This can be in cases of overriding public interest or where economically, socially and environmentally alternative mitigation or compensation could produce better results. This would need to be carried out on a case by case basis but could represent a valuable means of funding public goods and reducing environmental outputs to net zero for key pollutants and key industries.

Question 2: Do you think there are other principles, which may also need to be included?

The Environment (Wales) Act 2016 introduced a set of key principles to apply sustainable development to the management of Wales' natural resources. These are known within the Act as Sustainable Management of Natural Resources principles (SMNR) but do not enshrine the Sandford Principle (1) or the Precautionary Principle (2) within them.

We would wish to see these principles carried forward as rules, through regulations and, extended across a range of public bodies and strengthened by

new arrangements in Wales and their application clarified and not lost in broader contexts.

(1) Where irreconcilable conflicts exist between conservation and public enjoyment, then conservation interests should take priority.
(2) Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

A further principle should be one of no environmental deterioration. This could take two forms. In terms of permissions, consents and permits strict emission limits as currently allowed need to be supported in areas of failing environmental quality where environmental loadings overall are an issue.

The competent authority should carry out systematic monitoring of recognised vulnerable habitats or assets, and where deterioration has occurred it should launch an investigation backed by a recovery plan.

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 should be made consistent with existing legislation and case law as outlined above and the same standard, including the Sandford and precautionary principles, and extended to all Local Planning Authorities and permitting bodies operating within Wales.

Section 6 of the Environment (Wales) Act 2016 provides a model for such a cross public body duty.

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

The benefits of following the principles of sustainable management of natural resources should be felt as a cultural change throughout Welsh life and culture. As such, the reach of these ways of working should be extended as far as possible to all Welsh Public Bodies, Planning Authorities and where legally possible through to statutory undertakers and supply chains.

Accountability

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

Governance arrangements need to include oversight to ensure that environmental obligations are met. Our current institutions serve us well in terms of probity, lawfulness of decisions and performance overall but tend to lack mechanisms for monitoring compliance, change and vulnerability. The current organisations have no oversight of whether obligations have been met, or legislation effectively introduced. We need powers of sanction over efficacy of delivery, achievement of obligations and outcomes of purposes.

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

A prerequisite for effective governance is clarity over competent authorities and their obligations for environmental delivery. A new independent body needs not only to be able to address the development of policy and legislation but to ensure that those bodies accountable meet their obligations, making clear that delivery includes achievement of outcomes and obligations.

There is a danger of policy development and delivery that does not achieve outcomes. Many habitats and landscapes of our most protected areas are in non-

compliant condition. A new body should have powers of investigation, publication, recommendation and sanction.

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

The broad range of action of the body is welcomed. This would be particularly useful in complex areas of special protected areas.

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

For the cultural change sought by Welsh Government to be effective the change should be seen through all levels of delivery and policy.

The policy areas should not be limited but should extend to the management of natural resources in Wales, including those not devolved to Welsh Government. Sanctions would not be available in all cases to the body but the powers of independent scrutiny and review would be valuable to the people of Wales and Welsh Government.

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

The remit of a new independent body should not be limited to oversight of specific bodies but to the broadest outcomes of SMNR envisaged by Welsh Government. This would avoid any unintended gaps in delivery being beyond the remit of the new body.

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

As outlined above, the efficacy of delivery or sustainability of management of natural resources needs to be assessed and gaps identified. Besides the Future Generations Commission these could include statutory undertakers or non-Welsh bodies whose co-operation could be sought as necessary to address any issue affecting Wales' natural resources.

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

The new body should be an independent executive. The office of a commissioner in Wales does not carry enforcement duties and the distinction between advice and sanction powers needs to be clear in the title of the new body. The new body must be given access to legal enforcement investigation instruments and powers, with ability to compel co-operation and requisition for information.

A body would require skilled investigators to deal with complaints, alongside investigation of efficacy of implementation of legislation, with policy review and scientific branches to mirror the role of the Commission.

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

Any new body in Wales would itself be subject to the general principles affecting all Welsh Public Bodies and would be in time have gathered much information and best practice to share. For example, it would be essential to liaise with the office of the Future Generations Commissioner to ensure that the lessons learned from scrutiny and complaint investigation and the boundary between poor performance and legal failure were clearly understood.

Advice on efficacy of delivery can be provided to the commissioner and Public Service Boards and Public Bodies.

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

It is essential that an oversight body be given powers to scrutinise the efficacy and drafting of legislation including the manner in which it has been implemented, enforced and the outcomes it has achieved. The body needs to ensure that a plan/implement and review cycle operates in Wales.

This can include attainment of environmental objectives as well as evaluation of management of new ways of working, monitoring the implementation of the Environment (Wales) Act and any legislation designed to further sustainable management of natural resources.

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

The extent of the function should be to ensure public bodies assess the outcomes of their actions, success and failures can be identified and lessons learned. These can be fed back to Welsh Government with recommendations for legislative amendment, for administrative direction or intervention, or resort to the courts where significant failures are found.

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 remit of investigation should include any environmental obligation that a competent authority has failed to meet. This could, for example, be the breech of an air quality standard as well as a procedural failure. All the complaint avenues currently open to citizens and groups need to be still available after we leave the European Union subject to a relevance and proportionality test. It is important that the distinction is made that implementation is about delivery and outcomes and not lip service.

The investigation powers must match any other enforcement agency with a remit to bring matters before the court. The strength of the European Commission was its ability to bring matters before the European Court and for penalties to be imposed. The new body must be able to gather evidence, primary source data, conduct interviews, serve notice and requisition information in a timely and publicly accessible manner.

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?

The oversight body would be an enforcing body and subject to the regulators' code and the Hampton Principles.

Informal methods could include efficacy reviews, and best practice investigations as part of plan/implement / review cycles.

Non-routine enforcement would include criminal investigations under the Police and Criminal Evidence Act code.

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

The body would need an enforcement policy describing the range of sanctions from advice to prosecution. There could be a role for improvement notices where informal advice or more severe failings are discovered. There would be the added option of referral to Welsh Government ministers for special measures, intervention and direction where systematic failures of SMNR are found.

Ultimately the body would need to take prosecutions before the courts.

Other

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

A shared set of principles would be useful particularly where a scheme of overriding national importance could involve mitigation across devolved boundaries or development that is not a devolved matter.

However, having made ground-breaking legislation Welsh Government should not now mark time while the rest of the UK catches up.

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

It should be similar in concept to an expanded redefined Joint Nature Conservation Committee but with competence in environmental impact assessment, landscape and related disciplines.

Environmental Principles and Governance in Wales Post European Union Exit

Consultation
Response form Your name.

Organisation (if applicable): Mineral Products Association (MPA)

e-mail/telephone

Responses should be returned by **9 June 2019** to

ELI Exit & Strategy Unit
Department for Energy, Planning and Rural Affairs
Welsh Government
1st Floor East, Cathays Park 2
Cardiff

CF10 3NQ

or completed electronically and sent to: e-mail:

Environmental.Governance@gov.wales

Environmental Principles

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

Yes - both the polluter pays and the rectification at source principles should be incorporated into Welsh legislation.

As noted in the consultation document, much of the existing legislation is predicated on these principles so there should be few barriers to their introduction and negligible disruption to Welsh regulators or industry.

Question 2: Do you think there are other principles, which may also need to be included?

The MPA considers that Welsh legislation should also include a 'proportionality principle' to ensure parity between environmental policy, legislation and regulation and social and economic policy, legislation and regulation is maintained once the UK leaves the EU. Reliance on sustainable development principles, as reflected in the five ways of working set out in the Well-being of Future Generations Act and the nine principles of the Sustainable Management of Natural Resources, will be insufficient to ensure that Welsh environmental policy and legislation maintains the principle of proportionality going forwards.

As para. 2.7 of the consultation document notes, the principle of proportionality is currently enshrined through European Treaties, which in turn are then reflected in various legislation that already applies to the UK. For example:

i. The Seveso III Directive requires an operator's major accident prevention policy to be "proportionate to the major-accident hazards."
ii. The Industrial Emissions Directive allows derogations from emission limit values based on best available techniques where achievement of those limits would lead to disproportionately higher costs compared to the environmental benefits.
iii. The UK Health and Safety at Work Act requires every employer to "ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees."
iv. The Environmental Permitting Regulations allow that a discharge is not a "groundwater activity" if alternative measures would increase the risks to human health or to the quality of the environment as a whole, or are disproportionately costly.

Looking beyond our withdrawal from the EU, it will be essential to ensure that this principle is maintained in delivery of existing policy and legislative requirements as well as the consideration of new policy and legislation going forwards.

The principle of proportionality does not conflict with the principles proposed in the consultation document, but its addition ensures that the proposed environmental principles are given equal legislative weight when compared to

established social and economic principles. Its inclusion should ensure that the introduction of environmental principles into Welsh Law does not create conflicts with existing legal principles, such as those highlighted above.

Furthermore, the addition of a ‘proportionality principle’ will enable single-issue environmental policies to be considered more holistically. For example, priorities are considered when mitigating greenhouse gas emissions and at the same time as improving air quality.

It should also help to ensure that policies look at the application of the environmental principles for the long term, rather than delivering short-term decisions that may actually have perverse outcomes in longer term, for example, a preference for one type of technology over another.

In addition, the requirement to consider proportionality will ensure that cumulative burden is taken into account. For example, the cumulative impact of environmental, social and economic policies or the cumulative impact of direct regulation and indirect measures such as taxes.

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

Yes - Given the policy and legislative frameworks in place, it will be important that all public bodies in Wales adhere to the same guiding principles when delivering their functions to ensure consistency in delivery. The addition of the proportionality principle would provide the necessary flexibility to support evidence-led, risk-based decision making that takes into account the longer term needs of the environment.

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

No specific comment - other than the duty needs to be applied consistently across all levels of Welsh Government.

Accountability

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

Yes.

The consultation document makes reference (in paragraph 3.22 - bullet point 3) to the ELI having ‘formal and informal’ complaints procedures. As explained later in the consultation document (see 3.51) these are actually formal and informal mechanisms to deliver solutions or outcomes.

There should be no confusion between these two aspects of governance. A complaint is, by its very nature, formal and should be considered through a clear, transparent and proportionate complaints process.

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

Existing bodies should maintain the roles they already perform - subject to any potential overlaps or duplication of functions with any new body that may be established.

In the event that there are overlaps, the respective roles and responsibilities of current and proposed bodies should be re-shaped to minimise the potential for duplication. Furthermore, establishing a new body should aim to be as cost-efficient as possible, building on existing systems and processes within existing accountability bodies.

Any new body for Wales alone must take into account the different targets or regulatory approaches in devolved administrations which may affect the environment in Wales, or may influence the preferred environmental solutions adopted by businesses which have operations across the UK. The inclusion of the proportionality principle in legislation, and in the objectives of any new body, will help to ensure this is the case.

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

It very much depends on the remit, structure and processes that it will be expected to operate within. Currently, the terms of reference are too open to offer more definitive comment. A further consultation on the structure, objectives and operations of a new governance body would be welcomed.

If a new body is established, it should operate in a clear, proportionate and transparent way that is in the public interest, recognising that it is necessary to balance environmental protection against other priorities and account for the cumulative effect of environmental protection, and other, priorities.

The relationship to, and interrelationships with, the governance approach and governance bodies in other devolved administrations will need to be very clearly defined to ensure there is a coherent structure across the UK. This in turn will help to minimise the negative impacts of regulatory diversity on businesses which operate across the UK.

A new body should have a balanced role in delivering environmental governance. In this context, it should be able to address issues of ‘over-regulation’ as well as areas of ‘under-regulation’. The inclusion of the proportionality principle will support achieving this balanced role.

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

Paragraph 3.30 of the consultation document lists some examples of the policy areas that should be included in the scope of the new arrangements. But it is important for the scope to cover the full range of natural resources that are defined under Section 2 of the Environment (Wales) Act 2016 - including minerals. This is important as minerals and mineral products represent the largest material flow (by tonnage) passing through the UK economy, yet are often overlooked - as reflected by the content of paragraph 3.30.

There may be benefit in capturing 'whole life' considerations within the policy areas, to ensure that governance takes a long term view of sustainable management of natural resources, rather than focussing on short term outcomes which may lead to longer term environmental disbenefit. Taking mineral products as an example, failure to adequately consider longer term mineral supply requirements may result in consequences for the future availability of cost-effective, sustainably sourced materials needed to support the delivery of infrastructure projects, as well as for homes, schools, hospitals and the wider social built environment.

Climate change is unquestionably one of the most important environmental issues being addressed by Government and business. Given the multiple and complex interactions between environmental issues in mitigating and adapting to climate change, it appears illogical to address the governance of climate change separately to other environmental matters. Indeed, it is likely that a single governance body will more effectively ensure that single-issue environmental policies are considered holistically. Furthermore, a single governance body is likely to be a more cost-effective option.

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

It is debatable whether local authorities should fall within the scope of the new governance structure. Ultimately, through Government, all other public bodies, including arm's length bodies, local authorities and other public authorities are accountable and so the first point of redress might be more appropriately through Government.

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

No comment.

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

To be effective and credible, it will be important for the oversight body to be independent of Welsh Government. It should also have sufficient resource, expertise and capability to be able to deliver its defined remit with confidence and authority.

Caution should be exercised to ensure that the oversight body does not have a 'higher' status than other bodies, or principles, related to social or economic governance.

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

Whilst MPA notes that a single oversight body is more likely to be able to address environmental matters in a holistic and cost-efficient manner, there is clearly a tension in having a single body performing both an advisory and an enforcement role.

Such dual roles have the potential to create a conflict of interest in the event that the body is required to take enforcement action against Welsh Government or other public bodies, where the Government has implemented proportionate policies in accordance with the advice it has received from the body, coupled with the outcomes of public consultation.

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

It will remain the role of the NAW to hold Welsh Government to account and scrutinise the effectiveness and efficacy of environmental regulatory implementation. Government is expected to continue to develop policy with the input of subject matter experts and to routinely consult on draft policy, legislative and regulatory measures. Alongside Judicial Review through courts, these measures would appear to work reasonably well in providing adequate enforcement and scrutiny without the need, and cost, of an additional governance body.

As such, it appears that existing expert input coupled with NAW debate and public consultation are adequate to ensure effective scrutiny of the delivery of key environmental policies.

That being said, if a new oversight body is introduced, then scrutiny may be an appropriate role - subject to ensuring any potential for duplication of functions are minimised and conflicts of interest are avoided.

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

It should be made clear when the new body is established:

i. Which existing policies & regulations are within the scope of this scrutiny role;

ii. How the Government will notify the body, and the public, of new policies & regulations that may fall within this remit.

In scrutinising the delivery of environmental legislation, the new body should take account of the cumulative effect of the broad range of environment policies and other policies impacting on the delivery of the environmental policy, for example, policies related to clean growth.

The value of an open remit to scrutinise the breadth of environmental legislation as implemented across Wales needs to be considered. It is unclear how work under the scrutiny role will be prioritised and if there is any requirement to demonstrate specific public interest in such a review.

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?

As set out in the response to Question 12 around the remit of the new organisation, such an investigatory role would be better suited to an independent body that does not provide parallel advice to Government.

Existing legislation should already include routes for appeal, often to the responsible Welsh Government Minister. The new body should not circumvent these processes or re-examine decisions which have already been concluded. Similarly, existing legislation may include a requirement for public consultation/participation in decision making processes. The new body should not provide a further route for public examination of decisions unless there has been a manifest process failure.

For example, where a permit is issued under the Environmental Permitting Regulations, the investigatory powers should not be used where there has already been an opportunity for public participation, the permitting decision was reached following consideration of the available evidence, including the evidence provided by public consultation, and where there is no tangible failure in the permitting process.

The oversight body should only investigate complaints where the complainant has first attempted to resolve the issue directly with the relevant public body, and escalated the concern through Welsh Government as necessary. Similar processes are in place for other legislation, for example:

- A complaint can only be referred to the Public Service Ombudsman for Wales if the public authority has been approached first - except in exceptional circumstances such as risks to safety.

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?

The benefits of an enforcement role for the new body are not clear. As set out in the response to Question 13, current judicial processes appear effective in holding the Welsh Government to account for legislative implementation. The response to Question 12 also expresses concerns about the desirability of a single body having both advisory and enforcement roles.

Should enforcement form part of the role of the new body, there should be:

- Checks and balances in place to ensure that enforcement is only undertaken where it is the best option for national interests, considering the national interest for the UK, as well as for Wales, and any implications and interests in other devolved administrations;

- Clear, transparent and publicly available decision-making processes to determine the desirability of enforcement action;

- Transparency in the enforcement action and outcomes.

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

The remit of any new body should focus on holding Government to account for any failures, through the responsible Government Minister - as currently occurs through the ECJ infraction process.

Ultimately, all other public bodies, including arm's length bodies, local authorities and other public authorities will be accountable to a responsible Government Minister, therefore the first point of redress should be focussed here.

Other

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

The UK mineral industry favours continuity of environmental controls once the UK leaves the EU to ensure a smooth transition and the Mineral Products Association (MPA) does not believe that there will be any environmental governance mechanisms missing as a result of leaving the EU, with the domestic courts fulfilling the role previously delivered by the ECJ. It is imperative that a stable investment environment is not put at risk by unnecessary changes in environmental regulation and governance.

The MPA is content that a stable regulatory regime is currently in place and do not expect this to precipitously fail as a result of the UK leaving the EU. Going beyond the legislative framework, the fundamental principle of environmental responsibility underpins mineral product operations and this will not change after EU exit. Thus, there are few concerns for the ongoing maintenance of environmental regulation in the short term.

The MPA supports a high level of protection for the environment and encourage the Welsh Government, the UK Government and other devolved administrations to seek efficiencies and improvements to the *acquis,* without diminishing environmental protection, to ensure that UK businesses maximise their competitiveness - particularly on a global stage. To this extent, a shared set of principles would be beneficial, including the proportionality principle, to ensure that businesses which operate across the UK are not disadvantaged by regulatory divergence.

The current proposals are only relevant to Welsh policy and unless common principles can be agreed across all devolved administrations, there is a high risk of fragmentation and differing legislative frameworks across the UK. Many mineral product producers operate in all regions of the UK, through their production operations or the markets they supply. As a consequence, any further divergence of operating and market conditions would be unwelcome. A UK wide solution is essential if those businesses that are currently based in the UK are to be able to compete effectively in global markets. It is important to recognise that when looking to trade or indeed invest, businesses will inevitably be required to consider the most stringent regulatory regime that exists across all the UK administrations to provide a baseline position.

The potential for a mismatch across policy areas across the UK, which may result in tighter environmental controls, could favour imported goods over domestic production. Such an approach may lead to increased levels of bureaucracy and reduced competitiveness rather than to better regulation or better environmental outcomes, as the environmental consequences associated with imported products are exported and therefore fall outside of UK influence or control.

The UK, and the Welsh Government, both have a strong record of regulatory compliance from EU sourced policies. There is no evidence to suggest that when exiting the EU environmental protection will diminish, and nor should it. Equally, there is also no evidence to suggest that the current institutional and legislative arrangements are not able to deliver stronger environmental controls where further environmental protection is needed.

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

The divergence of regulatory approaches, environmental legislation and governance arrangements, together with monitoring and reporting requirements, already create inconsistencies which need to be managed by businesses that operate across the UK.

As such, it will be vitally important that governance structures aim to understand and minimise those gaps that already exist, including the identification and agreement of best practice. This will ensure that future governance, legislation and policy does not create new gaps unnecessarily or inadvertently. This can only be achieved by a transparent and cohesive approach to environmental governance in the future that is achieved through direct collaboration with all relevant institutions across the UK.

Environmental Principles and Governance in Wales Post European Union Exit

Consultation response form

Your name:

Organisation (if applicable):

Wyeside Consulting Ltd

e-mail/telephone number:

Your address:

Responses should be returned by **9 June 2019** to

EU Exit & Strategy Unit
Department for Energy, Planning and Rural Affairs
Welsh Government
1st Floor East, Cathays Park 2
Cardiff
CF10 3NQ

or completed electronically and sent to:

e-mail: Environmental.Governance@gov.wales

Environmental Principles

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

Yes, but see answer to 2. below.

Question 2: Do you think there are other principles, which may also need to be included?

In my view Wales (and all parts of the UK) should include a commitment in their legislation to apply the same four environmental principles as are presently found in Article 191.2 of the Treaty for European Union (the precautionary principle, preventive action, rectification at source and polluter pays). The whole of the UK is legally committed to observe those principles at present. I don't agree that it helps to argue that the precautionary principle is the same as the duty in s. 4 Environment (Wales) Act 2016 to "take account of all relevant evidence".

I also believe that it is wrong for the UK government to have so far failed to re-enact Article 191.1 of the Treaty for European Union, and think that this too ought to be reflected in the law in Wales, and each part of the UK-

> "A.191.1 Union policy on the environment shall contribute to pursuit of the following objectives:
>
> - preserving, protecting and improving the quality of the environment;
> - protecting human health;
> - prudent and rational utilisation of natural resources;
> - promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change."

It is true that Welsh legislation in particular applies the principle of sustainable development, in its own way, as Sustainable Management of Natural Resources (which may reflect the third indent of Article 191.1 above). I understand that the view of Welsh Government may be that any gaps in application could be different for Wales with its distinct legislation than for the rest of the UK. However, Article 191.1 and 191.2 of TFEU matters for each part of the UK.

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

Yes, see answer to 4. below.

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

I suggest that it ought to be possible to apply all four of the main environmental principles to the discharge of their functions by all government departments and public bodies, so far as relevant to those functions, and that ought to apply also to the SMNR principle.

Accountability

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

For environmental laws, EU Exit will mean that the UK no longer has -

(i) Treaty obligations reinforcing environmental laws (e.g. Article 191 Treaty for European Union);

(ii) Application of environmental principles through EU law;

(iii) Enforcement by the European Commission;

(iv) Enforcement by the Court of Justice of the European Union;

(v) The ultimate sanction of Member States risking fines for continuing breaches of EU law;

(vi) Legal requirements on government to ensure that penalties for breaches are "effective, proportionate and dissuasive" (see e.g. Water, Waste, Air Quality Framework Directives, REACH etc);

(vii) The right of individuals to activate enforcement of environmental laws, at no cost, through complaints to Commission; and

(viii) Application of EU derived environmental laws throughout the UK.

It is not known yet, as at June 2019, whether, when, how, on what terms or even if the UK will leave the European Union. The terms of departure may include parallel commitments with major implications for the way that environmental laws are applied. Other political commitments to regulatory alignment will affect this area, for example commitments to "maintaining environmental standards." There are also some other legal considerations, such as the "non regression" commitments in the Withdrawal Agreement between the UK and EU.

Finding effective ways to implement environmental laws is both a vital national priority, but also an important factor in international negotiations. We can say what will be lost in terms of

enforcement of EU environmental law through Brexit, but the question is what will replace it, and also how that will be seen by the UK's trading partners. "Non-regression" sounds like an obscure technicality, but is really about whether the UK and its component parts have the commitment to maintain the same level of environmental protections as they have done of late.

In a major new report published in January 2019 by the UN Environment Programme, *Environmental Rule of Law: First Global* Report, the authors noted that -

> *"While environmental laws have become commonplace across the globe, too often they exist mostly on paper because government implementation and enforcement is irregular, incomplete and ineffective."*

That is what is at risk: whether the UK and Wales is really committed to have properly enforced and fully effective environmental laws.

EU Exit and UK response

The political commitment by the UK government was to 'repatriate' the whole of the *acquis communautaire* or body of EU law, to allow for decisions on what should replace it to be taken by future governments.

In environmental law terms and at UK level, this resulted in section 16 of the European Union (Withdrawal) Act 2018, which committed the Secretary of State to publish a Bill setting out how he would apply environmental principles, and to set up a body which would be able to challenge Ministers for non enforcement of environmental laws.

Section 16(2) of the European Union (Withdrawal) Act 2018 sets out what the UK government considers to be the main EU environmental law principles involved -

> "(2) The set of environmental principles mentioned in subsection (1)(a) must (however worded) consist of -
>
> (a) the **precautionary principle** so far as relating to the environment,
>
> (b) the principle of **preventive action to avert environmental damage**,
>
> (c) the principle that **environmental damage should as a priority be rectified at source**,
>
> (d) the **polluter pays** principle,
>
> (e) the principle of **sustainable development**,
>
> (f) the principle that **environmental protection requirements must be integrated into the definition and implementation of policies and activities.**"

This resulted in publication of the *Environment (Principles and Governance) Bill,* and its pre-legislative scrutiny by two committees of the House of Commons, the Environmental Audit

Committee and the Environment Food & Rural Affairs Committee. Whilst recognizing that this mainly applied to England, a great deal was learned from this pre-legislative scrutiny and consideration in detail of the UK government's proposals, and both of the reports contain important reflections which could be of assistance to the Welsh Government (if only in seeking to avoid the same pitfalls in Wales, where responsibility for the environment has been devolved) -

EAC Committee report 25 April 2019

'MPs call for urgent action to plug gaps in environmental protection'
https://www.parliament.uk/business/committees/committees-a- z/commons-select/environmental-audit-committee/news- parliament-2017/draft-environment-bill-report-publication-17-19/

EFRA Committee report 30 April 2019

'New environmental watchdog needs greater independence and sharper teeth'

https://www.parliament.uk/business/committees/committees-a- z/commons-select/environment-food-and-rural-affairs- committee/news-parliament-2017/draft-environment-bill-report- publication-17-19/

Both reports were highly critical of key areas within the draft legislation as published, calling it a 'significant regression' from EU standards of enforcement. They called for greater independence and additional enforcement powers for the proposed Office for Environmental Protection; more accountability for Government Departments and public bodies; enforcement of environmental law in the climate change area; reinstatement of the aims for a high level of protection of the environment from the EU treaties; and removal of the wholesale exclusions from the application of environmental principles.

Neil Parish MP, the Chair of the Environment, Food and Rural Affairs Committee, said:

"Although the Government has made a real attempt to establish a robust framework for environmental governance, the draft Bill clearly fails to meet its own ambition to 'ensure the environment is even better protected in future' as we exit the EU. In some areas it actually marks a significant regression on current standards.

Given this unique opportunity to rethink how we protect the environment in the future, we cannot afford to see the standards we currently adhere to slip.

There is also little point in setting up an environmental watchdog if it is unable to fulfil its essential function of holding the government to account. The new watchdog must not solely be a creature of Government but needs real independence.

To achieve real independence there needs to be a role for Parliament in all decisions relating to the membership of the OEP's board. Funding for the OEP must also not be solely at the whim of Defra ministers, as is currently the proposal. Sustained cuts to arm's length bodies such as the Environment Agency and Natural England demonstrate the need for the OEP to have greater budgetary protection to guarantee genuine independence.

The watchdog will also need sharper enforcement teeth. The Government must explore

appropriate ways to ensure greater personal accountability for Ministers and public servants if they fail to uphold environmental law before presenting this Bill to Parliament.

It is imperative to future generations that the Government does not squander its chance to get this right – it is unlikely they will get another any time soon."

Similar considerations will apply to any comparable body established in Wales.

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

If any body is to do the job presently carried out by the European Commission of holding government to account for non compliance with environmental law, it must be established in a properly independent way, with some role for the National Assembly in ensuring that its appointments and funding are protected by statute and by its relationship with the Assembly. This measure of independence from the executive might be possible by adding to the role of the national auditor, as is done with the Commissioner of the Environment and Sustainable Development in Canada, or through a new body.

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

I suggest that part of the new body's role would be to scrutinise the Welsh Government's implementation of environmental law. That part of its job would be similar to the role of a Parliamentary Commissioner for the Environment, for which there are successful models in New Zealand, Canada, and in some ways the role of the UK Climate Change Committee.

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

I suggest that Wales should not replicate the mistake made in England with the draft *Environment (Principles and Governance) Bill* of trying to take an artificially narrow definition of environmental law.

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

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

It is suggested that all government departments and public bodies should be required to apply the high level environmental principles as far as relevant, and that the remit of the new body should therefore match this requirement.

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

Experience elsewhere suggests that a new body able to call government to account must be robustly independent, and that the National Assembly will need to have a role independent of the executive in confirming appointments and ensuring that the new body's budget is protected.

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

Some models of Parliamentary Commissioner have included an ability to assist inquiries by Parliaments or to review and respond to annual environmental reports from agencies. It should not duplicate the work of other agencies such as NRW.

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

Yes: not to duplicate the front line enforcement responsibilities of NAW, but to be able to question whether and if so how environmental laws have been implemented. This is regularly done by for example other models of Parliamentary Commissioner for the Environment, as in Canada or New Zealand.

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

The new body will need sufficient resources, know-how and experience to be able to investigate and speak with authority about whether environmental legislation is being properly applied.

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 right that EU citizens currently have to bring complaints of breaches of EU law by public bodies to the attention of the Commission for investigation is a very important right in practice. It will need to be able to prioritise complaints, reject those with no merit, but investigate those of significance, and to challenge ongoing non compliance.

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?

See answer to 17. below.

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

The new body needs to be able to resolve investigations without formal action once there is a proper answer to suggestions of non-compliance. Ultimately it will need a straightforward way - whether by reference to a Tribunal or otherwise - of confirming that a government department or public body remains in breach of environmental laws, and the means to require that department or public body to come back into compliance (the EU law obligation is for this to be done as quickly as possible) – ultimately by some mechanism such as judicial review. Having the power to require that Ministers responsible for government departments or the heads of public bodies should be required to attend National Assembly hearings to explain continued non-compliance with environmental laws might also be a significant practical sanction.

Other

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

Yes. This is done at the moment through EU law, and without undermining the different devolution settlements. It is not clear how the environment would benefit from having gaps in the application of core environmental principles in the different parts of the UK as the UK diverges from the application of these principles in the rest of the EU.

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

The EAC Committee report, cited above, in particular noted the particular differences between UK and Welsh legislation through the implementation of the Well-Being of Future Generations Act 2015, Planning Act 2015 and Environment (Wales) Act 2016. The EAC Report, on devolution, noted that -

> "170. We are disappointed that limited effort has been made to co-design a body and governance framework to cover all four nations of the UK, given this would provide greater independence, a level playing field and more coordinated action. We consider that although it appears coordination has improved since the publication of the Bill, the lack of action in the lead-up to, and drafting of the Bill, had already ruled out possible areas of collaboration which could extend into the future.
>
> 171. *The Government should set out in response to this report how it intends for the Office for Environmental Protection to work collaboratively and without overlap with its potential equivalent bodies in Wales and Scotland. The response should clearly set out which provisions are within the scope of the Office for Environmental Protection in respect of reserved matters."*

It is a matter for real regret that the UK government did not address this need more effectively in its proposed legislation. I agree with the House of Commons Committees' criticisms of this lack of action, and very much welcome the willingness of the Welsh Government (reflected in the consultation) to continue to look for ways to make this sort of collaboration work in practice.

It is notable that the UK Climate Change Committee seems to be widely respected in all parts of the UK, perhaps because of its structure and the way that it reports to each Parliament, so that there is 'ownership' of the Committee in each part of the UK.

It may be that this sort of structure, fully respecting the differences in devolved environmental law, could still be developed. I support the suggestion that this could be further reviewed in 5 years time.

Meanwhile I would suggest that all bodies established to carry out similar functions in the different parts of the UK should be subject to a statutory duty to seek to collaborate and cooperate with their counterparts, with a view to encouraging the adoption and promotion of similar principles and standards.

Environmental Principles and Governance in Wales Post European Union Exit

Response submitted by the National Trust to the Department for Energy, Planning and Rural Affairs

June 2019

The National Trust is a charity founded in 1895 by three people who saw the importance of our nation's heritage and open spaces and wanted to preserve them for everyone to enjoy. More than 120 years later, these values are still at the heart of everything we do. We look after special places throughout England, Wales and Northern Ireland for ever, for everyone.

Introduction and summary

The National Trust is playing its part in restoring a healthy and beautiful natural environment. We are undertaking significant efforts on our own land to improve habitats, ecosystems and biodiversity. We are working with others to achieve the same goals beyond our boundaries in the wider countryside and marine environment.

The implementation of EU law and principles has helped to safeguard and improve our environment. For instance, the Bathing Water Directive has transformed the state of UK beaches. In more recent years, EU law has undoubtedly contributed to the goals set-out in the Well-being of Future Generations Act (Wales) 2015 and the Environment Act (Wales) 2016, which themselves are aligned with EU and UN goals for sustainable development.

When the UK leaves the EU, much of this body of law and the environmental principles will need to be transferred across. Alongside it, new arrangements will be needed to replace (and improve upon) the governance provided by the European Commission and the European Court of Justice. These bodies currently ensure that the UK Government is abiding by environmental laws. They have the power to impose fines if the UK is found to be in breach of this law.

The Wellbeing of Future Generations Act (Wales) 2015 and the Sustainable Management of Natural Resources (SMNR) principles already embedded in the Environmental Act (Wales) 2016 uniquely position Wales in filling gaps in environmental governance post-EU exit. However, Wales' legislative framework was created in the context of EU law already in place. It could be said that the EU laid the foundations for environmental legislation and

that the introduction of primary legislation in Wales created a framework on top to continually build upon. On leaving the EU, the foundations will no longer exist so primary legislation in Wales will almost certainly need to be amended to set and strengthen the foundations – the principles being the best place to start.

Our responses to the questions set-out in the consultation paper are below. In summary;

- NT welcomes the WG's commitment to non-regression and to enhancing the environment
- All four EU environmental principles should be in place post EU exit as a minimum and the principle of non-regression should be embedded in primary legislation in Wales
- NT would see the SMNR principles, and a duty to pursue SMNR, extended to all public bodies. Resourcing must follow to enable this to happen
- There are currently significant accountability gaps which cannot be filled by the existing arrangement of accountability bodies
- NT supports creation of an independent oversight body with the resources to monitor, advise and enforce
- The scope of the oversight body should be all-encompassing of environmental factors and should include agriculture directly
- Senior appointments to the body should be made through an independent appointment process, potentially through the Commissioner for Public Appointments

Environmental Principles

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

To ensure non-regression, it is essential that all four of the EU's environmental principles continue to be in place post-EU exit. The National Trust supports inclusion of the Rectification at source and Polluter pays principles into primary legislation in Wales as a minimum and it should be possible to expand the list in future (see Q2 for more detail on this).

The National Trust encourages further coherence across principles and notes that the Environment Act (Wales) 2016 and the Well-being of Future Generations Act (Wales) 2015 were created in the context of over-arching EU law. Environmental protection should be integrated in all policies and activities, as was the case with EU law. It is currently unclear how the principles already reflected in Welsh legislation will relate to newly introduced principles and this needs to be clarified.

Question 2: Do you think there are other principles, which may also need to be included?

We would like to see the inclusion of a non-regression principle in Wales primary legislation alongside the four principles proposed. There should be no rollback of

environmental protections, rather a ratcheting-up. These protections are needed to ensure that environmental degradation is reversed in order to secure SMNR. The existing regulatory floor, for example, is insufficiently strong and is not monitored or enforced adequately. This is a deterrent to, for example, water companies who wish to invest in land management. We believe there is real potential for functioning markets based on private investment in environmental restoration. There are already some small-scale examples in place or underway, such as the Green Alliance and National Trust's work on 'Natural Infrastructure Schemes' (focusing initially on flood risk mitigation).

Furthermore, a non-regression principle could help to ensure a consistent approach to environmental standards across the UK and avoid the creation of an uneven regulatory floor between the four administrations.

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

There should be an overarching environmental duty on all public bodies to actively support the improvement of the environment. As such, the SMNR principles and duty should be embedded across the public sector and apply to all public bodies.

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

As above in our response to Question 3, the National Trust supports embedding the SMNR principles across all public bodies, but they need to be adequately resourced by government. It is also necessary to look at where public money is spent, particularly where the public and private sectors form partnerships, such as the recent Growth Deals. Such partnerships are becoming increasingly relevant and are likely to form a central role in payment for ecosystem services schemes. Future conservation finance models involving private investment should have a duty to pursue SMNR and this would have the positive side effect of safeguarding against perverse outcomes.

Accountability

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

The current arrangement of accountability bodies operating in Wales will not provide adequate protection of the environment post EU exit. The National Trust agrees with the gaps identified (independent accountability, simple and inexpensive mechanism to raise complaints, enforcement mechanisms) goes further to suggest that a new environmental accountability body must have sufficient expertise, powers and resources to hold the government and other public bodies to account. This will need to include the skills and resourcing necessary to continue the monitoring work currently undertaken by the EU Commission.

The should be a requirement to rectify damage at source, as under EU law, alongside the polluter pays (for such damage) principle. However, the National Trust recognises that

where environmental damage has degraded agricultural land, there may need to be a 'resetting' period in order to establish and/or reset baselines. Whilst the National Trust supports direct inclusion of agricultural policy in the scope of the new governance arrangements (ref Question 8), it will be important to avoid penalising land managers for historical damage (for example, soil loss) which may have been caused whilst delivering on previous schemes under the EU's Common Agricultural Policy. This would encourage land managers to return soils to good health, which we would see supported through the new 'Public Goods Scheme', outlined in the post EU exit agriculture bill consultation paper.

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

Existing accountability bodies already play an important role in environmental governance, for instance by monitoring the state of Wales' natural resources and ensuring compliance with the law by private actors. They monitor progress and implement initiatives and projects on the ground.

However, the current framework of existing accountability bodies is not adequate to ensure non-regression. NRW alone has scientific and technical expertise in environmental protection but as a body it lacks the legal expertise, power and independence necessary to replace the functions currently held by the EU Commission and the Court of Justice for the European Union. Critically, NRW's lack of independence has seen it suffer from changing political priorities and under resourcing, which in turn undermines efforts to achieve environmental outcomes.

Alongside the existing bodies, a new framework is needed to enforce adherence to the law, to hear complaints from citizens and other actors affected by or concerned about breaches of the law, and to set policy or legislative direction. The National Trust supports the creation of a specific, independent environmental oversight body with a specific focus on the environment to provide a more coherent, coordinated and powerful oversight. An environmental oversight body must match the expertise and powers currently provided by the EU.

As acknowledged in the consultation document, Wales has legislated to embed the principle of sustainable development into all policy and decision-making. Nonetheless, the Future Generations Commissioner for Wales is primarily an advisory body and lacks the resources and powers necessary to hold public bodies to account in a substantial way. This not only serves as an example of why allocating sufficient resource and power is essential and must be ensured for non-regression but is a plea for a strengthening of powers of the Future Generations Commissioner to work alongside the new environmental oversight body.

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

An environmental oversight body should have the power to monitor and enforce governments to adhere to environmental law and to provide a free mechanism for citizens

to register complaints (alongside other powers and responsibilities). Such a body would be able to act in the interests of the long-term (as opposed to the oftentimes short-term decisions of political and economic cycles). This is in line with one of the 5 ways of working ('Long Term') set-out in the Wellbeing of Future Generations Act and SMNR principles. As commented above in the response to Question 6, NRW has suffered from diminished resources and changing political priorities and an oversight body must be immune to these factors.

Importantly, it should have the power and resources to take Welsh Government to Judicial Review and to impose fines where breaches are identified (a power that the European Commission currently has). We suggest a UK-wide framework of common standards which would set an even regulatory floor across the four nations and provide a foundation for close cooperation between the four oversight bodies. The National Trust recognises that nature does not recognise borders, so a close working relationship and common set of standards is essential.

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

The National Trust agrees that the scope of an environmental oversight body should be all-encompassing, including policy on water, air, nature conservation, climate change, soils, forestry, chemicals, pesticides, waste and circular economy. Furthermore, given that approximately 90% of land in Wales is agricultural land, agriculture should be listed alongside forestry and not only considered where policy intersects with the other listed items.

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

The National Trust does not think that the list of bodies is sufficient. Environmental protection should be integrated in all policies and activities, as was the case with EU law. If it is not integrated into all policies and activities it will represent regression.

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

The roles of the Future Generations Commissioner and the oversight body need to be clear as a degree of overlap is possible.

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

The oversight body must be independent from Government in order to carry out and defend its remit effectively and resist political pressures that can arise over time. Conventional non-departmental public bodies which are sponsored by Departments can suffer from changes to remit, reductions in funding, and real or perceived political vulnerability can impact on decision making. One option to avoid this is for the new body to be directly accountable to the National Assembly for Wales, similar to arrangements for

the Auditor General for Wales. This could help to guard against future governments weakening the body by cutting its funding, if it were perceived as too robust in its scrutiny or enforcement role. This could also safeguard other agencies (such as Natural Resources Wales) against facing further cuts to fund the new body. Senior appointments to the body should be made through an independent appointment process, potentially through the Commissioner for Public Appointments.

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

The enforcement function is one of the biggest governance gaps created by leaving the European Union. The oversight body should be able to provide advice to the WG (backed by sufficient technical and scientific expertise) and to scrutinise government progress on environmental objectives, plans and policies. However, we would expect its primary role to be the enforcement function.

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

The National Trust supports the proposal for the new body to provide advice and scrutiny on existing environmental law. If the new body is to be an effective 'watchdog' on Government adherence to the environmental law, then this role should cover the full body law, not just environmental law and include both new laws and existing ones. It can also provide an important role in advising on whether changes to existing environmental law are likely to improve environmental outcomes.

However, the roles of the Future Generations Commissioner and the oversight body need to be clear as a degree of overlap is possible.

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

As above in Question 13, the National Trust supports extension of the function to all laws, not just environmental law, where they can be shown to have an impact on the environment.

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?

At present, the European Commission hears complaints from civil society organisations and citizens for free. The new body should provide a way for complaints about possible breaches of environmental law to be raised, investigated and appropriate legal remedies pursued. Access to the complaints mechanism should be free for citizens, civil society organisations and other public stakeholders. Alongside its legal enforcement role, this should be one of the primary purposes of the body.

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?

The oversight body should have access to both formal and informal enforcement methods as currently available to the EU. The body should be able to issue fines and binding notices enforceable through the Courts, with the potential of an injunction to force Government to act. Further, the body should be able to intervene in proceedings brought by third parties where the body's expertise in or experience of the matter being heard it would benefit the court. This is standard practice for independent regulators monitoring compliance with the law.

There may also be other potential mechanisms for enforcement or sanction that could be considered in addition to these legal routes, including the ability to suspend or remove individual office holders within public bodies, hold public investigations or inquiries, or impose a form of "special measure" (along the lines of those imposed by Ofsted or the Care Quality Commission) on public bodies not performing in terms of their environmental duty.

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

The National Trust supports reasonable enforcement actions to ensure that any damage is rectified and paid for by the guilty party, and future damage is deterred. Financial penalties have been proven to serve as an effective way to punish guilty parties whilst deterring future harm.

Other

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

The National Trust supports the current devolution settlements – i.e. powers which are currently devolved, including most environmental matters, should be passed on to the devolved administrations where possible following the Great Repeal Bill. Even so, there is a strong case for a core set of agreed principles across the four nations. Public bodies in Wales already need to apply the principle of the 5-ways of working, including: integration, long-term, prevention, involvement and collaboration, so it could be said that we have a duty to extend this further, particularly where the environment is concerned. It is clear that nature does not recognise boundaries and therefore cooperation between the four nations needs to be embedded into environmental governance.

The National Trust suggests a UK-wide framework of common standards, in order to set an even regulatory floor across the four nations and provide a foundation for close cooperation between the four oversight bodies. In the case of climate change, particular attention needs to be paid to the oversight and collaboration between nation states. In some cases, climate change could come under both reserved and devolved matters and therefore clarity of process in these cases is necessary.

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

What is clear is that any structure be representative and collaborative. A ministerial council is one option, where equal representation across nations is embedded.

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Environmental Principles and Governance in Wales Post European Union Exit

Consultation response form

Your name:

Organisation (if applicable): Social Farms & Gardens

e-mail/telephone number:

Your address:

Responses should be returned by **9 June 2019** to

EU Exit & Strategy Unit
Department for Energy, Planning and Rural Affairs
Welsh Government
1st Floor East, Cathays Park 2
Cardiff
CF10 3NQ

or completed electronically and sent to:

e-mail: Environmental.Governance@gov.wales

Social Farms & Gardens

Social Farms & Gardens exists to support and develop community-based food & fibre production in all forms including, but not limited to, Community Gardens, Allotments, Community / City Farms, Community Woodlands, Care Farms and Community Supported Agriculture (CSA) projects. We represent around 1,000 member organisations across the UK, 390 of which are in Wales. It is a new organisation created as a result of the merger between the Federation of City Farms and Community Gardens (FCFCG), and Care Farming UK. The two joined together in April 2018 to better support and represent the farmers, gardeners and growers who run life-changing projects in our urban and rural communities.

Both former organisations and have a long track record of supporting projects in their specific areas. FCFCG was established in 1980 to support community farms and gardens across the UK. It has offices in Cardiff, Newtown, Bangor, Bristol, London, Scotland and Northern Ireland. It has helped the movement grow from a handful of projects at that time of its establishment to the robust, diverse and dynamic sector it is today. Care Farming UK promotes and supports care farms in the UK, along with thousands of grass roots projects that have helped millions of people.

In the UK there are some 5000 community gardens, 200 city and school farms, 100 CSA projects. Between them they employ 550 people, engage with thousands of volunteers and attract over three million visitors each. In Wales, the only UK country to have a specific community growing strategy, there are about 450 community gardens & school gardens, 2 city farms, 6 care farms and 9 CSA projects. Social Farms & Gardens manages both the Tyfu Fyny Project & Community Land Advisory Service (CLAS) in Wales.

Our response

Our response is submitted on behalf of our members, and we believe is representative of the wider sector. The health and wellbeing of our people and communities depend directly and indirectly on a healthy environment. As community-based farmers and growers, our work is fundamentally about using natural resources to promote and improve the health and wellbeing of people and the communities in which they live. We interpret this in the broadest sense to ‘Developing People’ through social, physical and mental health interventions ‘Developing Communities’ through community development, social enterprise development giving greater community cohesion & resilience. All whilst having the highest regard for the environment we operate in.

We consider that environmental legislation should aim to support & deliver positive action on all of the areas mentioned above as well as tackling key concerns such as biodiversity loss and climate change. Welsh Government has recently declared a ‘Climate Emergency’, but it is through policy and legislation that positive action can be encouraged.

We recognise that in introducing the Wellbeing of Future Generations Act in 2015 and the elucidation of its 7 goals, the Welsh Government has taken huge steps in this direction. Many of our responses to the questions in this consultation are about further integration of the act with the Environment Act (2016) and arguing for a stronger role for the Future Generations Commissioner, in effect giving the WBFG act more ‘teeth’ with respect to development & implementation and enforcement.

We also recognise the progress that has commenced through supportive initiatives such as the 'Enabling Natural Resources and Well-Being (ENRaW) & Sustainable Management Systems (SMS) programmes in Wales. We hope that the thinking and approach behind this programme is extended to the development and implementation of the legislative framework for the environment.

Environmental Principles

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

Yes

Rectification at source: This principle, which essentially seeks to prevent or contain problems at their source, rather than seeking remedies for their effects, sits squarely with the principles of Prevention (Environment Act and WBFG Act) and Resilience (Environment Act). Our impression is that it is considered in the context of pollution, but we encourage the Welsh government to think imaginatively about how it may also be applied sensitively to tackle the root causes of other aspects of environmental damage, such as habitat destruction, soil erosion; nutrient leaching etc.

Polluter pays: This principle has been a key part of environmental legislation across the globe through organisations such as the OECD and of course the EU. Not adopting the principle would appear to be a retrograde step, especially in the context of the Welsh Government's stated commitment to 'ensuring there is no drop in environmental standards'. Having said that, the application of the polluter pays principle to agriculture can be problematic, particularly given the diffuse nature of pollution and the question of proportionality (e.g agriculture is not responsible for *all* nitrate pollution). The polluter pays principle currently underpins legislation such as the water directive, including nitrogen vulnerable zones. We support the continuation of this approach, and the application of the principle to maintain in the first instance and ultimately drive up environmental standards. The flip side of the polluter pays principle is the 'provider gets' principle, which incentivises the active delivery of environmental benefits. We refer to our response to your 2018 response to your consultation on post Brexit Policy for a detailed argument on what should that entail and the contribution community-based farming and growing can make in this area.

Question 2: Do you think there are other principles, which may also need to be included?

Yes. As a representative of community-based food and farming organisations, our concern is that the principles of participation, sustainable development and using natural resources to improve health and wellbeing in its widest sense, are central to the legislative process. We feel these should be more explicitly included in the principles for example public *participation and benefit.*

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

Yes.

We agree that a healthy environment underpins health and wellbeing of the nation and our communities, and that our natural resources should be placed within the context of all seven wellbeing goals. While Natural Resources Wales is ideally placed to deliver on some of these goals, this is less so for some of the more community / society-based goals (health, cohesive communities, vibrant culture etc.) As an organisation representing community-based food and farming we place great importance on these goals and would like to see NRW competences extended to this area, or support given to another body to fill this gap.

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

We believe that the NRW should be the lead organisation but because, as discussed above, we believe there are key areas in which the NRW lacks the necessary focus. As a result of this lack of focus we argue for FGC to given enforcement powers.

We note that the Climate Change, Environment and Rural Affairs Committee has discounted both these organisations on the grounds that *'fundamental change to their functions that would be required and their lack of resources. It was felt that NRW, as the environmental regulator, does not have sufficient independence and the Future Generations Commissioner currently does not have sufficient environmental focus and expertise'*. While we don't question the validity of these concerns, we cannot identify one organisation that has all the competencies and resources available to step into this role. We therefore think that rather discounting these key organisations, the approach should be to seek the to address the issues/ strengthen the areas of expertise with in them

Lack of resources is certainly an issue, but we must find solutions. Joint working with other UK countries, so we do not effectively replicate the same broadly similar system 4 times could be one approach. However, we are clear that this must not constrain the Welsh Governments ability to implement its own progressive policies, for which it is rightly renowned. We are clear that 'we'd like to but can't afford it' is not an acceptable response to an area so fundamental to our future and current wellbeing.

The issue of lack independence of NRW is perhaps more difficult. We are unable to offer solutions at this point but think it unlikely that these issues have not been considered and dealt with elsewhere and feel sure we could learn from other countries/ systems.

Local Authorities (County, Town and Community Councils) all need support and encouragement to do more to enhance, protect and utilise the green spaces they have responsibility for and bringing planning policy guidance up to date with things such as the Future Generations act is one way to possibly encourage positive steps.

We also think that there should be a role for organisations such as Welsh Water/ Dwr Cymru, to provide expertise that underpins legislation, although we acknowledge there will be issues of independence that will need to be addressed.

Accountability

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

We agree with the gaps identified and do not consider that there are others

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

We agree that existing accountability bodies can and should have a role to play in a new environmental governance system for Wales. Our concern is that many (e,g, the Auditor General and the Public Sector Ombudsman) are not sufficiently specialized to effectively deal with complex environmental issues, and this is acknowledged in the consultation document.

We argue that overall responsibility for environmental governance should sit with organisations with the necessary knowledge and capacity to do the job. This would imply a strong role for NRW. However, we question whether the merger of the Environment agency with CCW and the Forestry Commission to create NRW has weakened the organisation's focus on environmental protection.

We believe a stronger role for the FGC is essential to delivering the wider community/ health/ wellbeing objectives and highlighting the importance the role of the environment and our natural resources in delivering them.

We also believe organisations outside the Welsh Government/ National Assembly should have a role in oversight; Scrutiny committees should have more public representation including private business, social enterprise and citizens. A Citizens Assembly could be a mechanism through which organisations like the Friends of the Earth, Wildlife Trust Wales and CPRW could have a more formal involvement in an oversight body.

We believe that Wales and the UK is well served by advisory bodies including Climate Change, Environment & Rural Affairs Committee; the UK Committee on Climate Change; JNCC. These should continue to have a central role. However, in line with the WBFG act, we think that the societal/ community elements of environment policy should be strengthened with in these bodies.

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

We agree that the role and objectives set are appropriate, but again argue that health and wellbeing of communities, as far as it relates to the management of natural resources, should be a specific area of responsibility.

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

We agree with the scope of what is considered 'Natural Resources'.

While the consultation document recognises 'the close relationship between the entire range of policy areas and specifically the impact climate change has on the environment and biodiversity', we also think it should recognise the close relationship between the environment and human health and wellbeing.

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

Yes. There is no body on this list we consider inappropriate

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

Yes. We believe that FGC should also have a strong role as an oversight body. We refer you to our responses to questions 4 and 6 for our reasoning.

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

We do not have the necessary knowledge/ understanding to answer this question

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

Yes. It would seem consistent with the preventative principle that an oversight body should be able to offer advice help individuals and businesses understand and comply with environmental legislation. It seems to us that if the number of breaches though misunderstandings or mistakes can be minimised, the total number of cases is reduced and resources can be focused on dealing with cases where breaches are wilful and deliberate.

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

Yes. It seems logical to us that the body responsible to for the oversight of the legislation should have a role in scrutinising it. This is common practice in other areas of legislation, both in the UK and abroad, and see no reason why this should not apply here

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

See responses to questions 11 and 13

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?

We share concerns highlighted in the document that there is currently no specific environmental focus within the current system for investigating complaints and agree this this should be addresses as a matter of priority

We agree that it should have the powers to investigate, assess the validity of complaints and make recommendations. We also agree it should be able to exercise some discretion over which complaints are pursued. However, there should be clear guidance over how that discretion is exercised. We cannot, for example, have a situation where complaints are dropped for reasons of political expediency or the avoidance of embarrassment.

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?

We agree that both informal and formal methods of enforcement should be available, and that where possible and appropriate, resolution should be sought informally in the first instance. If this approach has proved effective within the EU, we see little reason why it should not be adopted post Brexit.

We acknowledge that the Climate Change, Environment and Rural Affairs Committee does not consider a judicial approach to be appropriate. However, we are not clear on what the alternative approach would be given the Welsh Government's commitment to ensuring the highest environmental standards and the criticisms levelled at DEFRA for putting forward toothless legislation for England.

However, we agree that recourse to the courts must and should be a last resort, but think there should be a robust system to impose sanctions and penalties in the event of wilful and/or repeated breaches of environmental legislation. We believe there should be system that operates at different levels that are appropriate to the severity of the breach, for example

- Informal warning/ advice/ opportunity to rectify the situation within a time frame
- Imposition of sanctions or fines, with right to appeal for more serious case
- Recourse to the judicial systems in the case of serious or repeated offences

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

See Question 16.

Other

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

Yes. As part of the EU, all four nations have been working to same principles with respect to environmental law, and it would be surprising and indeed counterproductive, were the 4 nations to go in fundamentally different directions.

There may be opportunities to share administration costs/ staff / facilities

However, this should, and must not prevent Wales from introducing progressive legislation, for it rightly has a reputation.

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

Joint committees/ working groups.

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Your name:

Organisation (if applicable): IBERS, Aberystwyth University

e-mail/telephone number:

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Environmental Principles

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

Yes. Rectification at source and polluter pays are both sound environmental principles and worthy of inclusion. Clearly they both present difficulties given the trans-boundary nature of many environmental issues. Care is also needed in relation to the precautionary principle, which has historically been misused or taken out of context, such as when applied to a new measure/threat without comparison to existing measures/threats. Beyond polluter pays there could also be opportunities to incentivise the delivery of more ambitious targets.

Question 2: Do you think there are other principles, which may also need to be included?

A principle relating to trans-national cooperation is worth considering; collective action is generally more effective than individual. It's possible that this is sufficiently addressed within the 'scale' principle of the Environment Act. There is also an 'integration' principle at EU level which does not seem to be well reflected in the current proposals.

A principle relating to environmental improvement/non-regression of environmental principles (as exists in France) is also necessary; this is not the same as preventing environmental damage and would be entirely consistent with the WBFGA.

We need to ensure that wider bioeconomy opportunities and climate-change net zero targets, are integrated into the approach. If we get this right there are new opportunities for economic benefit, including job creation, as well as an improved environment.

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

Yes, although not without support in place (e.g. finance, advice/support).

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

The same public bodies to which the WBFGA applies.

Accountability

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

Agree with gaps identified.

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

No view.

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

Yes

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

The proposed scope of policy areas seems appropriate.

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

It is surprising to see that the National Parks Authority are not on the list.

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

As above, National Parks Authority.

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

It would seem sensible to integrate this function with the WBFG Commission office.

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

Not without an analysis of the extent to which this role is already carried out by NRW and other existing bodies.

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

Yes

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

Implementation of legislation should be scrutinised in relation to worldwide best practice. Scrutiny will also need to ensure that implementation of legislation includes measurable outcomes and mechanisms to ensure that these are reached. It will also be essential to ensure an overall integrated approach to legislation, the avoidance of unintended consequences, and the approach to be taken in relation to trade-offs.

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?

At least equal to those already existing.

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?

Similar to those currently carried out at EU Commission level.

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

Other

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

Perhaps, but clearly Wales is considerably ahead of England in relation to this, and it is possible that a combined approach will conflict with the goals of the WBFGA. Circumstances in Wales are clearly very different, and it will be important not to dilute Wales' contribution to the world and our ability to enforce higher standards.

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

No view.

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Organisation (if applicable): Cardiff University; Queen's University Belfast

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Environmental Principles

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

Do you agree the following principles should be included within legislation for Wales?

- **Rectification at Source;**
- **Polluter-pays.**

Yes, it is crucial for these two key environmental principles to be enshrined in Welsh primary legislation. These are longstanding international and EU environmental principles that currently play a role when drafting EU legislation.

The manner in which these principles (and others please see Q.2.) are going to be integrated into the legislation requires careful consideration. Having a third piece of legislation dealing with the environment (as well as the Well-being of Future Generations (Wales) Act 2015 (FGA) and the Environment (Wales) Act 2016 feels too much and could negate certainty and consistency and create loopholes. The Environment (Wales) Act 2016 ought to be amended accordingly to avoid approaching environmental protection from the perspectives of different acts and their different ways of framing environmental objectives as well as the environmental principles. Amending the 2016 Act would enable an enhanced level of protection and a more coherent approach towards environmental protection and the delivery of sustainable management of natural resources.

Lessons should be learnt from the responses to DEFRA's proposals on this subject (e.g. EAC, 2019; Brennan, Dobbs & Gravey, 2019; and Dobbs & Petetin, 2019), and the principles should be integrated in such a manner as to impose clear obligations to act in accordance with the range of environmental objectives and principles wherever relevant. Thus, the duty cannot simply be one to 'have regard to', which is a notably weak formulation enabling the objectives and principles to be effectively bypassed (EAC, 2018; Select Committee on the Natural Environment and Rural Communities Act, 2006). Potential approaches could reflect those taken in the FGA whereby actions must be '*in accordance with* the sustainable development principle' (emphasis added) or the similarly mandatory approach in the 2016 Act. However, they must also be broader in scope than the existing Welsh legislation or regulatory gaps risk appearing. The obligations should be imposed upon all Welsh public authorities and bodies undertaking actions on behalf of Wales (including WG, regulatory bodies and the courts) thereby ensuring that the objectives and principles underpin all Welsh policy and law at all stages –reflecting the current approach to EU environmental law.

Question 2: Do you think there are other principles, which may also need to be included?

The opportunity should be taken to incorporate a wide range of environmental principles and objectives within one single piece of primary environmental legislation – within Wales and ideally, as discussed below, across the UK as a whole.

A key principle missing from the relevant Acts and what is proposed is the **precautionary principle**. Despite the claim that it is de facto included in the definition of 'sustainable management of natural resources', this gives a weak status to a key international and EU principle. This should not be interpreted as Wales not being precautionary in its approach. But enshrining the precautionary principle as a principle driving forward Welsh policies is paramount and ensures a precautionary approach irrespective of who the decision-makers are in future.

Another notable principle that is not mentioned is any **commitment to maintain a high level of environmental protection in the development of future policies**. Article 191 of the Treaty on the Functioning of the European Union, in setting out the principles that underpin EU environmental policy, provides that 'Union policy on the environment shall aim for a high level of protection taking into account the diversity of situations in the various regions of the Union.'In the EU context, this overarching goal sets the framework within which the other environmental principles are interpreted. This is very **different from the non-regression principle**. The latter is about not decreasing the current level of protection/standards whilst the former is about fostering a spiral to the top and placing an obligation on the legislator to increase environmental protection and relevant standards. Para 1.5. indicates that EU exit 'provides an opportunity to develop a structure, which supports not only a commitment to non-regression, but more fundamentally a commitment to enhancing the environment to meet the challenges we face', but the consultation document does not clarify whether such a commitment will be actually enshrined in Welsh legislation. Such a commitment should be made stronger by maintaining this principle in Welsh environmental law and policy. This would send a clear message to Ministers and Governments nationally and internationally and would establish that Wales is a world leader in environmental protection. To take it a step further, it would be highly desirable if Wales would also incorporate a principle of environmental improvement. Thus these three principles (high level of environmental protection, non-regression and environmental improvement) should be incorporated into the legislation and could thereby act as over-arching objectives, which would strengthen the approach further.

Incorporation of the Aarhus principles granting rights on individuals (and eNGOs) would be a worthwhile endeavour, especially considering the significance yet weaknesses of the existing judicial review system (discussed in more detailed in

our response to question 17).

The integration principle is essential to a holistic and effective system of environmental governance, rather than increasing the potential for a silo-ed approach. This is present within the TFEU and ensures that all EU policy must integrate considerations of a high level of protection of the environment. Again, including this expressly as a binding principle would be a useful failsafe for continued environmental protection in the future.

Other principles become of greater significance in a post-Brexit world – including ones addressing borders, cooperation (including within the UK) and who should be regulating an area. The **obligation to avoid transboundary environmental damage**, which is commonly recognised as a principle of international environmental law (Bratspies and Miller, 2006; Jack and Petetin, 2018.) should also be recognised as an environmental principle. Similarly, principles on cross-border cooperation, collaboration and participation should be encompassed, as for instance seen in the Espoo Convention. These principles will be relevant to the *internal* borders within the UK – indeed, they could be a useful driver for cross-UK collaboration on environmental governance (see our responses to questions 17 and 18) – as well as with the EU and beyond.

The principle of subsidiarity remains relevant as a principle of good governance after EU exit. Subsidiarity is concerned with the allocation of competences between the EU Member States and the EU institutions. According to the principle, decisions should, as far as possible, be made by the lowest level of government. However, it also indicates that where circumstances indicate that coordinated decision-making or action would lead to greater efficiencies, e.g. due to the potential for transboundary effects, then some degree of centralisation might be appropriate. (Dobbs, 2016; Petetin, 2019). The principle would assist in addressing both internal Welsh decision-making and also approaches to decision-making across the UK, through guiding when more localised or more centralised approaches are appropriate (Engel and Petetin, 2018). To play the role on a UK level it would need to be embodied within a UK common framework, but it could at least assist within Wales for the time being.

The proposed body should have oversight over all environmental obligations, both national and international. If environmental principles are to have practical meaning, the new body should be able to call the government to account for failing to meet all environmental obligations – including through failure to comply with the environmental principles. It should be borne in mind that principles by their nature guide rather than typically mandating specific outcomes, thereby still leaving considerable discretion to the government as to how they implement such

principles.

The principles should be integrated and underpin the formulation of **all (sectoral) law and policy at all stages** wherever relevant (not simply environmental law and policy) – as under EU law. They must be binding upon all Welsh public bodies and bodies playing such a role. This also means that they should be binding on the courts in order to ensure the continuation of the existing purposive approach.

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

We answer questions 3 and 4 together, as below.

The duty to pursue sustainable management of natural resources and the application of the SMNR principles should be extended to include all existing and future Welsh public bodies, including the National Assembly for Wales and WG. Crucially, a duty to abide by the existing and proposed principles (see Q.1. and Q.2.) wherever relevant should be placed on these entities.

As with the principles proposed for incorporation, the SMNR principles should also be integrated and underpin the formulation of <u>all (sectoral) law and policy at all stages</u> wherever relevant (not simply environmental law and policy) – as under EU law. This is important, if it is the WG's contention that the principles of SMNR in fact are vehicles for key EU environmental principles. In practical terms it would be worth considering transposing the SMNR principles alongside these other principles and objectives, in order to have them all within one piece of environmental legislation and to ensure coherency and improve clarity.

Providing for principles to apply only in the most obvious or core situations would lead to gaps and incoherencies arising – in contrast, by incorporating and requiring that they be applied wherever relevant will provide flexibility to the system and help ensure that all parties act to further environmental protection.

In an earlier NAW consultation on this subject, concerns were raised about potential conflicts between these existing principles and the proposed principles if incorporated (Jenkins, 2018) – there are indeed some challenges. However, firstly, it needs to be borne in mind that legal principles, whilst binding, are malleable and do not demand specific outcomes unlike rules. Secondly, it would need to be clear which were the overarching objectives (e.g. non-regression, a high level of environmental protection, and environmental improvement) that all the principles were to be interpreted in light of, thereby facilitating coherence. Placing environmental protection principles subordinate to duties to carry out sustainable development, say, raises familiar concerns that environmental obligations become

weakened within an approach more concerned with balance (Jenkins, 2018b). Although not explicitly articulated, it is the case at present that Wales's approach to environmental protection and sustainable development works within a framework of EU environmental law.

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

See answer to question 3, above.

Accountability

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

We agree with most of the governance gaps identified but the list of gaps in 3.2.2. does not sufficiently address the loss of the monitoring and reporting machinery for environmental law currently required by the EU.

The consultation document gives no clarity on how far current reporting arrangements in Wales for environment/sustainability embrace EU environmental laws (some may well be EU-compatible, others are Welsh specific). Some (but not all) of the current reporting requirements concern progress against firm standards and targets, that is a quality of EU reporting and accountability requirements.

Moreover, the critical thing is that monitoring and reporting should not be conducted ritualistically, but in the service of meeting legal obligations and fostering future learning and improvement i.e. there is a need to create mechanisms whereby the information is used.

To this end, we contend that the new arrangements should also include requirements for systematic government reporting on the application of environmental laws. As the consultation document notes, existing reporting obligations under national and international obligations are weaker than in EU law. They are not the same as the requirements imposed by EU law for the delivery to the European Commission of systematic reports on the implementation and application of EU environmental laws.

Two levels of reporting need to be highlighted here. Firstly, it would be essential for the Welsh government and existing bodies to provide regular reports in each environmental policy sector to the new body – including where they would currently report to the EU Commission. These reports would encompass information on the state of the environment, mechanisms being undertaken to

implement environmental obligations and any other relevant information. These reports would provide a key information source from which the proposed body could report on the delivery of the government's overarching environmental policy goals. Secondly, the new body must then itself report to the Welsh Assembly on its own compliance and on government progress towards achieving its environmental policy goals. All reports should be made publically available.

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

While existing accountability bodies cover some elements of the roles required of a new environmental governance structure for Wales, it is clear that they only do so to a limited extent as the consultation document notes. Moreover, conceiving of their potential role in any new structure is difficult, for a number of reasons. One is the knowledge available on which to make a judgement viz. There is reasonable research evidence about the efficacy of EU-style environmental governance mechanisms (and their problems). However, the innovative Welsh legislation on the environment and its associated governance mechanisms are still new and there is little research as to how well it works (Jenkins, 2018b). This makes it difficult to judge how far and in what way existing mechanisms need supplementing, or might prove capable of adaptation to embrace roles formerly performed by EU institutions.

The question is also made difficult by the fact that 'potential role' elides three questions. The first is scope i.e. the subjects that fall within the purview of existing and new bodies. It is important to avoid the risk that multiple bodies will be in charge of different aspects of the environment without having an overall approach towards environmental protection. Adopting a segregated approach towards the environment is not beneficial, as gaps or conflicts might arise.

The second question concerns the *power* that any governance mechanisms should have i.e. how is goal-setting to be done and how is implementation and compliance to be driven? It is clear that existing bodies lack the full sets of powers that have been exercised by EU institutions. There is a link between scope and power. For instance, in terms of environment and sustainable development in particular, many of the principles within Welsh legislation are procedural in nature rather than substantive (see table in consultation document, p.17), making them more slippery objects on which to hold people to account and drive implementation, and where goals exist they lack the precision associated with EU legislation, which facilitate effective monitoring, oversight and enforcement. Equally, the governance approaches of Welsh legislation (in terms of power) often adopt a very different approach compared to EU environmental governance i.e. the processes are designed to be more consensual and about encouragement, and the objectives are often expressed in less 'hard-edged' ways against which implementation can be assessed, being more concerned about balancing economic, social and environmental concerns. It would be

glib therefore to suggest that EU-style governance mechanisms for driving implementation could be simply stretched to embrace Welsh legislation or that the regulatory roles of existing bodies could be straightforwardly extended.

Given this, there are some risks in the way that the Document also appears to assume that the FGA and Environment Act are the examples to follow. However, these acts were formulated and drafted when Wales was part of the EU, where for instance they could rely on robust EU enforcement mechanisms. Further, these acts contain issues that could be replicated in the drafting of future acts. Here there is an opportunity to completely overhaul the approach towards environmental protection and well-being rather than potentially 'copy and paste' what already exists for certain bodies and making it work for a future environmental protection body and good environmental governance in Wales.

Thinking about the relative role of existing bodies compared to a new body leads to the third question – the relationship between any new body and what exists. In a post-Brexit period, Wales will lose the role of the European Commission and the surrounding governance mechanisms, including reporting, monitoring and enforcement actions, thereby weakening environmental governance. This may also be a critical issue for any future relationship with the EU as highlighted in the Withdrawal Agreement which requires the UK have independent enforcement bodies – irrespective of any deal, some regulatory alignment will be required if there is to be market access and thereby adequate enforcement mechanisms will be needed. This suggests that any new body has an overarching role vis-à-vis existing bodies, and oversees their actions too insofar as they pertain to its area of interest (i.e. the role of existing bodies is largely unchanged).

However, the Future Generations Commissioner brings specific expertise to their functions on the well-being of future generations. If it remains separate from the proposed environment body there must be an expectation that the two bodies will closely collaborate to avoid potential conflicts. Such functions would promote holistic approaches, collaboration and joined up thinking when formulating future environmental policies to achieve sustainable development (Petetin and Dobbs, 2018).

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

The outlined roles and objectives are broadly appropriate but the tone of the question seems to imply that all environment, sustainability and natural resources legislation can now be overseen by a singular body. There is considerable merit in doing this, in terms of the prospects of achieving overall cohesion in the way that environmental governance is achieved. However, concerns arise about how this might operate in practice.

For instance, it must be noted that in addressing the entire body of both Welsh-derived and EU-derived environmental law, firstly this is highly resource intensive

for one body and it must be adequately funded. Secondly the regulatory context affects how the law operates in practice (Welsh-derived law may operate differently if EU-inspired mechanisms are applied; and EU-derived law may operate differently where the EU-inspired mechanisms are applied, but without the Commission or CJEU) and the approach may need to be reviewed to see if either the law or governance mechanisms need to be revised in future.

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

The WG is to be commended for pushing for an 'all-encompassing scope' for the new governance arrangements with respect to the environment, and for embracing climate change (*contra* England). The concept of 'natural resources' likely to underpin the ambit of any new body is broad but also explicitly flexible (consultation document para 3.29). One can observe environmental issues that are not specifically listed, though might be encompassed e.g. noise, light pollution, landscape. However, it is also important that the new governance arrangements can engage with the strong environmental dimensions of agricultural and food policy, human and environmental health and with planning (Petetin, Dobbs & Gravey, 2019). With the latter, there is scope to align planning more firmly to the delivery of environmental goals, a step with evident support among many planning practitioners (RTPI, 2019), as is already underway with alignment to the FGA.

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

We answer questions 9 and 10 together:

The consultation document appears to focus on public authorities exercising functions concerning the environment. The list of public bodies is significantly shorter (four public bodies) than the 44 public bodies identified that have obligations to carry out sustainable development under the FGA.

In practice, the integration principle entails that the proposed body oversees the actions of all **competent authorities** whose decision-making functions and actions could impact on the environment. It should be able to act across sectors and authorities in its oversight role. The proposed body should, however, only exercise oversight when a body is **acting as a competent authority**. In this way, it would embrace all Welsh Ministers giving it cross-government reach.

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

See answer to question 9.

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

We support the WG's proposal that any oversight body should be independent of government inter alia by being accountable to the NAW, having independent appointment structures and having independent sources of funding. Constituting the body in this way would also better meet the requirements of the Withdrawal Agreement and Irish backstop requirements for an independent enforcement bod(y/ies)(Part 2 of Annex 4 of the Protocol on Ireland/Northern Ireland to the Withdrawal Agreement – Nov. 2018).

One significant consideration (as we discuss also under Question 6) is whether the new body should be linked intrinsically to existing bodies, or indeed whether an existing body should take on these new roles. Whilst the Future Generations Commissioner (FGC) could take on such a role, there is the risk that environmental protection would be relatively diminished due to the multifaceted focus points of the FGC and it might even be necessary to take enforcement actions against the FGC. Consequently, a main alternative would be to create a new Commission of persons having relevant expertise.

The body must have teeth. The proposed environmental body should have jurisdiction over government and all competent authorities exercising functions in relation to the environment and be able to address those that fail to adequately consider environmental protection when exercising these functions. It must have for instance the ability to initiate or join legal actions against Welsh public bodies, to issue enforcement notices or impose administrative sanctions as appropriate, and to seek fines from the courts. Other elements are noted in our responses below.

In addition to the above, a matter of great concern is the gap in institutional support, capacity and evidence gathering created by leaving the EU. Sharing information, knowledge and expertise was a key aspect of the EU, especially with bodies such as the European Environmental Agency (EEA) or the European Food Safety Authority (EFSA). The lack of participation in such entities could be felt when formulating new policies and legislation. We recommend that Wales/the UK remain a member of the EEA to help remedy to this issue, ensure evidence gathering and access to a larger pool of scientific expertise in environmental matters. It would also save on the costs of having to generate 'national' data that would simply replicate what is already available.

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

We believe that it is fundamentally important that the proposed body should exercise this role to ensure best practice passed on after identifying issues/concerns from complaints.The new body must act as an independent advisor to highlight issues of its own choosing as part of its scrutiny and compliance functions, as well as responding to advice requests and **proposals for legislative change**.

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

We answer questions 13 and 14 together:

1. It is vital that the new body should exercise scrutiny functions in order to identify weaknesses and potential improvements within the present legislative framework, covering actions and potential actions across all public bodies, where they pertain to environmental protection. Both formal and informal mechanisms should be created to investigate concerns about government and other public bodies' implementation of environmental law, and hold them to account.

2. As recognised in the consultation document, the kind of oversight and scrutiny provided by European institutions is not fully matched by those arrangements currently operating at Wales-level, in terms of *inter alia* the focus in relation to implementing environmental legislation (contra PSO), full independence from government (contra NAW) and ability to link the results of scrutiny to potential actions and enforcement remedies. We support the proposal that the body should be able to undertake thematic reviews of implementation. This may be in response to, say, successive complaints in a particular policy area.

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

See answer to question 13.

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?

Withdrawal from the EU will leave an important gap in environmental governance, by removing the ability of individuals and NGOs to make complaints to the European Commission.

Guaranteeing citizens' rights: Mechanisms for individuals or organisations to make an official complaint and free of charge about alleged failings in relation to

environmental law and governance must be maintained. The fact that individuals can write to their AM, the Assembly or the Public Services Ombudsman is not an adequate substitute. None combine the expertise in environmental law, the independence and the powers of the European Commission.

It is therefore very important that the proposed new environmental body should have the specific function of receiving and investigating public complaints concerning the implementation and application of environmental law by competent authorities, **free of charge**.

Similarly to the Commission, the new body should have discretion to decide whether to accept individual complaints. Where complaints are accepted the new body must have effective powers to investigate them, to require competent authorities to co-operate with those investigations and to compel timely compliance where failings are identified.

It is very positive that the WG recognises that another facet of EU environmental governance is the scope to complain about breaches on substantive grounds, not merely procedural grounds.

It should deal effectively with complaints linked to complying fully with the Aarhus convention (which we address under Question 17).

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?

Formal and informal mechanisms by which an independent, official body can investigate concerns about government's implementation of environmental law are crucial. None of the existing mechanisms adequately replicate the powers and functions exercised by the European Commission in investigating government compliance in relation to environmental law. It is vital for the new body to be able to investigate what the Welsh Government and other public bodies will undertake (please see Q.17).

Wales is probably well-served by informal mechanisms of enforcement, it is the formal aspects that are likely to be lost with Brexit. Moreover, the backstop element of the Withdrawal Agreement seeks sanctions that are 'effective, proportionate, dissuasive and have a real and deterrent effect'.

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

Powers to refer a government and other public bodies to court for alleged failings in implementing environmental law is a vital formal enforcement mechanism. Again, it is clear that withdrawal from the EU will create a lacuna in this area. Currently,

in the UK no public authority has power to bring proceedings against government in relation to environmental issues. Moreover, there is a need to enable enforcement in the context of non-achievement of targets and standards rather than just procedural compliance (HoC EAC Report, 2019).

Similarly, 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. Fines collected could be utilised for environmental benefits, i.e. fund projects that would enhance environmental protection.

We commend WG for picking up the merits of short-term 'stop notice' type actions as well as mechanisms for restorative justice.

Fines collected should be utilised for environmental benefits, i.e. fund projects that would enhance environmental protection.

It is acknowledged that Parliament has a role in providing scrutiny of government compliance. However, this is not sufficient and should supplement a power for the proposed environment body itself to refer cases back to national courts where government bodies prove reticent in complying with judgments against them.

Third party judicial review proceedings as a potential alternative mechanism is not an adequate substitute for the European Commission's current powers for three key reasons (UKELA, 2018). First, judicial review is concerned with the process through which particular decisions were taken, rather than the **merits** of the decision - whereas substantive compliance is at the heart of the distinctive (and relatively effective) mode of EU environmental governance. It is often inadequately suited to act as an arbiter in environmental matters. Secondly, despite the involvement of the Aarhus Compliance Committee, the high costs of bringing a judicial review and the strict time limits (usually four months) within which a case must be launched act as a **disincentive to litigation**. Thirdly, litigants in judicial review are often drawn to particular causes within environmental law, such as nature conservation. Relying on judicial review would leave a vacuum where less 'attractive', but not in any way less important, aspects of environmental law might be ignored (Jack and Petetin, 2018).

That aside, the proposed environment body should have the power to intervene in judicial review applications concerning the implementation and application of environmental law by competent authorities.

There is a risk that if the Commission's role is lost and not replaced by an effective domestic body, then the eNGOs would find themselves playing the supervisory role by default – impacting negatively on the eNGOs' other roles and environmental governance.

The proposed new body should be given the function and powers to supervise government's delivery of environmental law and be empowered to secure compliance where necessary. This should focus on the implementation and

application of environmental law by competent authorities and not on the enforcement of environmental law against individual third parties.

Other

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

Yes. Environmental impacts easily traverse jurisdictional borders, without shared standards there may be a race to the bottom in parts of the UK and regulatory divergences that make cooperation more difficult. A shared core set of common environmental principles and objectives (as outlined in questions 1 and 2 and discussed elsewhere) would help to minimise these risks and ensure a holistic, coherent approach; minimise risks of races to the bottom; facilitate cooperation; and overall promote environmental protection. Depending on how they are created they could even be used to keep the actual devolved administrations and the UK government in check, beyond simply judicial review. We should also simply wish to see a high standard of environmental protection striven for and achieved across all of the UK (and beyond).

It does seem sensible that each UK government works to at least a set of shared environmental principles. This would provide an important basis for cross-UK dialogue around, for example, Common Frameworks, international commitments and other shared environmental governance concerns. It would also be helpful in the hope that the post-Brexit environmental governance arrangements become more integrated in the future.

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

There is much value in the new post-Brexit environmental governance arrangements for the UK operating on a cross-UK basis, and it is very positive that WG's consultation proposals recognise this. It has been recommended by the NAWCCERA in its previous reports, and we have argued for it previously as have other organisations (Dobbs & Petetin, 2019; Broadway Initiative, 2018).

Currently the EU provides shared frameworks and networks – whether on standards, procedures, processes, reporting mechanisms, expertise, coordinated action, objectives, principles or otherwise. Not only is there 'regulatory alignment' to varying degrees, but there are specific mechanisms and resources tailored towards cross-border cooperation. This facilitates collaboration and collective decision-making within Wales, within the UK and between the UK and surrounding EU Member States. Whilst variations and in particular different levels of protection are possible currently, every change and element of regulatory

divergence will makes such cross-border cooperation more difficult. The reduction in resources targeted at the environment due to lack of access to shared EU knowledge or funding and a limited block grant, will impact further. Consequently, a significant vacuum will arise.

Creating machinery for environmental governance that operates across the UK would have benefits for:

a. Dealing with cross-UK environmental issues in a coherent way, whether that be environmental issues that straddle borders between the UK's constituent nations; issues that have an international dimension, such as complying with international conventions; or issues linked to trade.
b. The power and efficacy of the governance arrangements themselves, because cross-UK mechanisms would be independent from any one government or legislature, and provide a framework in which constituent nations could hold eachother to account for delivery.
c. It would also be fit for the new challenges of Brexit, such as offering scrutiny and oversight for Common Frameworks and dealing with risks such as UK nations – outwith the legislative frameworks of the EU - backsliding on environmental protections to attract jobs.
d. One can envisage wider staffing and streamlining benefits, as well as enhanced scope for cross-UK learning. UK-level ring-fencing of funding would also reduce competition for resources with other priorities.

Creating effective cross-UK environmental is also required by the EU Withdrawal Agreement and the Irish backstop provisions.

However, practical problems of institutional design arise for any governance structures arise and fall into two categories.

1) Time

The need to avoid environmental governance gaps created by Brexit in the short term has driven DEFRA to act; the devolved governments, for various reasons, have moved more slowly. As a result, the timeframes at which London, Edinburgh and Cardiff are moving are mismatched, and this – and the ticking of the Brexit clock – makes effective collaboration difficult. The time dimension is especially important given that thinking carefully about shared UK arrangements for environmental governance requires more time and bandwidth than is likely to be available.

A key question for cross-UK collaboration is how to manage short-term uncertainties in such a way that better, more integrated, cross-UK approaches are not 'locked out' in future. Professor Colin Reid at Dundee University makes useful suggestions (Reid, 2019; supported by HoC EFRA, 2019):

a) Any new arrangement should not needlessly impede collaboration, e.g. they should enable the sharing of data between bodies exercising similar functions in other parts of the UK.

b) The different administrations should agree to review the position in a few years' time

to see if there is scope for improvement, such as streamlining or closer integration. It is a widely shared view that the intra-UK governance architecture will need reinforcement, post-Brexit, to address various new demands placed upon it (Welsh Government; Burns et al, 2018); the scope for more collaborative environmental governance arrangements, with cross-UK reach, may co-evolve with these wider developments.

2) Substance

The second problem is envisaging the substantive form of any shared arrangements. Ideally, besides frameworks for specific regimes, e.g. waste, air, water, nature conservation etc, there is a need for frameworks that are specifically tailored to governance. For instance frameworks could be created addressing the frameworks themselves (creation, implementation, enforcement), incorporating UK-wide objectives and principles, focusing on the role of individuals in cross-border environmental decision-making, providing for pooling resources, developing an effective enforcement body (that is not simply the proposed English Office for Environmental Protection), addressing environmental tribunals/courts, etc. However, not only does the time frame come into play, but the different national circumstances and institutional design principles that need to be balanced.Indeed, it is hard to separate this from wider challenges with the cross-UK governance architecture and the issue of Common Frameworks.

One might envisage the task in terms of creating some portmanteau cross-UK arrangements in which the various environmental bodies serving the UK nations would sit, and then within that portmanteau there being layers of collaboration which could be built up over time. Perhaps the first 'layer' for cross-UK collaborative governance could focus on monitoring and reporting protocols and external compliance, and be performed by an institution similar to the JNCC. A second layer might apply the format of the Climate Change Commission – its monitoring, scrutiny and reporting function - for other dimensions of environment on a cross-UK basis. However, closer collaboration between the parts of the UK in future would require arrangements with more clout; herein is another reason why cross-UK governance architecture needs to be beefed up to properly cope with Brexit.

Crucially, if cross-UK arrangements are to emerge, then they would need to be designed collaboratively in a way that enables them to embrace shared concerns about environmental principles, standards and processes of enforcement, without unduly constraining the ability of the devolved governments to pursue approaches to environmental protection appropriate to local circumstances (Brennan, Dobbs & Gravey, 2019; Dobbs, 2016). The identification of shared frameworks should be based on ideas of **subsidiarity** and **proportionality** – leading to a more centralised/common approach where required for the sake of effective environmental protection, but facilitating localised approaches and elements where possible. The starting point should be the continuation of shared legislative frameworks where these exist under EU law, unless good reason exists to do otherwise. The creation of such frameworks should be undertaken on a basis that respects devolution, with frameworks created by all four administrations working in conjunction with each other and not simply having 'English' frameworks

imposed on the three other administrations. This is important for democratic, constitutional and environmental reasons – the latter because the circumstances of each jurisdiction may impact upon how the frameworks should evolve.

References

Bratspies, R., and Miller, R.,(2006) (eds), *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration,* (CUP);

Brennan, C., Dobbs, M., & Gravey, V., (2019) 'Out of the Frying Pan, Intro the Fire? Environmental Governance Vulnerabilities in Post-Brexit Northern Ireland', 21:2 *Environmental Law Review* 84-110. Author accepted version available at: https://eprint.ncl.ac.uk/file_store/production/256535/D066ED55-7546-446C-875D-7A4590826805.pdf.

Broadway Initiative, (2018), https://www.iema.net/assets/newbuild/Broadway/Governing%20the%20environment%20-%20is%20there%20a%20case%20for%20UK%20nations%20sharing%20architecture.pdf.

Burns, C., Carter, N., Cowell, R., Eckersley, P., Farstad, F., Gravey, V., Jordan, A., Moore, B., and Reid, C., (2018) *Environmental policy in a devolved United Kingdom: Challenges and opportunities after Brexit*, https://www.brexitenvironment.co.uk/wp-content/uploads/2018/10/BrexitEnvUKReport.pdf.

Dobbs, M., (2016) 'Attaining Subsidiarity Based Multilevel Governance of Genetically Modifies Cultivation?' 28:2*Journal of Environmental Law* 245-273. Author accepted version available at: https://pure.qub.ac.uk/portal/files/17421201/Dobbs_Attaining_SBMLG_of_GM_Cultivation_accepted_version.pdf.

Dobbs, M. and Petetin, L., (2019) Written Evidence to the EFRA Scrutiny of the draft Environment (Governance and Principles) Bill, (January 2019) http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/environment-food-and-rural-affairs-committee/prelegislative-scrutiny-of-the-draft-environment-principles-and-governance-bill/written/95916.html.

Environmental Audit Committee,(2018) *The Government's 25 Year Plan for the Environment,* HC 803, 24 July 2018, https://publications.parliament.uk/pa/cm201719/cmselect/cmenvaud/803/803.pdf;

Environmental Audit Committee, (2019) *Report on the Scrutiny of the Draft Environment (Principles and Governance) Bill*, 25 April 2019, https://www.parliament.uk/business/committees/committees-a-z/commons-select/environmental-audit-committee/news-parliament-2017/draft-environment-bill-report-publication-17-19/;

Engel, A. and Petetin, L., (2018) 'International Obligations and Devolved Powers – Ploughing through Competences and GM Crops', (2018) 20 (1) *Environmental Law Review*, 16 http://journals.sagepub.com/doi/abs/10.1177/1461452918759639.

Jenkins, V., (2018), Evidence to the CCERA on *European Union Environmental Governance and Principles,* 10th May 2018, http://senedd.assembly.wales/documents/s74961/Evidence%20paper%20from%20Dr%20Victoria%20Jenkins.pdf

Jenkins, V., (2018b), 'Sustainable Management of Natural Resources: lessons from Wales', (2018) 30:3 *Journal of Environmental Law*, 399-423, https://academic.oup.com/jel/article-abstract/30/3/399/5032465.

House of Commons Environmental Audit Committee, (2019), Report on the Scrutiny of the Draft Environment (Principles and Governance) Bill (2017-19 HC), https://publications.parliament.uk/pa/cm201719/cmselect/cmenvaud/1951/1951.pdf.

House of Commons Environment, (2019) Food and Rural Affairs Select Committee, Report on *Pre-legislative scrutiny of the Draft Environment (Principles and Governance) Bill* (2017-19 HC 1893, para.139).

Jack, B. and Petetin, L., (2018) *Environmental principles and governance after EU exit,*available at: http://orca.cf.ac.uk/114856/.

Petetin, L., (2019) 'Managing Novel Food Technologies and Member States' Interests: Shifting more Powers towards the Member States?' in M. Varju (eds), *Between Compliance and Particularism: Member State Interests and European Union Law* (Springer, 2019) 233-253.

Petetin, L. and Dobbs, M, (2018) Collaborating for Agricultural Sustainability' for the Environmental Justice Research Unit (EJRU) of Cardiff University, 13 June 2018https://blogs.cardiff.ac.uk/environmental-justice-research-unit/2018/06/13/collaborating-agricultural-sustainability/

Petetin, L., Dobbs, M., and Gravey, V., (2018) Written Evidence to WG 'Brexit and Our Land' Consultation, October 2018, available https://pure.qub.ac.uk/portal/en/publications/written-evidence-submitted-to-the-welsh-government-on-brexit-and-our-land-consultation(cffc26d7-37bf-4023-be22-59de5e7a7635).html.

Reid, C., (2019) submission to the Scottish Government Consultation (19th May 2019).

RTPI, (2019) 'Environmental Planning After Brexit', January 2019, https://www.rtpi.org.uk/media/3186871/environmental_planning_after_brexit.pdf.

Select Committee on the Natural Environment and Rural Communities Act 2006, (2018) *The countryside at a crossroads: Is the Natural Environment and Rural Communities Act 2006 still fit for purpose?,* HL 99, 22 March 2018, https://publications.parliament.uk/pa/ld201719/ldselect/ldnerc/99/99.pdf.

Welsh Government, (2017)Brexit and Devolution – Securing Wales' Future, https://gov.wales/sites/default/files/publications/2018-10/white-paper-securing-wales-future.pdf.

Environmental Principles and Governance in Wales Post European Union Exit

Consultation response form

Your name:

Organisation: Friends of Pembrokeshire Coast National Park and Alliance for Welsh Designated Landscapes

e-mail/telephone number:

Your address:

Responses should be returned by **9 June 2019** to

EU Exit & Strategy Unit
Department for Energy, Planning and Rural Affairs
Welsh Government
1st Floor East, Cathays Park 2
Cardiff
CF10 3NQ

or completed electronically and sent to:

e-mail: Environmental.Governance@gov.wales

Environmental Principles

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

The consultation paper sets out the four EU principles; prevention, precautionary, polluter pays and rectification at source. Although SMNR principles reference the precautionary principle, no guidance is given on the regard given to the evaluation of risk and the balance to be given to conservation in cases of conflict or reasonable doubt.

Future legislation needs to clarify the guidance given in section 62 of the Environment Act 1995 and include existing reference to the operation of the precautionary principle, affording environment protection in cases of conflict and doubt.

Rectification at source and *Polluter pays* are both important but should not, as the first of these questions implies, be treated independently outside a wider suite of principles., Moreover, there may be instances where better outcomes may be achieved by mitigation or compensation. This can be in cases of overriding public interest or where economically, socially and environmentally alternative mitigation or compensation could produce better results. This would need to be carried out on a case by case basis but could represent a valuable means of funding public goods and reducing environmental outputs to net zero for key pollutants and key industries.

Question 2: Do you think there are other principles, which may also need to be included?

The Environment (Wales) Act 2016 introduced a set of key principles to apply sustainable development to the management of Wales' natural resources. These are known within the Act as Sustainable Management of Natural Resources principles (SMNR) but do not enshrine the Sandford Principle (1) or the Precautionary Principle (2) within them.

We would wish to see these principles carried forward as rules, through regulations and with reference to the Silkin Test, extended across a range of public bodies and strengthened by new arrangements in Wales and their application clarified and not lost in broader contexts.

(1) Where irreconcilable conflicts exist between conservation and public enjoyment, then conservation interests should take priority.
(2) Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

A further principle should be one of no environmental deterioration. This could take two forms. In terms of permissions, consents and permits strict emission limits as currently allowed need to be supported in areas of failing environmental quality where environmental loadings overall are an issue.

The competent authority should carry out systematic monitoring of recognised vulnerable habitats or assets, and where deterioration has occurred it should launch an investigation backed by a recovery plan.

Although the Aarhus Convention functions independently, it is necessary to ensure that when outside the EU that this pan-European duty is maintained.

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 should be made consistent with existing legislation and case law as outlined above and the same standard, including the Sandford and precautionary principles, and extended to all Local Planning Authorities and permitting bodies operating within Wales.

Section 6 of the Environment (Wales) Act 2016 provides a model for such a cross public body duty.

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

The benefits of following the principles of sustainable management of natural resources should be felt as a cultural change throughout Welsh life and culture. As such, the reach of these ways of working should be extended as far as possible to all Welsh Public Bodies, Planning Authorities and where legally possible through to statutory undertakers and supply chains.

Accountability

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

Governance arrangements need to include oversight to ensure that environmental obligations are met. Our current institutions serve us well in terms of probity, lawfulness of decisions and performance overall but tend to lack mechanisms for monitoring compliance, change and vulnerability. The current organisations have no oversight of whether obligations have been met, or legislation effectively introduced. We need powers of sanction over efficacy of delivery, achievement of obligations and outcomes of purposes.

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

A prerequisite for effective governance is clarity over competent authorities and their obligations for environmental delivery. A new independent body needs not only to be able to address the development of policy and legislation but to ensure that those bodies accountable meet their obligations, making clear that delivery includes achievement of outcomes and obligations.

There is a danger of policy development and delivery that does not achieve outcomes. Many habitats and landscapes of our most protected areas are in non-compliant condition. A new body should have powers of investigation, publication, recommendation and sanction.

It would obviously need to be part of a pan-UK system. There also needs to be a mechanism to consider how, why and if, its criteria would differ from the rest of the EU. The existence of some form of oversight body within Wales would set parameters and mechanisms which existing partners would find more immediate and operable. Essentially it should work as a two-way process receiving reports from them and issuing appraisals to them. They could then be sent reviews and warnings to allow them to take remedial action before breaches became serious or irrevocable or formal actions became necessary.

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

The broad range of action of the body is welcomed. This would be particularly useful in complex areas of specially designated landscapes and protected areas.

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

For the cultural change sought by Welsh Government to be effective the change should be seen through all levels of delivery and policy.

The policy areas should not be limited but should extend to the management of natural resources in Wales, including those not devolved to Welsh Government. Sanctions would not be available in all cases to the body but the powers of independent scrutiny and review would be valuable to the people of Wales and Welsh Government.

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

The remit of a new independent body should not be limited to oversight of specific bodies but to the broadest outcomes of SMNR envisaged by Welsh Government. This would avoid any unintended gaps in delivery being beyond the remit of the new body.

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

As outlined above, the efficacy of delivery or sustainability of management of natural resources needs to be assessed and gaps identified. Besides the Future Generations Commission these could include statutory undertakers or non-Welsh bodies whose co-operation could be sought as necessary to address any issue affecting Wales' natural resources.

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

The new body should be an independent executive. The office of a commissioner in Wales does not carry enforcement duties and the distinction between advice and sanction powers needs to be clear in the title of the new body. The new body must be given access to legal enforcement investigation instruments and powers, with ability to compel co-operation and requisition for information.

A body would require skilled investigators to deal with complaints, alongside investigation of efficacy of implementation of legislation, with policy review and scientific branches to mirror the role of the Commission.

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

Any new body in Wales would itself be subject to the general principles affecting all Welsh Public Bodies and would be in time have gathered much information and best practice to share. For example, it would be essential to liaise with the office of the Future Generations Commissioner to ensure that the lessons learned from scrutiny and complaint investigation and the boundary between poor performance and legal failure were clearly understood.

Advice on efficacy of delivery can be provided to the commissioner and Public Service Boards and Public Bodies.

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

It is essential that an oversight body be given powers to scrutinise the efficacy and drafting of legislation including the manner in which it has been implemented, enforced and the outcomes it has achieved. The body needs to ensure that a plan/implement and review cycle operates in Wales.

This can include attainment of environmental objectives as well as evaluation of management of new ways of working, monitoring the implementation of the Environment (Wales) Act and any legislation designed to further sustainable management of natural resources.

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

The extent of the function should be to ensure public bodies assess the outcomes of their actions, success and failures can be identified and lessons learned. These can be fed back to Welsh Government with recommendations for legislative amendment, for administrative direction or intervention, or resort to the courts where significant failures are found.

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 remit of investigation should include any environmental obligation that a competent authority has failed to meet. This could, for example, be the breech of an air quality standard as well as a procedural failure. All the complaint avenues currently open to citizens and groups need to be still available after we leave the European Union subject to a relevance and proportionality test. It is important that the distinction is made that implementation is about delivery and outcomes and not lip service.

The investigation powers must match any other enforcement agency with a remit to bring matters before the court. The strength of the European Commission was its ability to bring matters before the European Court and for penalties to be imposed. The new body must be able to gather evidence, primary source data, conduct interviews, serve notice and requisition information in a timely and publicly accessible manner.

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?

The oversight body would be an enforcing body and subject to the regulators' code and the Hampton Principles.

Informal methods could include efficacy reviews, and best practice investigations as part of plan/implement / review cycles.

Non-routine enforcement would include criminal investigations under the Police and Criminal Evidence Act code.

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

The body would need an enforcement policy describing the range of sanctions from advice to prosecution. There could be a role for improvement notices where informal advice or more severe failings are discovered. There would be the added option of referral to Welsh Government ministers for special measures, intervention and direction where systematic failures of SMNR are found.

Ultimately the body would need to take prosecutions before the courts.

Other

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

A shared set of principles would be useful particularly where a scheme of overriding national importance could involve mitigation across devolved boundaries or development that is not a devolved matter.

However, having made ground-breaking legislation Welsh Government should not now mark time while the rest of the UK catches up.

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

It should be similar in concept to an expanded redefined Joint Nature Conservation Committee but with competence in environmental impact assessment, landscape and related disciplines.

Environmental Principles and Governance in Wales Post European Union Exit

Consultation response form

Your name:

Organisations (if applicable): Organic Growers Alliance, Landworker's Alliance Cymru

e-mail/telephone number:

Your address:

Responses should be returned by **9 June 2019** to

EU Exit & Strategy Unit
Department for Energy, Planning and Rural Affairs
Welsh Government
1st Floor East, Cathays Park 2
Cardiff
CF10 3NQ

or completed electronically and sent to:

e-mail: Environmental.Governance@gov.wales

Organic Growers Alliance (OGA)

The OGA is a membership organisation that supports professional organic growers in the UK. We represent our 256 (29 in Wales) members on all matters of interest to a wide range of organisations and bodies who influence the development of the organic horticultural sector and our members businesses and livelihoods, including:

- UK and Devolved Governments
- Organic Control Bodies
- Research organisations and educational institutions
- Regional support centres
- Horticultural supply chain organisations
- Any organisation offering advice, vocational courses, training or any other type of support to growers including access to land and planning,

We also connect growers throughout the UK, facilitating the sharing of knowledge and experience and fostering an environment of mutual support and encouragement among organic growers across the UK

Landworkers Alliance Cymru

The Landworkers' Alliance (LWA) is a grassroots union of farmers, growers and land-based workers with a mission to improve the livelihoods of our members and create a better food system for everyone. We are a democratic member- led union, run by producers for producers, and are members of La Via Campesina, the global movement of small-scale producers and peasant farmers.

LWA Cymru has over 100 members across Wales. Our membership includes horticulture, livestock and arable farmers as well as a growing number of foresters. Our members are small and medium businesses with a range of business models as well as individual land workers. We are united by a common vision for a healthy and ecologically sustainable food system rooted in local communities.

Our vision is that '*People of all income levels and backgrounds, whether urban or rural should have access to healthy, affordable food from farmers they can trust. The backbone of this food system should be a vibrant mixture of independent small and medium farms, both traditional family farms and innovative farming models, looking after our landscapes and communities while producing the food we need. '*

Our response

Our response is submitted on behalf of members of both our organisations. In the context of this consultation, our views are very closely aligned. As such we see no need to submit separately but are sure that the increased weight of a combined response will be taken into account. We have also worked closely other food sovereignty organisations including Social Farms & Gardens and Paramaethu Cymru.

Our businesses depend directly and indirectly on a healthy environment. The idea that the health of individuals and communities cannot be separated from the health of ecosystems is fundamental principle of organic and agroecological production systems.

We recognise that by introducing the Wellbeing of Future Generations Act in 2015 and the elucidation of its 7 goals, the Welsh Government has taken huge steps in this direction. Many of our responses to the questions in this consultation are about further integration of this Act with the Environment Act (2016) and arguing for a stronger role for the Future Generations Commissioner, including enforcement powers, in effect giving the WBFG act more 'teeth'.

We also recognise the progress that has commenced through supportive initiatives such as the 'Enabling Natural Resources and Well-Being (ENRaW)' and 'Sustainable Management Systems (SMS)' programmes in Wales. We hope that the thinking and approach behind these programmes is extended to the development and implementation of the legislative framework for the environment post Brexit

Environmental Principles

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

Yes

Rectification at source: This principle, which essentially seeks to prevent or contain problems at their source rather than seeking remedies for their effects, sits squarely with the principles of Prevention (Environment Act and WBFG Act) and Resilience (Environment Act), and also with organic/ ecological farming principles which are basis of our businesses. Our impression is that it is considered in the context of pollution, but we encourage the Welsh Government to think imaginatively about how it may also be applied sensitively to tackle the root causes of other aspects of environmental damage, such as habitat destruction, soil erosion; nutrient leaching etc.

Polluter pays: This principle has been a key part of environmental legislation across the globe through organisations such as the OECD and of course the EU. Not adopting the principle would appear to be a retrograde step, especially in the context of the Welsh Government's stated commitment to 'ensuring there is no drop in environmental standards'. We recognise that the application of this principle to agriculture can be problematic due to the diffuse nature of pollution, but the fact that it is complicated and difficult to determine does not mean that agriculture should be excluded from the polluter pays principle. The flip side of the polluter pays principle is the 'provider gets' principle, which incentivises the active delivery of environmental benefits. As famers and growers using organic & agroecological techniques, we deliver many of these benefits by virtue of approach to production. We refer you to our responses to your 2018 consultation on post Brexit Policy for details.

Question 2: Do you think there are other principles, which may also need to be included?

Yes.

We urge the Welsh Government to go well beyond current EU legislation and make ecocide a crime. Ecocide is the loss or damage to, or destruction of ecosystem(s) of a given territory(ies) such that peaceful enjoyment by the inhabitants has been or will be severely diminished. Such a law has the potential to radically alter decision making involving action or inaction resulting in severe environmental harm and as such could be a game changer.

Wales has shown itself to be a world leader in legislation with the Wellbeing of Future Generations Act, it now has the opportunity to do this again by making ecocide a criminal offence. For more information on this, we refer you to the work of the late Polly Higgins https://eradicatingecocide.com/.

In a wider context, we also believe that environmental legislation should aim not only to ensure a healthy environment in terms of ecosystems, but also ensure the health and wellbeing of people and communities. We feel this should be explicitly included in the principles.

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

Yes. As previously stated, we agree a healthy environment underpins the health and wellbeing of the nation and our communities. Management and protection of our natural resources should be linked the Well Being of Future Generation Act and contribute to the attainment of all seven wellbeing goals.

We also argue that the principles of SMNR should be extended to include private companies.

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

We believe that the NRW should be a leading organisation but, as we discuss in our answer to question 6, as a result of the mergers that led to its formation it has lost some its focus on environmental protection. We also feel it is less well equipped to deal with some of the more community / society-based goals of the WBFG act. We therefore argue for the Future Generations Commissioner (FGC) to have a larger role and be given enforcement powers. Support should be provided to these and any other appropriate public bodies to fill the knowledge/ expertise gaps.

We note that the Climate Change, Environment and Rural Affairs Committee has discounted both these organisations on the grounds that *'fundamental change to their functions that would be required and their lack of resources. It was felt that NRW, as the environmental regulator, does not have sufficient independence and the Future Generations Commissioner currently does not have sufficient environmental focus and expertise'*. While we don't question the validity of these concerns, we cannot identify one organisation that has all the competencies and resources available to step into this role. We therefore think that rather discounting these key organisations, the approach should be to seek the to address the issues/ strengthen the areas of expertise within them as necessary

Lack of resources is certainly an issue, but we must find solutions. Joint working with other UK countries (see our response to Question 18), so we do not effectively replicate the same broadly similar system 4 times could be one approach. We are clear that 'we'd like to but can't afford it' is not an acceptable response to an issue so fundamental to our future and current wellbeing. Such an approach is also incompatible with the recent declaration of Climate Emergency by the Welsh Assembly Government[1].

The issue of lack independence of NRW is perhaps more difficult. We are unable to offer solutions at this point but think it unlikely that these issues have not been considered and dealt with elsewhere and feel sure we could learn from other systems/ countries.

[1] https://gov.wales/welsh-government-makes-climate-emergency-declaration

Accountability

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

We agree with the gaps identified and do not consider that there are others.

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

We agree that existing accountability bodies can and should have a role to play in a new environmental governance system for Wales. Our concern is that many (e,g, the Auditor General and the Public Sector Ombudsman) are not sufficiently specialized to effectively deal with complex environmental issues, and this is acknowledged in the consultation document.

As indicated in our response to Question 4 we argue that overall responsibility for environmental governance should sit with organisations with the necessary knowledge and capacity to do the job. This would imply a strong role, but not exclusive role for NRW; we suspect that that the merger of the Environment agency with CCW and the Forestry Commission to create NRW has weakened the organisation's focus on environmental protection. We reiterate our belief that a stronger role for the FGC is essential to delivering the wider community/ health/ wellbeing objectives and highlighting the importance the role of the environment and our natural resources in delivering them.

We also believe organisations outside the Welsh Government/ National Assembly should have a role in oversight; Scrutiny committees should have more public representation including private business, social enterprise and citizens. A Citizens Assembly, made up of a representative sample of the population and presented with relevant information from experts on the issues, could be a mechanism through which this could be achieved

We believe that Wales and the UK is well served by advisory bodies including Climate Change, Environment & Rural Affairs Committee; the UK Committee on Climate Change; JNCC. These should continue to have a central role. However, in line with the WBFG act, we think that the societal/ community elements of environment policy should be strengthened within these bodies.

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

We agree that the role and objectives set are appropriate, but again argue that health and wellbeing of communities, as far as it relates to the management of natural resources, should be a specific area of responsibility. We note the absence of any powers to prosecute breaches and refer you to our response to Question 16 for our views on this issue.

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

We agree with the scope of what is considered 'Natural Resources'.

While the consultation document recognises 'the close relationship between the entire range of policy areas and specifically the impact climate change has on the environment and biodiversity', we also think it should recognise the close relationship between the

environment and human health and wellbeing and the importance of local, sustainable healthy food and food sovereignty.

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

Yes. There is no body on this list we consider inappropriate

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

Yes. We believe that FGC should also have a strong role as an oversight body. We refer you to our responses to questions 4 and 6 for our reasoning.

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

We do not have the necessary knowledge/ understanding to answer this question

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

Yes. It would seem consistent with the preventative principle that an oversight body should be able to offer advice help individuals and businesses understand and comply with environmental legislation. It seems to us that if the number of breaches though misunderstandings, ignorance or mistakes can be minimised, the total number of cases is reduced and resources can be focused on dealing with cases where breaches are wilful and deliberate.

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

Yes. It seems logical to us that the body responsible to for the oversight of the legislation should have a role in scrutinising it. This is common practice in other areas of legislation, both in the UK and abroad, and see no reason why this should not apply here

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

See responses to questions 11 and 13

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?

We share concerns highlighted in the document that there is currently no specific environmental focus within the current system for investigating complaints and agree this this should be addressed as a matter of priority

We agree that it should have the powers to investigate, assess the validity of complaints and make recommendations. We also agree it should be able to exercise some discretion over which complaints are pursued. However, there should be clear guidance over how that discretion is exercised. We cannot, for example, have a situation where complaints are dropped for reasons of political expediency or the avoidance of embarrassment.

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?

We agree that both informal and formal methods of enforcement should be available, and that where possible and appropriate, resolution should be sought informally in the first instance. If this approach has proved effective within the EU, we see little reason why it should not be adopted post Brexit.

We acknowledge that the Climate Change, Environment and Rural Affairs Committee does not consider a judicial approach to be appropriate. However, we are not clear on what the alternative approach would be given the Welsh Government's commitment to ensuring the highest environmental standards and the criticisms levelled at DEFRA for putting forward toothless legislation for England. If there is no power to prosecute cases in court then the legislation will not be effective. However, we agree that recourse to the courts must and should be a last resort, but think there should be a robust system to impose sanctions and penalties in the event of wilful and/or repeated breaches of environmental legislation. We believe there should be system that operates at different levels that are appropriate to the severity of the breach, for example

- Informal warning/ advice/ opportunity to rectify the situation within a time frame
- Imposition of sanctions or fines, with right to appeal for more serious case
- Recourse to the judicial systems in the case of serious or repeated offences.

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

See Question 16.

Other

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

Yes. As part of the EU, all four nations have been working to same principles with respect to environmental law, and it would be surprising and indeed counterproductive, were the 4 nations to go in fundamentally different directions.

There may be opportunities to share administration costs/ staff / facilities. However, this should, and must not prevent Wales from introducing progressive legislation, for which it rightly has a reputation. A framework of shared principles should be a minimum, that can be added to.

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

We do not have the necessary knowledge/ understanding to answer this question

Farmers' Union of Wales, Llys Amaeth, Plas Gogerddan, Aberystwyth, Ceredigion, SY23 3BT

09.06.2019

EU Exit & Strategy Unit
Department for Energy, Planning and Rural Affairs
Welsh Government
1st Floor East, Cathays Park 2
Cardiff
CF10 3NQ

Dear Sir/Madam

The FUW welcomes the opportunity to provide feedback on the 'Environmental Principles and Governance in Wales Post European Union Exit' consultation.

Members of the FUW had concern about the timing of this consultation emphasising a lack of understanding of the current pressures and uncertainty caused by Brexit; including significant cuts to government budgets and public funding.

Summary

Following consultation with members, the Farmers' Union of Wales agreed shortly after the EU Referendum 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.

We note that the Environment Act (EA) was designed to work together with the Well-being of Future Generations Act (WFGA) to encourage a systemic approach to the environment by public authorities. The objectives of Sustainable Management of Natural Resources (SMNR), within the EA, show strong links to the Well-being Act's well-being goals. Despite this integration, it is the WFGA which has received most awareness and understanding. The EA is still largely unknown, and most notably, SMNR is an unknown acronym for many.

The FUW would suggest, therefore, that the terminology needs to be looked at and means by which to better engage with citizens be explored.

The FUW agree 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. The EC and the ECJ, along with other European bodies play an important role in implementing and enforcing environmental laws across the EU. It is therefore accepted that

mechanisms which provide for independent accountability and opportunities to raise complaints will therefore be necessary at a Wales and UK level post EU exit.

The EC can take enforcement action against Member States for noncompliance with EU law. Third parties, including citizens and civil society organisations, can bring complaints to the EC. These non-compliance complaints are often addressed through negotiation.

The ECJ can hear cases of non-compliance with EU law brought either by the EC or Member States and failure to comply with an ECJ judgement may result in a fine. The ECJ may also be asked for a ruling on the interpretation of EU law where cases are brought by individuals in national courts that directly apply EU law.

In addition to its enforcement functions, the EC also undertakes a wider role in relation to environmental governance, by:

1. evaluating and reporting on the effectiveness of the implementation of EU law and policy by Member States.
2. informing the long-term direction of EU policy through road maps, action programmes and sustainable development strategies.

EC policy development is supported by the work of several European agencies, such as the European Environment Agency, the European Chemicals Agency and the European Food Standards Authority.

Introduction

The FUW was established in 1955 to protect and advance the interests of Welsh families who derive an income from agriculture.

As an organisation established more than sixty years ago to advance and protect the interests of Welsh farmers, the Farmers' Union of Wales remains fully committed to devolution and the advantages it has brought to Wales and other nations over the past two decades.

This does not negate the need for all our nations to work together to develop approaches which are mutually beneficial and protect not only our farmers and internal markets, but also our status and reputation across Europe and the World.

The FUW is a democratic organisation, with policies being formulated following consultation with its twelve County Executive Committees and eleven Standing Committees.

The views expressed in this response therefore represent the democratically established views of the FUW membership.

Environmental Principles

The FUW believes that the consultation document adequately identifies the gaps in environmental governance structures and principles that will be created by leaving the EU.

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.

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 is concerned, based on experience in relation to Welsh Government proposals to other areas, that the practical and financial implications of any new arrangements for public bodies and businesses should be thoroughly assessed before any decisions are reached.

Moreover, the FUW 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.

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 overtly negligent or deliberate actions.

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 less costly 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".*

The four EU environmental principles which underpin EU environmental policy do not create any direct legal rights but help to shape the EU environmental law and policy.

In Wales, since 2015, there has been a progressive programme of legislation placing sustainable development at the centre of governance in Wales through both the WFGA and the EA. Sustainable Development was positioned to provide an overarching context to the policy and align to the wider sustainable development policies coming from the Conference of Sustainable Development (Rio) and its “global goals.”

Wales is in a very different starting point than the rest of the UK because it already has policies in place to deliver two of the four EU environmental principles: Prevention, which can be delivered through the 5 ways of working which are outlined in the Wales Future Generations Act, and precaution, which is encapsulated within the SMNR principles.

It should be borne 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.

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 an holistic approach to environmental governance.

The FUW believes it makes sense to align future legislation to include the other two principles; The polluter pays and rectification at source and agrees with the statement in the consultation that this will need to be done in a way that complements and enhances the environmental principles already reflected in the Environment Act as well as adhering to the overarching context of sustainable development as outlined in the WFGA.

The polluter pays principle is, by and large, already present, with a broad acceptance of the principle. However, clarity is needed, for example in terms of whether fines equate to paying for pollution, and how proportionality is applied in cases of genuine accidents, where all legislation has been adhered to or extreme weather places events outside the control of businesses or individuals.

The principle of rectification at source is that it is more cost effective and more environmentally effective to prevent accidents rather than to pay for clean-up costs 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".*

The FUW is concerned that a distinction must be drawn between what should or must be taken account of under Welsh Primary Legislation as a result of the UK leaving the EU, and any additional powers that it may be deemed desirable to legislate for through Primary Legislation, and the practicality and costs of both for all concerned.

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 EA, while adhering to the overarching context of sustainable development as outlined in the WFGA, and without adding to existing burdens for public or private bodies.

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 WFGA and the 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 SMNR, within the EA, show strong links to the WFGA's 'well-being goals'.

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.

Moreover, it is notable that both the WFGA and EA are at an early stage in terms of implementation and understanding their practical and financial implications, not least for public bodies, and this must be taken into account when considering any additional legislation, functions or duties.

As such, members of the FUW agreed that the duty to pursue sustainable management of natural resources and the application of its principles might be extended, but suggested that this might be done in a more simplified way in order to achieve better engagement.

Accountability

Members recognised the merits in working closely with the English authorities given the length of the Wales-England border and the habitats, rivers etc. which cross the Wales-England border. As such, an overarching framework with associated governance arrangements that fully respect devolved powers should be established.

The scope of new governance arrangements should initially reflect the same policy areas of the EU bodies that they are replacing.

The FUW feels that the proposed list of bodies is appropriate at the moment though these bodies should be subject to regular review.

The FUW believes that the status, form and constitution of an oversight body should be independent and comprise individuals from a broad range of backgrounds, including agriculture, who understand all elements of the seven well-being goals and the SMNR principles.

In addition, the FUW would not object to the principle of an oversight body which is able to act in an advisory capacity. However, similar to comments made above, we would highlight that no cost

analysis appears to have been carried out in relation to such a body, making it impossible to fully assess the implications of establishing such a body.

Any powers associated with an oversight body to investigate complaints from members of the public about alleged failure to implement environmental law should initially be modest, but subject to review. Indeed, the FUW would recommend this modest approach be implemented with regard to whether the oversight body should be able to scrutinise and act - as opposed to advise - the implementation of environmental legislation.

The FUW believes that the priority of this oversight body should be to assist in compliance, rather than adopting a punitive approach, and that a more robust approach could be adopted at a later stage in cases where there wasn't corrective action.

The creation of a new body would entail various costs, including but not limited to:

- One-off setup costs, including for public appointments, staff recruitment, and enabling IT systems
- Governance costs, including remuneration and expenses for non-executive members
- Direct staffing and other operating costs for enforcement, complaints and scrutiny functions
- Corporate and 'back office' costs including finance, premises, communications, HR and IT. We would hope that the body would have the effect of reducing expenditure incurred on Judicial Reviews etc., as breaches of environmental law will be flagged and the body will initially serve advisory notices based on perceived breaches allowing Government and public bodies to take corrective action before court action is undertaken.

Joint Approach

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.

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.

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.

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.

The FUW would emphasise that any UK joint approach needs to be co-designed by all UK Governments.

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.

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.

9 June 2019

Dear EU Exit and Strategy Unit

CONSULTATION ON ENVIRONMENTAL PRINCIPLES AND GOVERNANCE IN WALES POST EUROPEAN UNION EXIT

Thank you for the opportunity to comment on the above consultation published in March 2019.

I would like to comment on the following question:

Question 7.
Outlined role and objective for a body.

I would suggest that in addition to overseeing the implementation of the Welsh legislative principles (as expanded) and environmental law, the body should have the role/option of referring public bodies to National Assembly scrutiny and the Courts, should the mechanisms for resolving issues fail.

This is reflected in the discussions in later questions, which needs to be reflected in the earlier text.

I would also suggest that there may be value as in the English equivalent document (DEFRA May 2018) in further describing its role in terms of being, “strong, independent, objective, impartial, well-evidenced, resourced, transparent” etc. See Para 79 of that document.

I have concerns about the presentation of information in the document itself; and the role of existing English and Welsh legislation:

- The presentation of information does not make absolutely clear whether the Welsh Legislation matches exactly the international principles. For instance 2.24 Table 1 while covering EU does not cover international principles.
- There seems to be no coverage of existing England and Wales legislation, or EU Case Law which has become part of the UK Law, which may be relevant to the situation – eg: Environmental Damage Regulations as part of “rectification at source/polluter pays”.

Finally, although I am based in England, and am an ex-Welsh Government employee, I welcome the use of the WFGA and E(W)A to underpin the new approach.

Title - Governance and principles consultation
Sent to: Environmental.Governance@gov.wales
Date: 9th June 2019

Introduction

1. Mark Drakeford's Leadership Manifesto stated that

2. *"Wales has some of the greatest environmental assets of any small country in the world. But under the surface all is far from well. Natural Resources Wales reported in 2016 on the threats to species, biodiversity and the impacts which this produces on water quality, air quality and the wider Welsh economy".*

3. *"The **principles of environmental growth** offer a route to reconciling some of the historical tensions between the economy and the environment, especially in rural Wales…**an Environmental Growth Plan for Wales, halting and reversing the damage already caused to our natural environment."***

4. To deliver this, we need to adequately replace important EU bodies and the environmental principles. They enforce our environmental laws, drive environmental standards and inform the development of policy and legislation. If we don't, we risk setting our nature on the path to even steeper decline.

5. Therefore, we welcome, and strongly agree with, the Ministers foreword in this consultation which states

6. "*As a Government, we are committed to ensuring there is **no drop in environmental standards**… **ensure all EU-derived environmental legislation was in place on exit day**. We are also committed to continuing to **improve environmental regulation as the UK leaves the European Union**… how we address the gaps arising from the UK exiting the EU, in a way which **continues to drive environmental improvement**; enhances our reputation for high standards; **provides a coherent, integration governance framework** and, **builds upon our internationally recognised legislation***".

7. We also welcome the Welsh Government
   - highlighting its priorities are to *ensure Wales' future prosperity after the UK's exit from the European Union, which includes **protecting and enhancing our natural resources and maintaining current standards in respect of air and water quality, emissions and environmental protection*** (section 1.1).

   - acknowledging that as *a consequence of leaving the EU there will be **gaps in the governance provided in the EU Treaties, including part of the architecture for developing policy and legislation as well as in the functions undertaken by the EU Commission as guardian of EU law**.* (section 1.2)

   - stating **"***As a government, we have committed to ensuring there is **no reduction in people's rights as a result of exiting the EU**. We have also committed to ensuring the continued implementation of environmental law and to continue to maintain and enhance standards. These commitments therefore underpin our approach*" (3.1)

8. This builds on the Ministers statements of having "***the same, if not better***" environmental standards post Brexit.

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

- Rectification at Source;
- Polluter-pays

9. **We agree that Welsh Government should introduce primary legislation** to add the EU environmental principles that would not continue to be in place post EU Exit, namely **Rectification at Source** and **Polluter-pays.**

10. **We recommend there should be a clear legal duty on all public authorities, including all Ministers, that they should have to directly apply the environmental principles when exercising their relevant functions**.

11. At present, the application of the EU environmental principles at EU level is informed by extensive case law. This helps to shape the interpretation of the principles, including how they relate to each other and to wider factors influencing decision-making. Therefore, **we recommend that the duty to directly apply the principles could be accompanied by a duty to produce a policy statement to guide its interpretation and application**. **The policy statement should be subject to full Parliamentary scrutiny and public consultation.**

12. The policy statement should set out in detail how the principles will be used to guide the development of policy and legislation, to support policy-makers and ensure the principles are used consistently. It should provide detailed guidance on how the principles should be applied in specific contexts. **The statement should have a statutory basis but could also be updated when required**, for example to track developments in the EU's application of the principles (**dynamic alignment**). An important function of a policy statement would be to capture the key considerations that need to be taken into account to ensure that the principles are not considered in isolation or out of context.

13. The principles should not need regular updating. They should not have to be changed in the light of new scientific knowledge. For example, new science might help you decide when it is appropriate to apply the precautionary principle but it should not change the principle in itself.

14. It is important that the implementation of the principles should be overseen by the proposed watchdog to ensure compliance with strong remedies for non-compliance.

Question 2: Do you think there are other principles, which may also need to be included?

15. EU environmental principles have to be read and implemented in the context of wider principles of EU law, including the **fundamental rights of individuals**, **proportionality** and **legal certainty**. For example, the principle of proportionality is important in interpreting how the environmental principles interact with economic and social objectives.

16. **The development of EU environmental policy and legislation is also informed by principles in international conventions and agreements**, such as the UN Convention on Biological Diversity. These principles are also reflected in law and policy developed in Wales.

17. It is important the wording of all the principles is strong. **We believe there should be a clear legal duty on all public authorities, including all Ministers, that they should have to directly apply all environmental principles when exercising their relevant functions.** We learnt from the NERC duty that just "have regard" is too weak to direct change.

18. We below are a few principles that we recommend should be included

Precautionary and Preventive Principles

19. The Treaty on the Functioning of the European Union (TFEU) (Article 191) contains reference to the core environmental principles,:

    *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 shall be based on the **precautionary principle** and on the principles that **preventive action** should be taken, that environmental damage should as a priority be **rectified at source** and that the **polluter should pay**.*

20. We recommend that **all** the above principles are named in new primary legislation. This is because at present, we believe the **precautionary** and **preventive** are not fully operationalised by SMNR principles and/or the 5 Ways of Working under the WFG Act, because;

    - there are scope issues with precautionary and preventive principles and also precautionary principle is difficult to interpret as it used in different areas of Welsh law and policy.

    - the SMNR principles have a limited application, applying to all of Natural Resources Wales' functions and to the Welsh Ministers in the development, production and implementation of the Natural Resources Policy and creating the section 7 biodiversity lists and their duty to take steps to maintain and enhance biodiversity.

    - having a preventative principle is stronger than having it as one of the ways of working.

    - we do not believe that the prevention and precautionary principles are afforded the legislative gravitas that they require.

21. **We also believe that the environmental principles should be able to be read together rather than having to read several pieces of legislation**. This would help a **user to gain a coherent picture of the environmental principles.**

22. Making specific references to the **precautionary** and **preventive** alongside the other principles such as **rectification at source** and **polluter pays** can be done in a way that **complements and enhances the environmental principles already reflected in the Environment Act** and the overarching context of sustainable development in the **Well-being of Future Generations Act**. The existing legislation can still continue to set the context for the application of the SMNR principles.

23. Having one new piece of legislation to hold all the environmental principles reduces complexity and makes the legislation more comprehensive and coherent.

Principles in ToR of Watchdog

24. One additional way of securing the principles more effectively would be for a governance body/watchdog to have the principles explicitly laid down in its terms of reference and its duties. **Therefore, having all the environmental principles and governance in one place is**

especially important if Wales is to have its own environmental watchdog as the principles should be a core part of the watchdog's remit. It is important that the implementation of the principles should be overseen by the proposed watchdog to ensure compliance with strong remedies for non-compliance.

Dynamic alignment

25. It's worth noting that the EU has already indicated[1] that it will seek 'Level Playing Field' commitments in any agreement. These environmental commitments will likely comprise a minimum standard that the EU will require in any negotiated future relationship. We would expect the future relationship between the UK and the EU to include extensive obligations with respect to environmental governance[2].

26. However, the UK Government has stated that it will be unable to transpose a third of EU environmental regulation due to its inability to replicate the functions of EU bodies and agencies[3]. Even when the UK successfully transposes EU regulation, it will not be the same. Many environmental Directives rely upon ongoing reporting and evaluation from the Commission.

27. Therefore, we recommend a principle of **dynamic alignment with EU, to keep pace with EU directives, case law and definitions.**

Non-regression principle

28. The **non-regression principle** recently gained international recognition and is ingrained in the Paris Climate Accord. The non-regression principle is the principle whereby environmental protections are not rolled-back.

29. We believe that this is vital to include in Welsh legislation. As environmental regulation imposes costs, there is an incentive for governments to give their industries a competitive advantage by lowering their standards and in turn causing potentially harmful externalities such as water pollution which other organisations have to clean up and transfer the cost to consumers i.e. water quality).

30. The EU has tried to prevent this problem in existing trade agreements by including 'non-regression' clauses; these prohibit trade partners from weakening or not enforcing environmental laws to benefit trade or investment.

Principle of proportionality

31. EU environmental principles have to be read and implemented in the context of wider principles of EU law, including the fundamental rights of individuals, proportionality and legal certainty. For example, the principle of proportionality is important in interpreting how the environmental principles interact with economic and social objectives

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[1] https://ec.europa.eu/commission/sites/beta-political/files/level_playing_field.pdf

[2] https://blogs.sussex.ac.uk/uktpo/2018/11/21/environmental-non-regression-in-the-withdrawalagreement-forcing-the-eus-hand-on-the-level-playingfield/

[3] Environmental Audit Committee, 'The Future of the Natural Environment After the EU Referendum', Sixth Report of the Session, 14 December 2016, p. 18. https://publications.parliament.uk/pa/cm201617/cmselect/cmenvaud/599/599.pdf

Other Principles and Rights

32. The Wildlife Trusts in Wales believe other rights and principles which have implications for environmental governance warrant consideration, including a non-exhaustive list of environmental principles that influence environmental policy at the EU including
    - proximity principle and
    - **principle of a high level of environmental protection and restoration** which is included in Article 191(2) of the Treaty of the Functioning of the European Union, that requires the EU to pursue a high level of environmental protection.

33. Then there is the **Aarhus Convention**. The UN Aarhus Convention 1998 established a number of principles in relation to rights of the public with regard to the environment, including[4]

    - the right of everyone to receive environmental information that is held by public authorities ("**access to environmental information**"). This can include information on the state of the environment, but also on policies or measures taken, or on the state of human health and safety where this can be affected by the state of the environment. Applicants are entitled to obtain this information within one month of the request and without having to say why they require it. In addition, public authorities are obliged, under the Convention, to actively disseminate environmental information in their possession;
    - the right to participate in environmental decision-making. Arrangements are to be made by public authorities to enable the public affected and environmental non-governmental organisations to comment on, for example, proposals for projects affecting the environment, or plans and programmes relating to the environment, these comments to be taken into due account in decision-making, and information to be provided on the final decisions and the reasons for it ("**public participation in environmental decision-making**");
    - the right to review procedures to challenge public decisions that have been made without respecting the two aforementioned rights or environmental law in general ("**access to justice**").

34. The rights of the public with regard to the environment need enshrined in in domestic rights. In addition, **there are important links between environmental principles and human rights**. Therefore, we should include the **right to be supported by a healthy ecosystem** – this was supported in a report from the Human Rights Framework for Scotland[5].

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

35. Yes, **SMNR should be extended to all public bodies (as defined in the Environment (Wales) Act) and all Ministers**. However, this should not be at the expense of a coherent and collated legislation with environmental principles that gives 'the same if not better' legal protections.

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[4] http://ec.europa.eu/environment/aarhus/

[5] **Right to a healthy environment** *This overall right will include the right of everyone to benefit from healthy ecosystems which sustain human well-being as well the rights of access to information, participation in decision-making and access to justice. The content of this right will be outlined within a schedule in the Act with reference to international standards, such as the Framework Principles on Human Rights and Environment developed by the UN Special Rapporteur on Human Rights and the Environment, and the Aarhus Convention* **Recommendations for a new human rights framework to improve people's lives - Report to the First Minister (Dec 2018)**

36. Requiring public bodies to implement SMNR would help ensure that the principles were considered in individual decisions that could have significant environmental consequences. It could be called upon by communities resisting proposals which they believe are environmentally harmful.

37. The application of the principles is particularly important where public bodies are responsible for policy creation and decision making without the need to refer matters back to central Government.

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

38. The Principles need to be embedded throughout Welsh Government and all **public bodies as defined in the Environment (Wales) Act**.

39. This will help ensure that the principles were considered in individual decisions that could have significant environmental consequences and could be called upon by communities resisting proposals which they believe are environmentally harmful. This is exactly what happens at the moment within the European Union. It is a routine part of administrative decision-making at all levels, right down to the street level, to apply the environmental principles.

40. **This is also important because scientists have warned of a catastrophic collapse of nature[6]. The scientists found billions of populations of mammals, birds, reptiles and amphibians have been lost all over the planet, leading them to say a sixth mass extinction has already progressed further than was thought.**

41. The **Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services** (IPBES) Report (biodiversity version of the Climate UN Inter Government Panel on Climate Change)(IPCC) estimated **around 1 million species are threatened with extinction**.

42. The Report ranked, for the first time at this scale and based on a thorough analysis of the available evidence, the five direct drivers of change in nature with the largest relative global impacts so far. These culprits are, in descending order:
    a) changes in land and sea use
    b) direct exploitation of organisms;
    c) climate change;
    d) pollution such as agri-pollution including slurry, pesticides and herbicides
    e) invasive alien species.

43. The direct and indirect drivers of change have accelerated during the past 50 years. Nature is declining globally at rates unprecedented in human history, and the rate of species extinctions is accelerating, with grave impacts on people around the world now likely**.**

44. **Last year the IPPC have warned there is only a few years for us to act if global warming is to be kept to a maximum of 1.5ºC[7].** If we miss this by even a half a degree then the risks of drought, floods, extreme heat and poverty for hundreds of millions of people becomes a

[6] Ceballos, Gerardo, Paul R. Ehrlich, and Rodolfo Dirzo. "Biological annihilation via the ongoing sixth mass extinction signaled by vertebrate population losses and declines." Proceedings of the National Academy of Sciences 114.30 (2017): E6089-E6096.
[7] IPPC https://www.ipcc.ch/sr15/

significant risk. Despite this the current level of commitments will mean that the world is on course for a disastrous 3°C of warming[8].

45. Governments, business and the finance sector are starting to question how global environmental risks, such as increasing pressure on agricultural land, soil degradation, water stress and extreme weather events, will affect the macroeconomic performance of countries, sectors and financial markets.

46. The **World Economic Forum**[9] identified the global risks as extreme weather, climate policy failure and natural disasters and accelerating biodiversity loss. "***Of all risks, it is in relation to the environment that the world is most clearly sleepwalking into catastrophe***." [10]

47. Therefore, we need action at all levels.

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

48. We agree that the gaps include namely the loss of:
    - **Independent accountability** – there would be no independent supervisory body with responsibility for the oversight of the implementation of environmental laws and policies by governments or potentially other public bodies. It's worth noting that the **independence of the Office for Environmental Protection** (OEP)(proposed by the UK Environment Bill) has been questioned given that the draft Bill proposes that it would be funded by Defra and that its chair, and other non-executive members, would be appointed by the Secretary of State;
    - **A simple and inexpensive mechanism to raise complaints** –the simple and free citizen complaint procedure provided by the EU would no longer be in place;
    - **Enforcement mechanisms** - the EU has both formal and informal complaints procedures and mechanisms that enable disputes to be addressed via negotiations. It can also seek recourse to the CJEU, which can result in significant financial penalties where there is failure to comply with the court's judgements.

49. The consultation states that pre-exit Court of Justice of the European Union (CJEU) case law general principles will apply in principle to EU retained law. **However, we recommend a system of Dynamic alignment with EU, to keep pace with EU directives, case law and definitions.** This is in part because the UK Government has stated that it will be unable to transpose a third of EU environmental regulation due to its inability to replicate the functions of EU bodies and agencies[11].

50. Even when the UK successfully transposes EU regulation, it will not be the same. Many environmental Directives rely upon ongoing reporting and evaluation from the Commission, these gaps will need rectifying.

51. It's worth noting that the EU has already indicated[12] that it will seek 'level playing field' commitments in any agreement. These environmental commitments will likely comprise a minimum standard that the EU will require in any negotiated future relationship. We would

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[8] IPPC https://www.ipcc.ch/sr15/

[9] World Economic Forum These are the biggest risks facing our world in 2019

[10]

[11] Environmental Audit Committee, 'The Future of the Natural Environment After the EU Referendum', Sixth Report of the Session, 14 December 2016, p. 18. https://publications.parliament.uk/pa/cm201617/cmselect/cmenvaud/599/599.pdf

[12] https://ec.europa.eu/commission/sites/beta-political/files/level_playing_field.pdf

expect the future relationship between the UK and the EU to include extensive obligations with respect to environmental governance[13].

52. There is also concern that functions could be spread across a number of bodies such as
    - Future Generations Commission,
    - Public Service Ombudsman,
    - Auditor General for Wales
    - NRW

53. This would create confusion. However, we welcome the recognition that existing domestic arrangements have their own constraints and limitations and are not equivalent to those at the EU level in terms of environmental protection. We would strongly oppose any move to make these institutions the watchdog **because none of these have the necessary remit, expertise, resources and independence to do the job effectively**. Therefore, we are pleased that the consultation does seem to accept the argument for an additional governance body to ensure all the EU functions listed are covered.

European Environment Agency EEA

54. Wales benefits from experience elsewhere in the EU. One of the key environmental organisations is the European Environment Agency (EEA) which is an important source of information for those involved in developing, adopting, implementing and evaluating environmental policy. The EEA currently has 33 member countries and six other cooperating countries.

55. The EEA's mandate is:
    - To help the Community and member and cooperating countries make informed decisions about improving the environment, integrating environmental considerations into economic policies and moving towards sustainability.
    - To coordinate the European environment information and observation network (Eionet). Our future ability to use EU systems to facilitate reporting and contribute to developing methodologies.
    - The ability to aggregate data at European level and assess UK progress on a comparative basis.
    - Access to wider expertise, systems, and data and knowledge holdings.
    - Potential loss of requirements for data to be published.

56. Wales will lose this important source of information that helps develop, adopt, implement and evaluate environmental policy.

57. We may also lose
    - our future ability to use EU systems to facilitate reporting and contribute to developing methodologies.
    - our ability the ability to aggregate data at European level and assess Welsh progress on a comparative basis.
    - access to wider expertise, systems and data and knowledge holdings
    - requirements for data to be published.

[13] https://blogs.sussex.ac.uk/uktpo/2018/11/21/environmental-non-regression-in-the-withdrawalagreement-forcing-the-eus-hand-on-the-level-playingfield/

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

58. They should continue as they do now except both NRW and the Future Generations Commission should take on many of the reporting functions currently done at the EU level. This will however need new and adequate funding. The watchdog should then become a useful hub of information which is provided by other agencies/bodies rather than producing all this information itself.

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

59. Partial.

60. **We agree that the role of a body would be to provide independent oversight**. We agree that the aim of such a body would be to act as a guardian of Wales' natural resources in ensuring policy and legislation is developed in accordance with the principles set out in the Environment (Wales) Act (including the missing EU environmental principles) and that delivery is in line with **all** the underpinning environmental regulations.

61. We also agree that the objectives are to
    - Ensure policy and legislation is developed in a way which maintains and enhances Wales' natural resources in line with the principles in Welsh legislation (e.g. that already specified within the Environment (Wales) Act);
    - Ensure legislation is implemented effectively and delivery is line with the aim of maintaining and enhancing Wales' natural resources;
    - Act impartially in assessing the effective implementation of Welsh legislation relating to the environment;
    - Act impartially in receiving complaints from citizens.

62. All of the above should be part of the environmental watchdog. It needs to hold government and public bodies to account, which should be its primary function. Its role and objectives should also include **to be an independent accountability, be a simple and free mechanism to raise complaints and take enforcement action.**

63. As a distant secondary function, we would agree that they could act in an advisory capacity on the sustainable management of natural resources for public bodies. It could help to stop plans or projects that would likely convene regulations early. However, this could create significant additional work that will stretch the body and thus diverting its focus on its main goal. This is especially important given that there will always be resource constraints. The EU Department has over 500 staff. It could be left to NRW and others to give advice. This will require new and adequate funding and the recruitment of expert advisors.

64. The consultation states the new body should be aligned to the **existing Welsh primary legislation, namely the Environment Act. However, it doesn't state that the watchdog will investigate breaches of environmental legislation which includes all the current EU law – we assume that was to be taken as read.**

65. It is important for the body to have oversight of both EU retained environmental law as well as current and any new domestic environmental legislation. **In order to maintain current environmental protections it is vital that the relevant powers of EU bodies are replicated like-for-like in the UK after Brexit – specifically the monitoring and enforcing breaches of current**

EU law. A strong new truly impartial body will be an essential element of replicating these current functions.

66. In terms of international environmental agreements, the body should definitely have a full role where this has been translated into domestic legislation. The body should also be able to review and scrutinise progress in terms of the Wales meeting its internationally agreed environmental obligations.

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

67. The central focus of the new body should predominantly be on the implementation and enforcement of existing **all** environmental legislation – domestic and the current EU Directives. The body should have oversight of all environmental law and no relevant areas that intersect with environmental issues should fall outside its remit.

68. We agree that the scope of a body should for example include: water, air, nature conservation, climate change[14], soils, forestry, chemicals, pesticides, waste, circular economy and where these intersect with other policy areas for example where agriculture intersects with all of the above.

69. However, other areas that interest with the environment should be includes such as
    - biodiversity;
    - national infrastructure development,
    - planning
    - transport
    - environmental impact, access to environmental information and environmental justice
    - marine environment
    - radioactive substances
    - climate change mitigation and adaptation obligations
    - contaminated land
    - biocides including pesticides

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

70. Partial. It must include **all public bodies subject to the Environment (Wales) Act.**

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

71. **All public bodies subject to both the Environment (Wales) Act which includes** emanates of the State such as Dwr Cymru Welsh Water. Presently they are not a Public Body in terms of the WFG Act but are included within the Environment Act.

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

72. We believe that the should it take the form of an Environment Commission with an Environment Commissioner.

73. We agree that any oversight body should be fully independent of government and able to hold government and other public bodies to account to ensure environmental protections are properly implemented and enforced.

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[14] While there are advisory bodies on climate change, none have enforcement powers and the new body should take on this enforcement role to ensure proper adaptation efforts are delivered.

74. We agree that independence needs to be shown by
    - being accountable for its activities in Wales, to the National Assembly for Wales (or other Parliaments if a UK or multi-government body).
    - being independently audited by a body such as the Auditor General for Wales;
    - having independent appointment structures; A non-partisan appointment process will be important to recruit high calibre, independent and well-respected candidates who are seen as impartial. **CCERA should have a clear role in the appointment process to the board (particularly the Chair and CEO).**
    - **having independent sources of funding**. It is absolutely essential for the new body to be well resourced and to have the necessary expertise to be able to fulfil its objectives effectively. Stable and sufficient funding arrangements should be put in place to safeguard the independence of the body. Existing environmental bodies, such as NRW, have over recent years seen their funding severely reduced which has significantly constrained their abilities to operate. Robust measures (be it ring-fenced funding, funding from two government departments or direct funding from Assembly) need to be in place to ensure the same risk does not undermine the new body. Funding should also increase in the future should future environmental legislation increase requirements on the body.

75. The body should operate in the public interest in a clear and transparent way to ensure it is seen as impartial and to ensure it becomes a well-respected institution. The new body should focus on the proper implementation of environmental legal objectives and their enforcement.

76. **While an understanding of the wider economic and social context will be needed the body should not, however, have to 'balance' other non-environmental priorities with its central remit to ensure environmental legal obligations are implemented and enforced**. 'Balancing' policy priorities is the responsibility of other government departments and agencies – this should not be the role of the new body which should instead focus on the implementation of and compliance with environmental law.

77. We believe that the body should be as UK wide as possible.

78. If the new body is a Welsh only one, it must have a
    - all the powers necessary to able to hold it and other public authorities to account (including strong enforcement powers) to ensure environmental protections are properly implemented and enforced.
    - The new watchdog should be established in primary legislation, with clear functions explicitly listed, to provide a strong and durable foundation for the body. It will be important to set a clear remit for the new body that is at least a like for like replacement of the current process.
    - The new body will also need to establish clear relationships with existing agencies such as the NRW, Marine Management Organisation *et al* and with local authorities.
    - The new body must also adequately join up with its counterparts in the EU over trans-boundary issues such as air and water quality, marine nature conservation, and land conservation issues in respect of the UK/EU borders with Ireland (Republic) and Spain.

79. If it is to be a UK body or multi-government body, it must adhere to f the above areas and also:
    - Be co-designed by all of the different countries of the UK.
    - there must be appropriate mechanisms to resolve disputes.
    - it must be accountable to legislatures, rather than government including appointments
    - it must be resourced appropriately;

- deliver the same functions and service we currently receive but extended to include provisions of the current Environment (Wales) Act and any future environmental policy and targets including

80. There are certain functions that a or multi-government body would be well-placed to perform:
    - Monitoring and enforcing the implementation of environmental policies by the UK and devolved governments.
    - Monitoring and enforcing the compliance of governments and public bodies with international agreements and treaties.
    - Managing trans-boundary resources and common resources.
    - A UK-wide body would be well positioned to take over the European Commission's role of receiving implementation reports from the agencies and/or governments currently responsible for producing them. The UK-wide body would then ensure the adequacy, consistency and transparency of these reports before using them as inputs into its evaluation of governments' and agencies' compliance and performance against targets.
    - Advise governments on the setting of environmental standards/targets, (some of which could be expected to vary between countries).

81. There are certain conditions for the creation of a UK or multi-government body would have to be met for such a body to be durable, effective, and consistent with devolution settlements:
    - It would need to be created and owned by the UK and devolved governments. This might mean that, amongst other things, the appointment of the body's Board would be done collaboratively between the governments.
    - It would need to have a presence in all countries to ensure effective communication between relevant stakeholders.
    - It would need to be sufficiently resourced.
    - And culturally sensitive to the different political entities it was reporting to
    - It would need to be able to scrutinise policy implementation by each of the four governments in a way that is both independent and sensitive to context.

82. A UK-wide or multi-government body has a number of advantages:
    - Such a body would be more durable than a Wales-only body, as it would be more resilient to potential efforts to weaken or dismantle it further down the line by a well-whipped majority in a single parliament.
    - It would be easier within a single institution to achieve consistency in policy implementation. This in turn would help standardise environmental outcomes for citizens where this is needed and provide a greater degree of certainty for business. It would also help create a level economic playing field and facilitate the functioning of the UK's single market without pursuing an unnecessarily uniform approach.
    - It would avoid a situation in which four similar but separate bodies are required to operate under unequal resources and potentially could develop deeper expertise than four separate bodies could.
    - It would benefit from the pooled expertise and evidence resources of the four countries, which might be particularly advantageous to the smaller countries.
    - It would be well positioned to manage transboundary environmental issues.
    - The UK will need a strong governance architecture to give trade partners, and signatories of other international treaties, (including of course the EU) confidence that we will meet agreed environmental obligations and outcomes.
    - efficiency saving through joint working;
    - cross-UK collaboration, given that post-Brexit environmental legislation is likely to be subject to various forms of common framework;

- recognition that environmental issues do not respect national borders; and
- improved buy-in and status through collaboration

83. The disadvantages:
    - It would take more time to set up a UK-wide or multi-government body, due to the need to reach agreement between UK and devolved governments. In the worst case it could be delayed until after the UK has left the EU.
    - Separate bodies could encourage positive competition and a 'race to the top', whereas a single body could not.
    - A single UK wide body might be easier to abolish than a set of four.

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

84. Holding government and public bodies to account through effective enforcement just like the EU does today should be their primary function.

85. As a distant secondary function, we would agree that they could act in an advisory capacity on the sustainable management of natural resources for public bodies. It could help to stop plans or projects that would likely convene regulations early. However, this could create significant additional work that will stretch the body and thus diverting its focus on its main goal. This is especially important given that there will always be resource constraints. The EU Department has over 500 staff. It could be left to NRW and others to give advice.

Question 13: Should an oversight body be able to scrutinise implementation of environmental legislation? **Question 14:** What should be the extent of this function?

86. Yes – A key function of the new body should be checking compliance with existing environmental law including legal targets and objectives. This should include monitoring, supervising and reporting on the performance of agencies.

87. Providing advice on how the Government can improve its performance in terms of implementation of extant environmental law will be an important function and would fit within the body's wider enforcement powers.

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?

88. **The current powers the EU has to investigate complaints**. The new body should also have a power to subpoena information which should be supplied in a timely manner and to summon witnesses under a penalty for failure.

89. A key function for the body should be supporting **access to justice on environmental issues** where the Government has failed to properly implement the law. There should be a new free mechanism, for citizens and NGOs to bring complaints for potential breaches of environmental law. The body should be able to respond to complaints from the public, have powers to take these on and investigate further and also cover these costs.

90. The complaint procedure must also be able to challenge the failure to meet environmental legal objectives (i.e. address the 'merits' of an issue) and not just challenge the failure to follow due process (as is the case currently with Judicial Review).

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?

91. We agree that there should be a similar set of functions as currently exist in the EU Commission. A new body should be able to carry out both formal and informal mechanisms to seek solutions to any issues, which have been identified either as a result of a compliant or from its own investigations. This can begin with informal discussions. Where this does not result in a solution, more formal approaches can then be pursued.
    - **Informal** - In line with the 5-ways of working, where an issue has been identified, an oversight body and the government or other public body should work collaboratively including with other relevant parties to seek a solution, taking a long-term and preventative approach.
    - **Formal** - Where an oversight body has to pursue formal procedures as a result of its investigations and failure to seek a solution via informal mechanisms, similar to the EU system, it could:
        - issue a formal notice requesting further information and a time limit for a reply and the body under investigations should cooperate with an oversight body;
        - issue a notice of its opinion and recommendations (similar to the reasoned opinion by the EU Commission) requesting a response within a set timeframe of the actions to be taken by the public body.
        - refer the matter to the courts, where a breach continues.

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

92. **It is essential that all of the relevant powers of the European Commission and the CJEU are replicated like-for-like** otherwise the Government's proposals will represent a step backwards from the status quo and weaker protections for the environment.

93. The EU Commission can currently refer the UK Government to the CJEU if it considers it is not properly implementing EU law. The power and ability of a well-resourced body to initiate legal proceedings as a last resort has proven to be essential in ensuring countries properly adhere to their environmental legal obligations. If the new body is to be able to deliver on its objective of holding the Government to account, then it must also have the power to initiate legal proceedings where necessary.

94. Furthermore, currently when the EU Commission believes a country continues to remain in breach of its obligations, despite previous judicial findings, it can refer the case back to CJEU which may then result in the country being fined. The levying of significant fines, even the threat of fines, has proven to be effective in ensuring compliance and, where the fines are on a daily basis, to the timely resolution of an issue. It is important that these functions are carried across.

95. The new body should be able to refer the Government back to court if it is still failing to abide by a judgement to ensure a fine can be imposed. **The revenues from any fine should then be placed within an environmental protection fund (ring-fenced for environmental improvements) to ensure it represents a genuine incentive to comply. <u>This fund should not then be used to justify cuts to environmental budgets elsewhere.</u>**

96. Also, fines will need to continue to be substantive in case this mechanism is seen as a route for biodiversity off-setting. In terms of where these public funds should come from – each year the UK Government allocates a 'Reserve' within its Budget (currently set at £6.5 billion for 2018/19) which could become the means of meeting the fine. The advantage of this is that it would protect departmental budgets.

97. **Binding notices** would be a powerful step along the route of ensuring compliance. The Wildlife Trusts supports a notice-based enforcement regime, providing that this means that such notices should require a public authority to comply with the law, including by setting out what steps must be taken if necessary. It will also be important that such notices are enforceable before the courts, backed with investigatory powers and the compulsion to provide information.

98. **Intervention in legal proceedings** - The new body should have strong enforcement powers including the power to initiate legal proceedings against the Government on its own. The body should also be able to intervene in the legal proceedings brought by others and be able to contribute time and resources to these. Otherwise, if it cannot intervene, then it will be a bystander whilst key issues on the implementation of environmental law are decided – which would be an odd position for a world-leading body to be in.

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

100. We agree that post EU membership for the four UK administrations there is a need to work more collaboratively with deeper and more sustained cooperation between governments in the exercise of our individual, but connected, competences.

101. Yes, there would there be advantages in have a shared core set of common environmental principles, for example,
    - they might be more durable as it would be more resilient to potential efforts to weaken or dismantle it further down the line by a well-whipped majority in a single parliament
    - It would avoid a situation in which four similar but separate systems operate including a 'race to the bottom'.
    - The UK will need a strong governance architecture to give trade partners, and signatories of other international treaties, (including of course the EU) confidence that we will meet agreed environmental obligations and outcomes.
    - cross-UK collaboration, given that post-Brexit environmental legislation is likely to be subject to various forms of common framework;
    - recognition that environmental issues do not respect national borders; and
    - improved buy-in and status through collaboration

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

102. The Welsh Government should engage openly and constructively with the UK and other devolved governments to discuss the best governance arrangements across the UK and be open to co-designing the proposed body (or even bodies). It is vital to map out which functions are best done at a UK or devolved level or both, as well as any cross-border implications.

103. It would be very beneficial if governance structures and processes could be co-designed and linked to the proposed new body given the economies of scale and consistency of approach this would provide.

104. In addition, the environmental principles should operate at devolved level in line with existing devolved competencies agreed by all four governments

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Natural Resources Wales

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EU Exit & Strategy Unit
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Welsh Government
1st Floor East, Cathays Park 2
Cardiff
CF10 3NQ

7th June 2019

Dear Sir / Madam,

Natural Resources Wales welcome the opportunity to comment on the *Environmental principles and governance in Wales post European Union exit* consultation. I attach our comments to this letter. In responding to this consultation, consideration has been given to 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 with these proposals. We would like to highlight the following key points in addition to the responses to the consultation questions:

- It is important that there is an overarching framework with a clear integrated 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 a framework for public authorities that supports delivery. Supporting the integration of environmental policy across wider policy remits is critical to helping 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.

- 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 Sustainable Management of Natural Resources 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.

- There is a need for further clarity on the jurisdiction and function of the new body. 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 framework for governance underpinned by a common objective, principles and standards would help to avoid gaps in the implementation of environmental policy across the UK. It would also help to clarify how regulators and administrations work together across the UK to manage transboundary issues, such as climate change, water quality or air pollution where a collaborative approach is essential. This approach would also clarify the role and remit of oversight bodies and regulated public bodies where devolved and non-devolved remits coincide. 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.

- A common environmental framework 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.

- 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 these principles help set the context within which our attached comments have been made.

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

Environmental Principles and Governance in Wales Post European Union Exit

Consultation response form

Your name:

Organisation (if applicable): Natural

e-mail/telephone number:

Your address: Tŷ Cambria, 29 Heol Casnewydd, Caerdydd, CF24 0TP

Responses should be returned by **9 June 2019** to

EU Exit & Strategy Unit
Department for Energy, Planning and Rural Affairs
Welsh Government
1st Floor East, Cathays Park 2
Cardiff
CF10 3NQ

or completed electronically and sent to:

e-mail: Environmental.Governance@gov.wales

Environmental Principles

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

Yes.

However, it is important that all four 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. For example, the “Polluter pays” principle helps to secure the regulatory floor, but in isolation is insufficient to deliver SMNR.

The consultation paper states that the precautionary principle is encapsulated within the SMNR principles and notes that it is not directly specified but is captured by the framework. However, it is important to note that both the Environment (Wales) Act and the Well-being of Future Generations Act were produced with the EU Environmental Principles as an overarching framework. Restating all the current principles in legislation would avoid any potential regression in standards and ensure that the EU Environmental Principles do not lose their legal status and priority that they possess in European law. Currently the EU Environmental Principles are legally binding on all public authorities, including Ministers and government departments, in the application of all their relevant functions.

Question 2: Do you think there are other principles, which may also need to be included?

Yes.

An 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 standards.

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.

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.

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

Yes, in principle.

However, in answering this question there are two points to consider. Firstly, the proposal to extend the duty to pursue SMNR and the applications of the principles in general, and secondly, as a specific proposal to address the identified gaps in the application and standing of the four EU environmental principles.

As a general proposal, extending the duty to pursue SMNR and apply the principles could help delivery against national policy and Area Statements and support the role of Public Services Boards. However, this should be an evidenced-based process to ensure a clear link between identified gaps in delivery and application of the extended duty to specific bodies and their remits, and the relationship between this extended duty and the existing Sustainable Development principle and the Well-being of Future Generations Act.

If, as noted, this proposal is specifically to address the identified gaps in the application and standing of the four EU environmental principles it is important to consider the current position. As noted in response to questions 1 and 2, currently the EU Environmental Principles are legally binding on all public authorities, including Ministers and government departments, in the application of all their relevant functions. Therefore, as the proposal is to encapsulate the environmental principles in this duty and to extend it only to Welsh public bodies, to avoid a gap in application it is essential that there is a supporting mechanism that also applies the EU Environmental Principles to non-devolved bodies and functions in the exercise of those functions in Wales, such as an overarching UK framework as noted in response to questions 18 & 19.

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

In answering this question there are two points to consider, as noted in response to question 3. The proposal to extend the duty to pursue SMNR and the applications of the principles in general, and as a specific proposal to address the identified gaps in the application and standing of the 4 EU environmental principles.

As a general proposal, extending the duty to pursue SMNR and apply the principles could help delivery against national policy and Area Statements and support the role of Public Services Boards. However, this should be an evidenced-based process to ensure a clear link between identified gaps in delivery and application of the extended duty to specific bodies and their remits, and the relationship between this extended duty and the existing Sustainable Development principle and the Well-being of Future Generations Act.

As noted in response to question 1, currently the EU Environmental Principles are legally binding on all public authorities, including Ministers and government departments, in the application of all their relevant functions. Therefore, as the proposal is to encapsulate the environmental principles in this duty, it could be applied to all Welsh public bodies in the application of their relevant functions, in relation to the environment. This would help to avoid any potential regression in standards and to support the integration of environmental policy across wider policy remits. It would also help to ensure consistency where bodies currently may not be subject to both the Environment (Wales) Act and the Well-being of Future Generations Act by providing a single overarching objective and set of principles that helps to enable collective decision making.

As previously stated in our response to Welsh Government's *Taking forward Wales' sustainable management of natural resources consultation,* Natural Resources Wales would support progressive measures to expand the application of the SMNR principles, as set out in s4 Environment (Wales) Act 2016, to the Designated Landscapes' Authorities when undertaking their duties. This would achieve alignment with the modern agenda, with NRW's new purpose and would provide a clear delivery mechanism for Area Statements priorities, by placing the Designated Landscapes as 'the drivers' of SMNR delivery in their areas, which is a key proposal endorsed by the Future Landscapes Wales programme.

Accountability

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

Yes, however there are additional gaps. 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.

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

The consultation identifies several accountability bodies and their remits and functions, as they apply in Wales. It is important that any new body, or changes to an existing body, complement and are compatible with the existing Welsh bodies and their functions. It is also important that during any transitional period there is strong alignment between Welsh legislation and transposed EU law and that the environmental principles continue to apply to all public authorities, including Ministers and government departments, in the application of all their relevant functions in Wales and the UK. To avoid significant gaps and risk of regression in standards or divergence, this necessarily includes non-devolved bodies and functions, as they apply in Wales, that are not currently subject to oversight by existing Welsh accountability bodies.

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.

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

The outlined role and objectives are appropriate for overseeing implementation of the Environment (Wales) Act aligned with the Well-being of Future Generations Act. However, this limits the body to oversight of Welsh public bodies and leaves a significant governance gap in relation to non-devolved bodies and functions operating in Wales. Further clarification is also needed to ensure that the objectives set out are complementary to the roles and functions of existing bodies. For example, Natural Resources Wales also acts in an advisory capacity on the sustainable management of natural resources.

The proposals set out in questions 1 to 4 are to encapsulate the environmental principles in the duty to pursue Sustainable Management of Natural Resources and to extend it only to Welsh public bodies. Therefore, to avoid a gap in governance and application it is essential that there is a supporting mechanism that also applies the EU Environmental Principles to non-devolved bodies and functions, in the exercise of those functions in Wales, such as an overarching UK framework as noted in response to questions 18 & 19.

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

The proposed integrated approach that includes a range of environmental policy areas based on the definition of 'natural resources' set out in the Environment (Wales) Act is appropriate, however it is also important to promote the integration of environmental policy across wider policy remits. This approach would help to maintain and enhance standards by supporting public bodies in Wales to take account of the environment in their decision making, in line with their duty under the Well-being of Future Generations Act to contribute to all seven national goals.

There may also be benefit in including enforcement of climate change mitigation and adaption by public bodies within the scope of the environmental oversight body. As the UK Climate Change Committee has no enforcement role, the proposed environmental oversight body could provide this function in consultation with the UK Climate Change Committee. It is important that there is clarity on the role and remit of the new body to ensure that there is no overlap or duplication in functions between the UK Climate Change Committee and the new body.

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

Yes, noting the answer given to question 10 below.

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

As noted above in answer to question 1 and 4, currently the EU Environmental Principles are legally binding on all public authorities, including Ministers and government departments, in the application of all their relevant functions. Therefore, if the principles and duties noted in this consultation were applied to all Welsh public bodies in the application of their relevant functions, in relation to the environment, it would be appropriate to include them in this list.

This would help to avoid any potential regression in standards and to support the integration of environmental policy across wider policy remits. It would also help to ensure consistency across the Welsh public sector and enable collective decision making.

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

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.

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

The oversight body should act as a high-level strategic body, rather than risk duplication and confusion with the remits of other public bodies that also act in an advisory capacity, for example Natural Resources Wales' leadership role on SMNR. 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 and the environmental principles and their application by public bodies.

Paragraph 3.42 states that *"The body could also be able to draw upon the expertise and knowledge of other bodies to assist it in the exercise of its functions and act in an impartial and independent manner in how it selects external expertise".* The expertise and knowledge pool may be relatively small in Wales for some technical areas. It is important that the scrutiny body is able to give sufficiently impartial and correct advice, therefore it may be advantageous or indeed necessary to draw on expertise from across the UK. A common framework and UK wide agreement on the overarching principles would aid this approach.

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

Yes.

As identified in response to question 5, 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. Consideration is needed on how the oversight body would address the sources of information currently reported to the EU under reporting obligations, which are used to help inform compliance with international legislation. 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 is essential. This and thematic reviews may require modification of transposed EU law to ensure operability.

The European Commission has provided guidance on the implementation of EU law, such as in the form of interpretation notes, FAQs and best practice guides. Further direction on the implementation of EU law has also come from the CJEU in

judgments on infraction cases against member states brought by the EC, and in rulings issued in response to direct referrals of questions by national courts. Equivalent functions, if applied to Welsh legislation and Wales and England legislation are undertaken by various bodies and could result in a gap if there is variation in approach and decisions between different parts of the UK.

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

Any proposals for the oversight body to have the power to commission or request additional information from other public bodies should also take account of the resourcing and budgetary constraints of these public bodies. It is important that the impact of additional, unfunded work on public bodies is fully considered especially given that it is likely that majority of these commissions or requests would apply to Natural Resources Wales. This should not prevent the oversight body from properly scrutinising and challenging the application of environmental legislation. However, it would recognise the need to ensure that additional resources may be needed to sufficiently support the proposed power to commission or request additional information. A proportional approach that considers the public interest would be appropriate.

The extent of the proposed oversight body's function to scrutinise the implementation of environmental legislation should aim to be equivalent to the current extent of the European Commission's function in scrutinising the implementation of environmental legislation to ensure no regression.

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?

As noted in the consultation, it is essential that the functions of the proposed body are clearly defined and that members of the public understand the role and remit of the oversight body and the types and nature of complaints that it pursues. This will avoid conflict or duplication with the roles of other public bodies in Wales, for example, the Wales Audit Office or the Future Generations Commissioner. Any new environmental oversight body, or function, should have environmental protection as a core remit, that is the focus of its role and duties. This would help to ensure a full application of the environmental principles, environmental law and governance and would reduce the risk of a dilution or reduction in standards or focus during any transitional period. It would also make it easier for members of the public to understand the role and remit of the scrutiny body and the types and nature of complaints that it pursues.

It is important that the complaints process for members of the public is clearly defined. Currently a member of the public is able to complain directly to the European Commission, though individual complaints are not automatically investigated. It is also important that the resourcing and capacity of other public

bodies is considered as if, for example, it is necessary to exhaust the complaints procedure of a public body before complaining directly to the environmental oversight body, similar to that proposed by Defra, it may result in increased demands on resources for public bodies that are subject to oversight.

The oversight body should be able to initiate investigations into suspected serious breaches of environmental law proactively. It should be able to prioritise according to the seriousness of issues, rather than be obliged to investigate all matters equally, for example by applying a public interest test to potential cases. This will allow the most appropriate and significant issues to be prioritised. For example, by taking a proportionate and risk-based approach to managing complaints that would allow the oversight body to prioritise high risk issues; those that are time-sensitive or have a significant impact on the environment, or those that have aggregated a large number of complaints. This would help to mitigate the risk of vexatious complaints or low risk issues reducing the oversight body's capacity to respond to more serious issues.

The resourcing and expertise of the oversight body and its approach to complaints and investigations of suspected serious breaches of environmental law should be considered. As noted in response to question 12, the expertise and knowledge pool may be relatively small in Wales for some technical areas. It is important that the oversight body is sufficiently impartial and has the necessary technical expertise, therefore it may be advantageous or indeed necessary to draw on expertise from across the UK. A common framework and UK wide agreement on the overarching principles would aid this approach.

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?

The consultation highlights that the Court of Justice of the European Union (CJEU) has the power 'to impose sizable fines on Member States in breach of their obligations under EU law' and that this is not the case for current UK and Welsh environmental governance. It could be counter-productive if the Environmental Oversight Body has the power to impose substantial fines on public bodies, as it is likely to result in reduced budgets for public bodies to remedy any issues highlighted. Enforcement should focus on remedial action to rectify issues, rather than a punitive process. It is important that the oversight body has credible sanctions however it should also aim to make best use of public money.

The oversight body could play a role in enforcing Welsh Government's wider environmental targets and objectives and scrutinising delivery against specific national policy outcomes by public bodies. This would support the role and remit of other public bodies, provided that there was no overlap or duplication of functions.

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

As noted in the response to question 16, it is important that any financial sanctions powers are proportionate and supported by a wider approach focussed on remedying issues. Enforcement actions should be designed to deliver SMNR outcomes and could include a process similar to enforcement undertakings as an approach to deliver such SMNR outcomes by focusing on rectification at source. The primary purpose of an enforcement undertaking is to allow the offender to restore and remediate any environmental damage they have caused and could be applied to public bodies to promote rectification of issues as a key function of enforcement. A similar approach could be taken to rectifying processes where issues are identified.

Other

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

Yes.

As stated in the consultation, 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.

Common environmental 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 for governance underpinned by a common objective, principles and standards would help to avoid gaps in the implementation of environmental policy across the UK. An overarching 'constitutional framework' would provide a clear and consistent baseline for governments, regulators, regulated businesses and individuals. Welsh primary legislation, such as the Environment (Wales) Act 2016 and the Wellbeing of Future Generations (Wales) Act 2015, was framed in alignment with EU Environmental Principles as an overarching framework that applied to all administrations in the UK. Further clarity on the operationalisation of principles and how they should apply without a common approach to devolved and non-devolved matters may be required without an

overarching framework, particularly where transboundary impacts occur. 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.

The current wording of the UK Government's draft Environment (Principles and Governance) Bill provides exemptions from the Policy Statement under Clause 1(6) that means the environmental principles may not be applied in several specific circumstances. These exemptions include UK bodies that operate in Wales and have are potentially a regression of standards in comparison to current EC oversight. These are likely to apply in Wales unless a common set of principles or overarching constitutional framework can be agreed between UK and devolved administrations.

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

There are a number of successful UK approaches to the setting of common frameworks and standards, that could be drawn on when considering governance structures to enable and facilitate collaboration and collective decision-making at a UK level. For example, the UK Technical Advisory Group (UKTAG) on the Water Framework Directive, the UK Forestry Standard (UKFS) and the UK Common Standards Framework for monitoring of protected sites.

The UKTAG is a working group of experts drawn from environment and conservation agencies. It was formed to provide technical advice to the UK Government, devolved administrations and its own member agencies. The UKTAG also includes representatives from the Republic of Ireland. Its role includes developing environmental standards and conditions to underpin the implementation of the Water Framework Directive.

The UKFS is the reference standard for sustainable forest management in the UK. It outlines the context for forestry, sets out the approach of the UK governments to sustainable forest management, defines standards and requirements, and provides a basis for regulation and monitoring – including national and international reporting such as the aggregation and reporting of data under international legislation and to the UN. The UKFS has been developed by the forestry authorities across the UK and has involved many interested parties and the general public in a formal consultation. The UKFS has been endorsed by the UK and country governments and applies to all UK forests and woodlands.

The UK Common Standards Framework for monitoring of protected sites is a detailed set of standards – coordinated and published by JNCC on behalf of the UK statutory nature conservation agencies – for monitoring and assessing the condition of habitats and species across the UK protected sites network (SSSIs and European sites). The common standards enable the aggregation of habitat and

species condition data at a site and country level, to enable national/UK level assessments of the conservation status of protected habitats, species and earth science features.

A common framework for governance underpinned by a common objective, principles and standards would help to avoid gaps in the implementation of environmental policy across the UK. It would also help to clarify how regulators and administrations work together across the UK to manage transboundary issues, such as climate change, water quality or air pollution where a collaborative approach is essential. This approach would also clarify the role and remit of oversight bodies and regulated public bodies where devolved and non-devolved remits coincide. It would also help in developing joint responses with other UK administrations and regulators to international environmental issues and provide a framework for aggregation and reporting at a UK level under a range of international and UN environmental commitments.

RTPI Cymru
Royal Town Planning Institute
Sefydliad Cynllunio Trefol Brenhinol

Royal Town Planning Institute
Cymru (RTPI Cymru)
Studio 107
Creative Quarter
8a Morgan Arcade
Cardiff
CF10 1AF
Tel
email
Website: www.rtpi.org.uk/wales

9 June 2019

e-mail response sent to: Environmental.Governance@gov.wales

Dear Sir/Madam,

Response to: Environmental principles and governance in Wales post European Union exit

The Royal Town Planning Institute (RTPI) is the largest professional institute for planners in Europe, representing some 25,000 spatial planners. RTPI Cymru represents the RTPI in Wales, with 1,100 members. The Institute seeks to advance the science and art of spatial planning for the benefit of the public. As well as promoting spatial planning, the RTPI develops and shapes policy affecting the built environment, works to raise professional standards and supports members through continuous education, training and development.

The response has been formed drawing on the expertise of the RTPI Cymru Policy and Research Forum which includes a cross section of planning practitioners from the private and public sectors and academia from across Wales.

We welcome the opportunity to provide a submission in response to the above consultation. RTPI Cymru has closely followed the development of the environmental policies of the Welsh Government and taken every opportunity to input into consultations on policy changes. These policies are set out in planning legislation, policy and technical advice as well as other related material such as the Well-being of Future Generations Act and sustainable transport and drainage initiatives. This body of policies and procedures has been developed in conformity with European Union (EU) legislation. While RTPI Cymru will always be ready to suggest detailed adaptations, we do broadly support this existing body of environmental policies and procedures and would wish to see it provide the basis for moving forward after the UK's departure from the EU.

We recognise that a wide range of important existing environmental protections and standards are set at EU level and we urge that existing standards should not be weakened. Therefore there should be an initial presumption that all existing standards and protections

should be incorporated into UK legislation, either at the UK or devolved level as appropriate. We regard it as essential that replacement regulatory and enforcement agencies have powers and resources which are equivalent to those currently available at EU level.

We anticipate that initially some of this legislation could be incorporated at the UK or devolved level. However we urge that there should be devolution of appropriate responsibilities, repatriated from the EU to the Welsh Government at the earliest possible opportunity. This will then enable the preparation of future Wales' initiatives for fine tuning of protections, standards and procedures to meet the distinctive needs of Wales.

While we can see opportunities for detailed and innovative environmental management in Wales from the repatriation of powers from the European level we also believe that there will remain a need for close co-operation on cross boundary matters with other parts of the UK and the wider international community. There will be situations where common standards and procedures, although in a distinctive Wales' format, will be essential. We note and agree with the statement at 3.56 of the consultation document, "With the overarching context of sustainable development at the core of decision-making and the gaps in principles in Wales being significantly different to gaps elsewhere in the UK, the response to address the gaps is therefore not the same for each administration."

We also note the consultation recognises the need for UK-wide governance mechanisms for when there is an interface. We welcome this but there needs to be a mechanism to ensure collaboration is taking place and progress is being made.

RTPI Cymru welcomes this open discussion across the nations and would be pleased to participate in any further discussions or consultations. Of course, further information and clarity on the possible future relationship between Wales and UK-wide governance is required.

The consultation sets out some fundamental strategic questions relating to structures and functions. We assume that this consultation is only the start of the process and that more detailed and informed discussions take these matters further before a conclusion is reached. RTPI Cymru will be very willing to take an active role in responding to consultations or in contributing to research and working groups at all stages of adapting and developing environmental policy in Wales.

The RTPI is a member of Greener UK and has recently commissioned research on the best way to achieve high environmental outcomes after Brexit. The first phase of this research was a briefing paper which considers the impacts of Brexit on the UK's implementation of key EU directives and legislation related to land use. The final report summarises the findings from this research and presents two heuristic tools designed to inform the debate moving forward.

More detailed comments in relation to the consultation questions are set out below. If you require further assistance, please contact RTPI Cymru

Yours sincerely,

Dr Roisin Willmott OBE FRTPI
Director
RTPI Cymru

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

- Rectification at Source;
- Polluter-pays

Yes. As stated above, we recognise that a wide range of important existing environmental protections and standards are set at the EU level and we urge that existing standards should not be weakened. Therefore there should be an initial presumption that all existing standards and protections should be incorporated into UK legislation, either at the UK or devolved level as appropriate.

Question 2: Do you think there are other principles, which may also need to be included?

In addition to our comments at Q1, if a consensus agreement cannot be achieved across governments in the UK, cross-border principles may also have to be introduced. This would include, for example, a principle of non-transboundary harm and a principle of enabling engagement in environmental decision–making in cross border scenarios.

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

Public Bodies in Wales already have a sustainable development duty required by the Well-being of Future Generations Act 2015.

Further information and understanding is required on how the proposed extended duty would work in practice, including frameworks, processes, procedures and resources.

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

See above. Further information and clarification is required not only in relation to the proposed extension of the duty, but also in relation to the public bodies with devolved competence. In some cases little is known about these bodies.

<u>Accountability</u>

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

The gaps identified in the consultation document are critical and need to be addressed. RTPI Cymru has not identified any gaps other than those identified in the consultation.

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

RTPI Cymru would support a UK-wide independent watchdog with the ability to enforce appropriate sanctions. With this in place it is considered that existing accountability bodies such as Natural Resources Wales, etc could provide the necessary new environmental governance structure for Wales. However, in the absence of an acceptable UK-wide watchdog, a specific oversight body for Wales would be required to provide the governance structure.

The risks associated with different approaches being adopted in the different UK administrations, and the risk of greater divergence of legislation within the UK, as well as between the UK and the EU, will be important considerations in practice.

Environmental matters transcend national boundaries within the UK and indeed beyond the UK. Structures which are set by individual national parliaments/assemblies would be much easier to alter with changes of government in any of those forums and may be weakened; a single body which is set up to operate across the UK is likely to endure much longer, as those agreed across the EU have. Therefore the RTPI believe there should be an overarching framework on environmental matters which applies across all jurisdictions of the UK and should be supervised by a single body, with the ability to engage with each of the devolved administrations, and to enforce appropriate sanctions, arising from agreement between the four jurisdictions.

The appropriate resourcing of either existing bodies or a new oversight body would be vital to the success of the future governance of environmental matters in the UK and Wales.

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

For effective scrutiny of government performance a newly established UK wide watchdog should be independent, clear in its remit, durable and statutory. The body needs to be able to survive a change in Secretary of State, or Government, and needs to have its own chair independent of government.

In order to ensure the principle of durability is maintained in operation, the establishment of a UK-wide body would be beneficial, but with appropriate representation in its governance from each of the devolved nations. A set of formal and ambitious environmental goals, targets and standards should be pursued, linked to clear time frames, against which implementation could be monitored and, if required, enforced.

In spatial planning, a new environmental watchdog should be able to hold the devolved governments to account in the design of the planning system. The European Commission did so in 2005, ruling that the UK Government had failed to apply the Habitats Directive to plan making (in all UK jurisdictions). It could furthermore advise on new planning policy, retaining and reinforcing the status of environmental goals in the making of development plans and development decisions.

A UK watchdog must be able to impose penalties, including fines. This has proved, during the UK's membership of the EU, one of the powerful levers to secure action from governments.

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

No comment

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

No comment

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

No comment

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

See comments at Q7.

To be fully independent, members of the oversight body must be independent of any public environmental organisations that it could potentially scrutinise and enforce against, to have any public credibility.

There is a perception that as the pool of suitably competent resources in Wales is quite small, the same people could move from serving one environmental organisation/public body to another. As a result impartiality could become an issue and possibly difficult to demonstrate. Issues such as this should be fully considered at the outset.

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

See comments at Q7.

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

See comments at Q7.

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

No comment

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?

No comment

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?

No comment

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

No comment

<u>Other</u>

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

While we support a single body working across the devolved nations, we recognise that it is likely to be a challenge to get the agreement of all four administrations, which doesn't result in significant compromise. It is important to ensure that all four of the devolved administrations have equal influence.

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

No comment

Environmental Principles and Governance in Wales Post European Union Exit

Consultation response form

Your name:

Organisation (if applicable):Bat Conservation trust

e-mail/telephone number

Your address:

Responses should be returned by **9 June 2019** to

EU Exit & Strategy Unit
Department for Energy, Planning and Rural Affairs
Welsh Government
1st Floor East, Cathays Park 2
Cardiff
CF10 3NQ

or completed electronically and sent to:

e-mail: Environmental.Governance@gov.wales

Environmental Principles

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

Yes.

If and when the United Kingdom leaves the European Union it will leave behind the underlying principles of Article 191 the Treaty of the Functioning of the European Union (TFEU) and in particular 191(2) that applies to the institution of the EU:

> *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 shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.*

BCT recognises that the Welsh Government has already 'operationalised' the prevention and precautionary principles within in the SMNR approach however it is our view that the four key environmental principles in Article 191(2) should be explicitly placed in a set of over-arching principles that should apply to all a public bodies when exercising any of their functions, so far as they may be affected by the exercise of those functions.

BCT does not have expertise at constitutional law however two options that could be considered are to amend the Wales Act 2017 with respect to the functioning of the Welsh Government, and\or changes to the Environment (Wales) Act 2016 with respect to all public bodies and Ministers. This approach would reflect Article 11 (TFEU) that sets out an all-encompassing legal duty to integrate environmental protection requirements in the policies and activities of the European Union (EU).

This approach would make the Principles clear and unambiguous which we believe the current approach of operationalising the prevention and precautionary principles within in the SMNR approach has not achieved. They will need to be easily interpreted by bodies that must implement them as part of their duties.

Question 2: Do you think there are other principles, which may also need to be included?

The UK Government is committed to legislating for an additional five principles in its Draft Environmental (Principles and Governance) Bill:

- Principle of sustainable development
- Principle that environmental protection requirements must be integrated into the definition and implementation of policies and activities
- Principle of public access to environmental information
- Principle of public participation in environmental decision making
- Principle of access to justice in relation to environmental matters

These are a mixture of accepted EU principles and rights linked to the Aarhus Convention.

BCT acknowledges that the Welsh Government has already legislated for sustainable development through the Well-being of Future Generations Act 2015.

What is currently proposed by the UK Government has the potential to deliver a principles and governance structure which could be stronger than that which currently exists in Wales, or that which is proposed in the consultation.

It is therefore disappointing that this consultation does not consider how these additional rights will be upheld in Wales. As a result, there is a risk that Wales will fall behind the rest of the UK in the strength and scope of its environmental ambitions, objectives, principles and rights as a result of our departure from the EU.

Whilst the UK will not cease to be a signatory of the Aarhus Convention as a result of leaving the EU, this does not prevent the Welsh Government from representing these rights in primary legislation and we would encourage it to do so as a statement of intent. This could be done through a Bill of Rights that would cover aspects such as right to access to information and environmental justice, as well as any new additional rights such as for example, a right to healthy environment, and a principle of non-regression. BCT would recommend that this latter principle should be incorporated as it is consistent with the aims and goals of sustainable development and the Well-being of Future Generations Act 2015.

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

Yes.

BCT would agree that incorporating the missing principles into SMNR would fill the gaps that is currently present however, we repeat our belief that the four core principles must be explicitly placed in a set of over-arching principles that should apply to all a public bodies when exercising any of their functions, so far as they may be affected by the exercise of those functions. These could then be further expressed in the principles of SMNR through amendments to the Environment wales Act 2016

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

BCT's view is that the duty should apply to all Public Bodies operating in Wales. We note that the devolution settlements places constraints on the Welsh Government that would mean that Public Authorities would not be included so this will need to be addressed to avoid different approaches within Wales.

It may be expedient to consider widening the scope to public-body/private-sector coalitions.

Accountability

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

Yes, however we would point out that under 'enforcement mechanisms' the EU's powers also include the rectification of damage caused by the offence. This is a vital aspect of the EU's enforcement mechanisms and its loss would be a significant regression.

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

BCT is quite clear that none of Wales' existing public bodies, as identified by the consultation, meet the criteria for a successful governance body. These are independence, resourcing, the right environmental expertise and having the 'teeth' to enforce environmental law.

This does not mean that an existing body could be changed to properly deal with this, however we believe that the resources needed to do this would effectively mean creating a new body anyhow and it will be vital for any new watchdog\regulator to have a clear role and for that not to be mixed up with their existing areas of interest.

Although both Natural Resources Wales and the Welsh Government have their own complaints procedures, neither have the independence to perform the additional functions that are currently undertaken by the EU. Furthermore, Natural Resources Wales could themselves face complaints.

We also recognise that there are other important scrutiny mechanisms currently undertaken by the National Assembly for Wales Committees, Wales Audit Office, Office of the Future Generations Commissioner and the Public Services Ombudsman. However, whilst all of these mechanisms will still be required, they do not provide equivalent enforcement functions with the EU Commission. Nor do they provide an equivalent citizen complaints mechanism, which is finance and liability-free, and which has the breadth of scope and the level of access to environmental expertise that the Commission can provide.

Replacing these EU Commission and CJEU functions with these existing Wales bodies would be wholly inadequate.

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

BCT broadly agrees with the role and objectives for a new body, and that the scope should be all-encompassing, and that the body should have a clear role and remit, with no overlap or duplication with the functions of existing bodies.

However we are left wondering why the consultation has included an advisory role on SMNR for public bodies which we see is a role for Natural Resources Wales and \or the Office of the Future

Generations Commissioner. This has the potential to bring conflict between the two bodies and we would therefore question if this is considered as a role for the new body.

BCT would strongly support the body producing guidance.

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

BCT considers that the scope of new governance arrangements should include all policy areas which have an impact upon the environment, e.g. economic, transport, social and health policies.

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

Yes but only in part. This does not cover Public Authorities that fall outside the scope of devolved competencies.

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

We note that the devolved constraints placed on the Welsh Government that would mean that Public Authorities would not be included. This will need to be addressed otherwise this result in different approaches within Wales.

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

BCT agrees with the proposal to make any new body transparent, accountable to the National Assembly for Wales that is independently audited, and independent of Government with regard to appointments and funding.

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

BCT has concerns, as already expressed in our response to question 7. Provision of advice appears to cross over with the duties of both Natural Resources Wales and the Office of the Future Generations Commissioner. This has the potential to bring conflict between the two bodies.

There is a natural risk in this respect that the body could be placed in a position where it is taking enforcement action against a body it has previous advised. For instance, we are aware of cases

where within NRW, internal advice has been ignored by departments. BCT is not confident that internal procedures would prevent this from happening.

We are also of the view that the body should not get side tracked in generating advice but should focus on its regulatory functions.

However, we note that the EU's DG Environment, undertake 'advisory' roles through various mechanisms such as training packages, publications, provision of guidance, and reports. Should it be considered that a new body should act be able to act in an advisory capacity, then this role should be clearly defined to avoid duplication with other advisory bodies.

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

We agree that an oversight body has to be able to scrutinise the implementation of environmental legislation.

Consideration will need to be given about extending this role to non-environmental legislation only if it can be shown to have an impact on the environment perhaps by way of referral from National Assembly for Wales or where evidence indicates that

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

- Oversee implementation in Wales of all domestic environmental law (adapting the definition from the Environmental Information Regulations), regardless of whether originally domestic or retained EU law
- Monitor compliance by the Welsh Ministers; Public Bodies & Authorities in Wales; business and other actors.
- Enforce environmental law by initiating investigations into possible breaches and responding to complaints from citizens and civil society organisations.
- Identify and act on breaches, with the application of appropriate remedies and sanctions (including legal and financial sanctions).
- Review and report information regarding both the state of the natural environment in Wales and performance against policy objectives.
- Publish environmental information fully and transparently.
- Engage with planning decisions that raise issues of a significant and strategic nature.
- Play a role in overseeing compliance with international environmental agreements in Wales.

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?

- Investigate potential breaches of environmental law in Wales.
- Consider and investigate citizen complaints about breaches of environmental law in Wales from members of the public.
- Require assistance from relevant bodies in the examination of investigations.
- Issue advisory notices for failure to implement environmental law in Wales, and identify corrective action.
- Issue a Reasoned Opinion or Binding Notices requiring breaches of environmental law in Wales to be remedied and setting out how this is to be remedied (for example through the publication of action plans, the implementation of certain policies or compensation payments).
- Where offenders do not comply with RO\BNs, they should refer cases to the Supreme Court with the Supreme Court being able issue punitive fines or put in place special measures. These could also include structural injunctions setting out the steps needed to be taken by a public body to comply with a binding notice issued by the new body.
- Fund litigation in Wales, or related to Wales, and other activities relating to its functions.
- Issue interim measures and stop notices to prevent irreversible environmental damage.
- Accept enforcement undertakings (an offer or promise to carry out certain activities, made by the regulated entity to the regulator in charge of enforcement, as an alternative to a criminal charge or other administrative sanctions). The details of such undertakings would be publicly available.
- Apply remedies similar to those under the Environmental Liability Directive, such as preventative measures, remedial action and compensatory measures.
- Undertake formal investigations into potential breaches of environmental law in Wales (including an own-initiative power in keeping with the majority of ombudsman schemes).
- Conduct inquiries into systemic problems in particular Welsh policy areas and make recommendations to the Welsh Government, including in relation to any policy changes that may be necessary as a result.
- Require information from bodies where this relates to an issue relating to the Welsh environment, especially where this relates to information that may be commercially sensitive or not in the public domain.
- Produce public reports on compliance with international law in Wales, and any other matter it thinks is important (respecting the devolution settlement).
- Ability to conduct investigations into any body within its remit without a complaint being raised.

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?

We consider that a new body should have informal and formal enforcement methods akin to those available within the EU.

These processes need to be responsive to the scale and severity of the case at hand, with swift action being taken to stop any damaging action while a longer investigation can be conducted.

Whatever methods are used, they should be transparent and open. As this is a matter of public interest, all complaints should be openly reported with relevant details of the case and progress within the case.

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

Environmental enforcement procedures are currently weak in Wales, with enforcement in response to agricultural pollution events being a case in point. Experience has also shown that whilst the legislation has helped in many cases, the application of penalties is poor, inconsistent and not of suitable level to deter future offences.

There are 3 keys areas that should be put in place:

- the power to require damage to be corrected by the polluter,
- for interim measures to be put in place to prevent additional harm while investigations are being conducted.
- the power to refer matters to the Supreme Court – we do not believe that the mechanism of Judicial Review is sufficiently robust. There is also an additional role for financial penalties to be levelled against guilty parties. While our priority is that damage is prevented, experience of the current system has informed us that financial penalties are a significant deterrent (if not the principle deterrent to public bodies) against poor decision making and policy setting. We believe these should be an enforcement action available to any new body. Such penalties must be of sufficient gravity so as to render them meaningful.

Other

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

BCT's view is that because the UK is the member state for international obligations, and any future trade agreements will need to have a high degree of conformity both within the UK and between the UK and trading partners, it will be vital to ensure that there is alignment between the devolved administrations and the UK Government.

There is a scope for alignment between the nations of the UK were there to be core principles agreed, and an overarching objective to improve the environment, but each were free to pursue a slightly different approach to achieving that objective at an operational level.

Given that the environment does not respect borders it is logical that there should be a shared set of common environmental principles across the UK that brings benefits. It would be especially advantageous given the current devolution settlement and the scope of the proposed UK Bill on reserved functions in Wales, providing coherence of approach. This would also be in keeping with EU approach of subsidiary as one of the five overarching principles of EU law.

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

BCT understands that the current devolution settlements were made within the context of the UK's current membership to EU and that these settlements have now created a problem that was previously not envisaged. In addition to this, Wales' legal system is intricately tied up with that of England.

We are also mindful that UK is the member state for our environmental international obligations and that certain aspects of the environment can often be cross boundary. We also look at the ecological units that any regulatory body would cover ie Northern Ireland and Eire, Scotland with England, and England with Wales or even England Scotland and Wales.

However our position is to consider, first and foremost, what is necessary for the environment.

Whilst we can see clear advantages in a Wales only body being accountable to the people of Wales, however we see no good reason why a pan UK regulatory body should not cover the four countries of the United Kingdom whilst still being accountable to the devolved parliaments, and taking account of devolution settlements.

A single body would have clear advantages in economies of scale, robustness and be able to take a UK perspective thereby achieving consistency between countries whilst respecting country approaches. This body would need to be co-owned and co-designed by all four UK governments.

However, if this is not possible, then we believe a new Welsh body that collaborates closely with its UK counterparts, and which has access to a clear dispute resolution mechanism when dealing with cross-border issues, will be necessary.

Environmental Principles and Governance in Wales Post European Union Exit

Consultation response form

Your name:

Organisation (if applicable): Public Health Wales

e-mail/telephone number:
Your address:

Responses should be returned by **9 June 2019** to

EU Exit & Strategy Unit
Department for Energy, Planning and Rural Affairs
Welsh Government
1st Floor East, Cathays Park 2
Cardiff
CF10 3NQ

or completed electronically and sent to:

e-mail: Environmental.Governance@gov.wales

Environmental Principles

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

Public Health Wales agrees that the precautionary principle is a key pillar of EU environmental guidance. Although the Environment Act draws on existing EU legislation the precautionary principle is not, however, explicitly specified in the Environment Act. The precautionary principle is a key distinction between the UK/EU and US approach to trade policy, which they refer to as 'non-science based restrictions and requirements' and it is one which the US is seeking to change in any future trade agreement(s) with the UK.

Consequently, Public Health Wales is of the view that there is a need for an explicit statement of adoption of the precautionary principle in key environmental governance and legislation in Wales to safeguard against any future potentially detrimental impact of trade agreements with other nation states.

Question 2: Do you think there are other principles, which may also need to be included?

No comment

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

No comment

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

No comment

Accountability

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

No comment

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

No comment

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

No comment

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

No comment

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

No comment

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

No comment

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

No comment

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

No comment

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

No comment

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

No comment

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?

No comment

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?

No comment

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

No comment

Other

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

No comment

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

No comment

OIL&GAS UK

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Telephone
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EU Exit & Strategy Unit
By Email: Environmental.Governance@gov.wales

07 June 2019

Dear Sir / Madam

Re: Consultation on Environmental Principles and Governance in Wales

OGUK is the leading representative organisation for the UK offshore oil and gas industry. Our membership includes around 400 organisations with an interest in the UK's upstream oil and gas sector. As the champions of industry, we work on behalf of the sector and our members to inform understanding with facts and evidence, engage on a range of key issues and support the broader value of this industry in a changing energy landscape. While offshore oil and gas production is a reserved matter, our members companies also operate under the Welsh government authority, and are therefore keen to understand the post-EU exit arrangements regarding environmental principles and governance in Wales.

The regulation of offshore oil and gas is the responsibility of the UK government, and therefore out of scope of this proposal. However, our members' onshore activities fall under the remit of the devolved governments.

OGUK supports the introduction of a duty to have regard to the four EU environmental principles following an exit from the EU. It is essential that environmental policy and legislation is designed to deliver environmental benefit, and scrutiny of such policy and legislation against defined environmental principles can help ensure this is the case.

The continuation of the four EU environmental principles will meet the declared purpose of maintaining effective environmental governance. Where the UK is a signatory to conventions containing other environmental principles, it might be practical to include those in the same legislation, but it is noted that only the legal status of the four principles from European law would be affected by an exit from the EU.

There are many statutory consultees and competent authorities who have a role in regulating industry's environmental performance, some of which are the responsibility of the Welsh government, and some of which are the responsibility of the UK government. Industry's position is that a consistent approach to environmental governance is of benefit to all, including in monitoring and measurement and scrutiny of government performance.

Whichever policy areas are included in the scope of scrutiny arrangements, consideration should be given to ensuring that monitoring and measuring arrangements minimise the additional collection and reporting responsibilities placed on industry, and that existing data is used wherever possible.

Any future scrutiny arrangements must ensure the appropriate level of technical capability in the area under review. In addition, there must be a clear and robust separation of responsibilities to ensure independence is maintained, as well as a clearly defined boundary between the role of the relevant competent authorities and the role of those assessing their performance.

The offshore oil and gas industry welcomes the extension of existing environmental protections and the government's stated ambition to maintain or exceed the levels of environmental regulation and governance following an exit from the EU.

Thank you for the opportunity to participate in the consultation.

EnvC 67/19

Response to Welsh Government Consultation on Environmental Principles and Governance in Wales Post European Union Exit

7 June 2019

About Energy UK

Energy UK is the trade association for the GB energy industry with a membership of over 100 suppliers, generators, and stakeholders with a business interest in the production and supply of electricity and gas for domestic and business consumers. Our membership covers over 90% of both UK power generation and the energy supply market for UK homes. We represent the diverse nature of the UK's energy industry – from established FTSE 100 companies right through to new, growing suppliers and generators, who now make up over half of our membership.

Our members turn energy sources into electricity for over 27 million homes and every business in Britain. Over 680,000 people in every corner of the country rely on the sector for their jobs, with many of our members providing long-term employment as well as quality apprenticeships and training for those starting their careers. The energy industry invests over £12.5bn annually, delivers around £84bn in economic activity through its supply chain and interaction with other sectors, and pays £6bn in tax to HM Treasury.

Executive Summary

Energy UK welcomes the opportunity to provide this submission to the Welsh Government's consultation on environmental principles and governance after Brexit. This response has been developed by our Planning Sub-Committee and Environment and Climate Sub-Committee.

We welcome the proposal to introduce the EU environmental principles that would not continue to be in place post EU Exit into Welsh primary legislation and recognise the value that this long-term measure could provide to Welsh Government, the environment and industry alike.

We welcome the opportunity for stakeholders to help shape the future direction of environmental compliance in Wales. Given the importance of this area, it is appropriate to consider this matter fully and we welcome Welsh Government's commitment to ensuring the process to develop a solution is fair, open and transparent for all stakeholders, is effective and proportionate in delivering strong environmental principles and governance arrangements; and also takes account of specific Welsh circumstances and established methods of accountability.

Although Energy UK recognises that the Welsh Government's starting point is different from that of the rest of the UK, we would encourage the Welsh Government to work with the UK Government, and the other Devolved Administrations, with a view to exploring the scope for a joined-up approach in this important area of environmental protection. From our viewpoint, we would welcome an approach that could offer a high level of consistency on environmental policies and enforcement across the UK in order to ensure a level playing field exists across the UK.

In this context, we would highlight the need to undertake a much more detailed gap analysis and mapping exercise to appraise the existing landscape and determine the various environmental governance mechanisms or gaps across the public sector that will be missing in Wales, and the UK as a result of leaving the EU, taking into account the wider sustainable development goals. A key objective of such a mapping exercise will be to ensure that the responsibilities and regulatory powers to be taken on by any new governance arrangements do not replicate and/or overlap with the existing

environmental responsibilities and regulatory powers of other public bodies such as Natural Resource Wales. In addition, the new arrangements or new oversight body should not replicate, but work in harmony, with the existing regulatory framework including the Well-being of Future Generations (Wales) Act and the Environment (Wales) Act.

We would be happy to discuss any of the points made in further detail with Welsh Government or any other interested party if this is considered to be beneficial.

Response to Questions

Question 1: Do you agree the following principles [Rectification at Source/Polluter Pays] should be included within legislation for Wales?
We welcome the proposal to include the principles of environmental protection within legislation. It is especially important to include the principles within Welsh legislation given the concerns expressed by MPs that the EU environmental principles may be weakened in UK law post EU-Exit. The energy sector in the UK has worked in alignment with the European environmental principles for some time, with these principles deeply embedded in the current legislative and regulatory framework – as an example the Industrial Emissions Directive is transposed into UK law via Permitting Regulations and is implicitly based on the EU Environmental Principles. We would therefore ask that the inclusion of these principles into legislation at a national level is done in a way that ensures the intended meaning of the principles as used in EU policy development is properly captured to ensure a consistent approach for industry.

Energy UK has concerns around the fact that it was unclear if the definitions for polluter and pollution are being considered in the wider context of use and depletion of natural resources to fit with the overarching sustainable development.

An issue raised in the 2014 'Utrecht Legal review of the Polluter Pays Principle'[1] highlights the issue of how multi-party causation is addressed. Although the Polluter Pays principle seems to provide an easy answer to the question 'who is responsible for the cost of environmental measures?' (i.e. the polluter), this easy answer might not be enough in cases where pollution is caused by a multitude of polluters. It may be sensible to consider that (inter)national environmental issues such as water pollution or air pollution, require a joint effort by all categories of polluters and a common governance approach across Devolved Administrations. It would be useful to understand how transboundary co-operation will be included within the implementation framework

Question 2: Do you think there are other principles, which may also need to be included?
Although environmental principles are important in providing a consistent framework, these need to be considered alongside other principles and wider social and economic considerations. Environmental policy-making needs to be evidence-based, risk-based and proportionate - taking into account the costs and benefits of a policy or regulatory proposal.

It might also be prudent to include international and national co-operation as a principle to assist policy formation.

Question 3: Do you agree the duty to pursue sustainable management of natural resources and the application of the SMNR principles should be extended?
Yes, Energy UK acknowledges that gaps would result from a transfer of responsibilities and would therefore support the extension of the duty to apply to additional Welsh public bodies in order to align objectives and provide a consistent basis for managing Wales' natural resources and enable collective decision-making.

[1] Lindhout, P.E. and van den Broek, B., 2014. The Polluter Pays Principle: Guidelines for Cost Recovery and Burden Sharing in the Case Law of the European Court of Justice. Utrecht Law Review, 10(2), pp.46–59. DOI: http://doi.org/10.18352/ulr.268

Question 4: On which Welsh public bodies, within devolved competence, do you consider a duty to pursue SMNR should apply?
Energy UK supports such a duty applying to all Welsh public bodies.

Accountability

Question 5: Do you agree with the gaps identified, or do you consider there are other gaps, which need to be considered?
Energy UK agrees with the gaps identified. Given that the EU Commission and CJEU will no longer be able to hold the UK or Welsh Government to account on environmental matters after the UK leaves the EU, we consider it important that any new governance structure has a remit to hold the Welsh Government to account. To meet this important responsibility, a new body would need to be fully independent, armed with the necessary powers and adequately resourced with funds and experienced staff.

The development of the new Welsh governance structure should be aligned with the development of the Office for Environmental Protection to ensure consistency across the UK.

We would however appreciate and welcome further clarification on transboundary consultation and how that will be implemented following exit from the EU.

Further consideration should also be given to establish cooperation arrangements between UK regulators and EU regulators, and to participate in discussions with key EU agencies in order to maintain high environmental standards.

Question 6: What role should existing accountability bodies provide in a new environmental governance structure for Wales?
Energy UK considers that existing accountability bodies based on primary legislation should provide either no or a limited role in a new environmental governance structure for Wales in order to avoid duplication.

Question 7: Is the outlined role and objective appropriate for a body responsible for overseeing the implementation of environmental law in Wales?
It is fundamentally important that additional governance arrangements have a clearly defined scope and do not duplicate or contradict existing arrangements. For example, the scope as described seems to overlap with some of the duties of NRW with regard to the implementation of legislation so new proposals will only work if some of the existing functions with NRW are transferred to any new body.

Question 8: Which policy areas should be included within the scope of new governance arrangements?
We agree with the proposed policy areas to be included and note that the scope of a potential additional governance body includes climate change (in contrast to the UK Government proposals for the Office of Environmental Protection). We agree that there are benefits in taking climate change drivers into account; it is fundamentally important that an integrated “joined up” approach is taken to different policy drivers. However, we would suggest that further consideration of the respective roles of the new body and those of the Committee on Climate Change is required to ensure there is not duplication.

Question 9: Do you consider the proposed list of bodies to be appropriate?
In our view the focus should be on replacing the accountability functions removed by the UK’s exit from the European Union. As such the remit should be to hold Welsh Government, and the proposed list of bodies outlined in the consultation document, to account similar to the role undertaken by the EC. Including any other bodies should be carefully considered as it potentially duplicates existing responsibilities and does not align with the principles of good regulation. It could also increase regulatory uncertainty and consequently the appetite for investment.

Question 10: Do you consider there are other Welsh bodies, which should also fall within the remit of an oversight body?
In the interests of avoiding duplication of responsibilities and functions, Energy UK considers that there are no other bodies which should fall under the remit of an oversight body.

Question 11: What should be the status, form and constitution of an oversight body?
The oversight body should be able to scrutinise government and its performance in relation to all environmental law, including those laws that are brought into force at a future date.

However, an oversight body should not act as an enforcement body nor should it scrutinise new statutory proposals and policy on behalf of Government where there is direct conflict with its role. Clarity is needed on what such an oversight body could ultimately hold Welsh Government and bodies accountable for. Furthermore, strong links across all UK bodies will be key in order to achieve consistency across all regions of the UK.

Question 12: Should an oversight body be able to act in an advisory capacity?
A new oversight body could potentially act in an advisory capacity if the governance structure is set up in such a way to provide independent comment and does not conflict with its overall function and delivery of its role.

Question 13: Should an oversight body be able to scrutinise implementation of environmental legislation?
Currently, EU-derived environmental law, even once transposed into UK and devolved domestic law, remains under the jurisdiction of the EC and the Court of Justice of the European Union (CJEU). As such, we would expect this legislation to be overseen by new arrangements, such as an independent body, on exit from the EU in keeping with our overarching principle that any new arrangements should solely replace the European institutional deficit.

Question 14: What should be the extent of this function?
As flagged during the consultation phase leading up to the creation of the Office for Environmental Protection by UK Government, our members consider that any role created or new body should have legal power equal to that of the EU institutions it is replacing. As such, whether the Welsh Government decides to create a new function for an existing body or a new body entirely, both should have the ability to take Government to court, in the same way that the EC can refer an offending Member State to the CJEU.

Nevertheless, we consider that the scope of the proposed arrangement should be clearly set out in the new duty in order to avoid the risk of unintended 'regulatory creep'. The duty should specify a focussed and well-defined remit of any new scrutiny arrangements to hold Government to account whilst also ensuring certainty and stability for business.

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?
It is also important that while appropriate open, fair and free of cost governance arrangements should be put in place to scrutinise and allow challenge of Government actions, these should not create a system that is open to misuse by individuals who disagree with a decision, as a means to frustrate development.

The oversight body should have discretion as to whether to act and need only act on a proportionate basis.

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?
Energy UK considers that any approach to enforcement must be focused, in the first instance, on the implementation of positive environmental outcomes. We would urge caution against any

method considering the use of fines against the Welsh Government, which could see communities suffer if measures are introduced to allow Government to recoup the cost of any fines, which ultimately see communities or society as a whole, paying for them.

With particular regard to enforcement, consideration should be given to the potential role of mediation and arbitration in order to drive a solution-based approach which delivers the best possible environmental outcomes which are deliverable within reasonable timescales. To this end, any enforcement action should be clear and have a set timeline, or at least confirmation of when an enforcement action is closed.

We would welcome the new body developing and publishing a policy which provides guidance of the types of cases it is likely to investigate and, if necessary, take enforcement action. This will assist in a greater public understanding of its role and focus.

Question 17: What enforcement actions do you consider need to be available?
It is suggested that as enforcement actions will be transferred in the first instance in the UK Withdrawal Act, these actions can be subsequently reviewed once transferred as to whether they and others need to be included.

Other

Question 18: Would there be advantages in having a shared core set of common environmental principles?
The electricity market operates across the UK as a whole and therefore we would encourage the Welsh Government to work with the UK Government, and the other Devolved Administrations, with a view to exploring the scope for a joined-up approach in this important area of environmental protection. From our viewpoint, we would welcome an approach that could offer a high level of consistency on environmental policies and enforcement across the UK in order to ensure a level playing field exists across 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?
We strongly believe that, as far as is possible, UK-wide mechanisms for the application of principles and for oversight and governance would help with ensuring optimum environmental outcomes are achieved and delivered effectively and efficiently.

In our view, a single UK-wide oversight body would be fundamental in facilitating this. Although the Devolved Administrations have different legal structures, the oversight body could be designed to accommodate this and a single body would by definition ensure co-ordination. However, as a minimum, an individual body should work to ensure they act consistently.

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7 June 2019

Dear Sir,

ENVIRONMENTAL PRINCIPLES AND GOVERNANCE IN WALES POST EUROPEAN UNION EXIT

Thank you for consulting on ways to address the environmental governance gaps that you anticipate will be left when the UK leaves the EU. Dŵr Cymru was pleased to take part in the workshop you hosted in Cardiff which we found very helpful.

These comments are from Dŵr Cymru Welsh Water, the statutory water and sewerage undertaker that supplies over three million people in Wales and some adjoining parts of England. We are owned by Glas Cymru, a single purpose, not-for-shareholder company. We provide essential public services to our customers by supplying their drinking water and then carrying away and dealing with their wastewater in a sustainable manner, one which protects our environment. In this way we make a major contribution to public health and to the protection of the Welsh environment. Our services are also essential to the sustainable economic development of Wales.

The Ministerial foreword in the consultation paper specifically acknowledges the benefits to Wales of cleaner beaches and drinking water, as well as the reductions in environmental pollution that have been delivered as a direct result of the implementation of European legislation. Dŵr Cymru is very proud of the contribution we have made over the years to these success stories.

We continue to invest our customers' money on ways to reduce, still further, our environmental impact and to enhance the resilience of our water supplies. Like the Minister, Dŵr Cymru does not seek reductions of current environmental standards and, for example, our business investment plan for 2020-2025 has been prepared on that basis.

Under current European governance arrangements, it is Member States – that is, national

governments – that are held to account by the European Commission and Court of Justice of the European Union. It is, in turn, for each of those governments to ensure that their territories comply with relevant European obligations, including those relating to the environment. This system of accountability is long established, transparent and well understood.

It follows that the main governance gap resulting from the UK's departure from the European Union will be a credible mechanism for holding governments to account. Dŵr Cymru would therefore not expect water companies to be directly answerable to any new bodies established to fill this governance gap. Instead, we assume that relevant obligations will continue to be applied to us through decisions and determinations made by government and its regulators: that is the current longstanding arrangement and it works well in practice.

To put it another way, the Welsh Government must avoid unnecessary duplication with existing domestic regulators who already enforce compliance by private companies, including statutory undertakers like ourselves.

Dŵr Cymru is already closely regulated. The Water Services Regulation Authority (or "Ofwat") is our economic regulator; our public water supplies are regulated by the Drinking Water Inspectorate; while our environmental impacts are regulated by Natural Resources Wales (NRW), the Environment Agency and/or Natural England.

If business in Wales is to thrive, it needs to operate within a transparent regulatory environment. So, for example, we urge you to ensure that the establishment of a new oversight body does not lead to any blurring or potential duplication of roles between regulators: the different tiers of environmental governance must have distinct and transparent functions.

Dŵr Cymru, like all sectors of industry, needs confidence about the obligations that are likely to be placed upon us in the future. Ofwat sets our price limits on a five year cycle, so we must be able to predict with reasonable certainty the investment expected of us during that timeframe if we are to be able to plan accordingly. Being the supplier of essential services brings with it additional responsibilities: we therefore try to plan for the longer term to ensure that our services to customers are resilient in the face of pressures such as population growth and climate change as well as future regulatory requirements. It follows that in shaping the future regulatory architecture you will need to be mindful that any uncertainty risks damaging business confidence in Wales.

Another priority should be ensuring that the new structure does not introduce the potential for additional delays in regulatory decision-making processes as this would also hamper potential development.

As a customer focused company, we always try to keep our charges affordable for all our customers. We would like to see a commitment to ensure that proportionality and affordability are at the heart of future environmental regulation in Wales.

Another outcome that we would welcome would be if the new oversight body ensured that there is a level regulatory playing field. For example, the (over £1billion) investment that Dŵr Cymru has made on coastal water improvements is the main reason why Wales now has so many award winning beaches. However, we know that other sectors, notably agriculture, also have a significant impact. Achieving regulatory fairness and even-handedness should be one of the overarching objectives of the new regime.

The relevant organisations must be adequately resourced if the new regime is going to work. As well as the requisite funding, the new oversight body will need the right legal and environmental skill sets. NRW will also need to be resourced so that it can fulfil its obligations and avoid being the subject of a disproportionate volume of complaints.

Environmental regulation is a function that has long since been devolved in Wales. Dŵr Cymru actively supports the delivery of the Welsh Government's distinct environmental agenda, including the landmark Environment and Well-being of Future Generations Acts and we respect your wish to establish post Brexit governance arrangements that are tailored to meet Welsh needs. However, it would be helpful for cross border organisations like ourselves if there was some underlying consistency between the approaches adopted in Wales and England to delivering the environmental commitments given in the Brexit leave agreement, as and when it is finalised.

I am copying this letter to your colleagues in the Welsh Government's Water Branch.

Yours faithfully,

Tony Harrington

Director of Environment

Cyswllt Amgylchedd Cymru

Wales Environment Link

The network for environmental, countryside and heritage NGOs in Wales

Environmental Principles and Governance in Wales Post European Union Exit

June 2019

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

WEL strongly agrees that the principles of 'Rectification at Source' and 'Polluter-pays' should be included within primary legislation for Wales.

The consultation acknowledges the limitations in scope of those principles that it considers to already be represented in Welsh legislation, and proposes a way to widen this scope, which we will comment on under question 3. Currently the four core environment principles do not exist in isolation and hold an overarching and legally enforceable status across the European Union. To ensure non-regression of current environmental standards, it is critical to consider how the two additional principles should be included in primary legislation and how they relate to other principles.

WEL is concerned that the proposal to simply introduce the rectification and polluter-pays principles risks an inconsistent approach being taken to the four, as a whole, in Welsh legislation. This is because Welsh legislation does not currently include the prevention and precautionary principles in a way which is consistent with their current clarity, scope and legal strength under the EU, as neither hold a sufficiently overarching or legally enforceable status.

Our concerns include:

- The precautionary principle at EU level clearly encompasses potentiality - which reflects the approach at the heart of the precautionary principle - namely that scientific uncertainty should not be a reason to avoid taking action. The Welsh approach, with its reference to preventing significant damage cannot be clearly understood to do this.
- The SMNR principle (h) refers to taking action to prevent significant damage to ecosystems. The inclusion of significance further narrows the application of the prevention principle as it is not equivalent to preventing damage to the environment. Moreover the current Welsh legislation does not explicitly name the precautionary principle which we consider necessary for clarity.
- We are doubtful that the reference to ecosystems is sufficiently broad to cover all aspects of the environment given that the environment is not defined within Welsh legislation – which instead talks in terms of Natural Resources.

When the Well-being of Future Generations and Environment (Wales) Acts were being developed WEL members, as part of the SD Alliance, argued for the inclusion of these principles. However, at the time we were informed that to do so would be duplication and that the Acts needed to operationalise the principles as part of an overarching EU framework. Without this overarching

framework it is difficult to see how the content of these Acts alone is now sufficient to ensure non-regression.

For genuine non-regression to be secured, it is essential that all four principles are clearly articulated in Welsh primary legislation in a way that includes an overarching purpose, scope and environmental objective, which the application of the principles can be assessed against. This means that amendments will be required to existing primary legislation.

The prevention and precautionary principles are currently 'operationalised' in the SMNR principles. Some of the core principles are also put into effect in other legislation (e.g. the polluter pays principle via the Environmental Permitting Regulations and the precautionary principle by the Habitats Regulations). It is unclear how the proposed inclusion of the rectification and polluter-pays principles would be treated. Would they be included explicitly or 'operationalised'? There is a risk of incoherence if they are not treated in the same way.

The consultation is also unclear on the extent to which there may be a need to amend the 'operationalisation' of existing principles to reflect changes to their scope. For the sake of coherence and consistency (and to reflect the desire of paragraph 2.28 in the consultation), we expect elements of both will need to occur.

In the EU Treaties the core environmental principles are aimed at an overarching objective of 'a high level of environmental protection'. The SMNR duty is centred on the objective 'to maintain and enhance the resilience of ecosystems and the benefits they provide'. We do not consider this to be equivalent and interpret the SMNR duty to be narrower. Instead there should be an overarching objective towards which the application of the principles can be measured.

WEL is clear that the four core principles need to be explicitly represented in Welsh primary legislation in a clear, standalone, overarching and legally binding way, so that there is consistency across the UK, and so that they are easily interpreted by bodies that must implement them as part of their duties. This would also make them more easily understood by the public.

Question 2: Do you think there are other principles, which may also need to be included?

The UK Government is committed to legislating for an additional five principles in its Draft Environmental (Principles and Governance) Bill. These are a mixture of accepted EU principles and rights linked to the Aarhus Convention. It is disappointing that this consultation does not consider how these additional principles and rights will be upheld in Wales.

Without enshrining these rights into law, true public participation in environmental decision-making and the ability to hold public bodies to account risks remaining an aspiration rather than a requirement of Welsh law. We encourage the Welsh Government to legally enshrine enforceable rights in Welsh law, as a statement of our national values. This action has the potential to further strengthen governance arrangements.

Whilst we recognise the intentions of this and previous Welsh Governments in legislating for sustainable development, these laws were created as part of the EU framework and have not been tested as a replacement environmental governance system outside that framework. We would urge

the Welsh Government not to miss this opportunity to continue its role as a leading environmental voice in the UK, and to use this process to fully retain and strengthen the standards and protections that we have had as part of the EU.

The consultation states (Paragraph 1.5) that whilst exit from the EU means the loss of a number of governance mechanisms, it also provides an opportunity to put in place new governance arrangements, which reflect and support international commitments and build on the Welsh Government's approach to managing natural resources as provided in the Environment Wales Act 2016. It states that there is an opportunity to develop a structure which supports not only a commitment to non-regression, but more fundamentally a commitment to enhancing the environment to meet challenges faced.

The consultation also states that the need to establish environmental principles and governance in Wales post EU exit provides "an opportunity here to enhance our national governance arrangements by introducing new mechanisms which address the gap, arising as a result of the loss of the oversight of EU provided by the European Commission."

We agree with this sentiment. Whilst the consultation proposes to legislate on environmental principles and governance, and address gaps arising from EU exit, there is an opportunity to consider additional measures including addressing weaknesses in the existing legislative framework for the environment and sustainable development.

The Welsh Government has argued that the objective of SMNR is sufficient to reflect principles such as non-regression; we do not accept this. This is partly due to the limited ambition contained in the SMNR duty to 'maintain and enhance', rather than to protect and restore resilience. We would suggest consideration is given towards adding a principle of progression which will ensure that we are constantly trying to achieve a higher standard.

Within the Treaty of the Functioning of the European Union, Article 11 states that "Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development". The current application of the integration principle is a concern, as it occurs within the WFG Act with a specific definition. Further investigation is needed to decide whether this definition and its scope of application give real equivalence to its intention at EU level. By this we mean that integration in the Act is specifically about integration between goals and objectives. This is not the same as the general principle explained in article 11 of the treaty mentioned above.

We recognise the SMNR duty itself is a vehicle for integration if properly applied; however, as indicated, we believe the SMNR duty will need to be enhanced, or an additional duty added (with specific reference to the four core principles and overarching environmental objective) to secure equivalent impact of the principles.

We recognise the inclusion of the Aarhus rights in the Westminster Environment Bill, and that the UK will not cease to be a signatory of the Aarhus Convention as a result of leaving the EU. However, this does not prevent the Welsh Government from enshrining these rights in primary legislation and we encourage it to do so as a statement of intent and of our national values, which has the potential to further strengthen governance arrangements subsequently discussed in this consultation.

Finally, we argue that there should be an overarching objective of achieving high environmental protection, towards which the application of all principles should aim. This has proven to be an effective tool in the European context, which has supported the interpretation of environmental principles from policy making through to CJEU judgements.

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

WEL is pleased that the Welsh Government has recognised the limitation of the SMNR duty to NRW, and Welsh Ministers in the development of the National Resources Policy. If the four core environment principles are to be enshrined in Welsh law in a way that provides equivalence with their current scope under the EU, this duty will certainly need to be extended at the least.

As well as the scope – in terms of which public bodies the SMNR duty applies to – the Environment Act will need to be amended in other ways. It will be critical to ensure the amended drafting makes public bodies' duties explicitly clear to all concerned. Currently, the drafting is aimed explicitly at two bodies and functions. To broaden this scope to non-environmental public bodies, and the range of matters they cover, may need amendments aimed at operationalising in different ways. We believe including the four core principles as standalone, overarching principles will help with the clear and consistent interpretation of public bodies' duties, but will not be sufficient on its own.

We look forward to participating further in the development of these changes.

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

WEL strongly recommends that the duty should apply to all public bodies operating in Wales. This should include public bodies created since the passing of the WFG and Environment Acts, such as the Welsh Infrastructure Commission. We also see benefits in this applying to public authorities and public-body/private-sector coalitions such as City/Regional Growth Deals.

We are concerned that only applying the duty to public bodies would likely cause a regression from the status-quo. We also recognise that the devolved constraints placed on the Welsh Government mean some public authorities[1] would not be included unless the Welsh Government ask the Secretary of State for Wales to act on its behalf. This demonstrates that non-regression cannot be achieved without co-operation between the Welsh and UK Governments. We urge both to ensure non-regression.

We also stress the importance of including public-body/private-sector coalitions such as City/Regional Growth Deals, given the power that these have been given to set the strategic direction

[1] By public authority, WEL uses the definition in Section 6 (9) of the Environment (Wales) Act (this definition includes, but is much broader than 'public body' as defined in S6(9)(e) or S10 of the Environment (Wales) Act. ::
(9) "Public authority" means– (a) the Welsh Ministers; (b) the First Mnister of Wales; (c) the Counsel General to the Welsh Government; (d) a Minister of the Crown; (e) a public body (including a government department, a local authority, a local planning authority and a strategic planning panel); (f) a person holding an office– (i) under the Crown, (ii) created or continued in existence by a public general Act of the National Assembly for Wales or Parliament, or (iii) the remuneration in respect of which is paid out of money provided by the National Assembly for Wales or Parliament; (g) a statutory undertaker.

and significant financial spending decisions across Wales. These coalitions are currently a grey area with regard to the Well-being of Future Generations Act, as only some of their partners are covered by the Act. This needs to be clarified and the coalitions fully and clearly integrated into any expanded SMNR duty.

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

We agree with the gaps identified in paragraph 3.22 with some amendment.

With regard to 'A simple and inexpensive mechanism to raise complaints' we would also add that the current system is also liability-free for any complainant. This enables them to make complaints without the fear that they will be subject to future action by those they complain against, or would face costs should the complaint not proceed, or be ruled against.

With regard to 'enforcement mechanisms' we would also add that the EU's powers also include the rectification of damage caused by the offence. This is a vital aspect of the EU's enforcement mechanisms and its loss would be a significant regression.

In addition to the above we would also add the extensive monitoring and data collection activities of the EU. 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. These additions are critical if the Welsh Government is going to deliver on its commitment to "ensure there is no reduction in people's rights as a result of exiting the EU". Equivalent rights will not be achieved if there are not equivalently powerful ways of giving effect to those rights.

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

WEL members are clear that none of Wales' existing public bodies, as identified by the consultation, meet all of our criteria for a successful governance body. These are independence, resourcing, the right environmental expertise and having the 'teeth' to enforce environmental law.

NRW has a particular role in achieving the sustainable management of natural resources and will continue to be required to perform its day to day role of managing land, regulating, permitting and enforcing environmental protections. We still need NRW to perform as a strong, and preferably more independent, environmental body. However, it does not currently have the resources or independence to perform the additional functions that are currently undertaken by the EU. Furthermore, NRW is one of the bodies charged by Government with delivery of environmental law, and advises Government on its (Government's) application of environmental law. It is therefore impossible for them to act as an independent watchdog of their own, and Government's compliance.

There are various important scrutiny mechanisms currently undertaken by the National Assembly for Wales Committees, Wales Audit Office and the Public Services Ombudsman, as the consultation identifies. However, whilst all of these mechanisms will still be required, they do not provide equivalent enforcement functions with the EU Commission. Nor do they provide an equivalent citizen complaints mechanism, which is finance and liability-free, and which has the breadth of scope and

the level of access to environmental expertise that the Commission can provide. Replacing these EU Commission and CJEU functions with these existing Wales bodies would be wholly inadequate.

The Office of the Future Generations Commissioner also does not have the level of independence, the resources, the environmental expertise or the teeth to perform the monitoring, enforcement and citizen's complaints functions that are currently provided by the EU. The FG Commissioner was not designed to provide these functions and WEL members are not convinced that it could be retro-fitted to do so. In particular, the environmental expertise of the FG Office would need to be increased enormously, if it were to be able to investigate breaches of environmental law with the same level of detail that the EU Commission is able to do. This would change the entire nature of the body, as it is currently constituted as an advisory champion, and it could lead to considerable skewing of the focus and resources onto environmental matters.

Whilst, in theory, an existing public body could be given new powers, duties and functions, to do so would be to fundamentally change that body, potentially giving rise to further complications and difficulties. The loss of the oversight role of the Commission will leave a significant gap which will need to be filled. This new and significant governance gap will not be plugged by changing our existing bodies, which already have important functions to deliver.

It is our view that the creation of a new independent environmental watchdog is necessary. The simplest way of integrating this new body into the existing institutional landscape is to make any new governance body responsible for advising on, investigating, and enforcing compliance with environmental law and require existing bodies to report to it on these matters; any additional matters the new body deems necessary; and for others to abide by its guidance and decisions.

The above solution also ensures a central point of contact for citizens, who might find it difficult to navigate which of the existing Wales public bodies are best suited to deal with their enquiry or complaint. WEL would be concerned if functions are portioned out across numerous existing bodies as this would create further complexity in our environmental governance, increase the risk of breaches of environmental law being addressed effectively and potentially make it more difficult to co-operate at a UK level.

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

In developing a new environmental governance body for Wales, WEL would like to see the Welsh Government bringing forward solutions that provide:

1. A co-ordinated transboundary approach to managing shared environmental resources
Environmental processes do not recognise borders, so the Welsh and UK governments need to ensure co-operation on a range of transboundary issues, such as managing river catchments, invasive species, cross-boundary protected areas and air pollution.

2. A race to the top, with no backsliding
If environmental policymaking takes place completely independently in each of the four countries, there is a risk of confusion, undermining of each other's aims, or, in the worst case, a race to the bottom with deregulation for competitive advantage. To support the integrity of the internal market

and prevent unfair regulatory competition, there need to be minimum common standards across the UK. But to ensure each government is constantly striving towards a healthier environment and nature's recovery, there should not be a ceiling to anyone's ambition.

3. International credibility

Although the UK government is the sovereign state that participates in multilateral discussions and is the formal signatory to international agreements, the devolved administrations have full or partial responsibility for delivering on such commitments. To ensure the UK's international promises are credible, mechanisms are needed to translate them into progress on the ground in each country. This includes relevant provisions in the Withdrawal Agreement with the EU (if approved), and any future trade deals.

4. Accountability, transparency and access to justice

Trusted institutions and processes, such as dispute mechanisms, are required to underpin the delivery of all of the above. New robust, transparent and well-resourced domestic governance arrangements will need to replace functions currently carried out by EU institutions in securing compliance with common standards across the four nations. People in Wales need to have equivalent access to information, participation in decision-making and access to justice as set out in the Aarhus Convention. These new arrangements will need somehow to be shared or co-ordinated across the UK, while working with the different systems of accountability and respecting the devolution settlements.

We agree that the broad role for a new body, which is identified in the consultation, contains appropriate objectives, and we agree that the scope should be all-encompassing and that the body should have a clear role and remit, with no overlap or duplication with the functions of existing bodies. In our answer to question 8 we explain why we think the definition of natural resources still may be too narrow a scope.

We are also pleased to see the clarification that the body would be empowered to monitor compliance with and enforce all environmental law in Wales, whether this is specific Welsh law or EU-retained law operating in Wales. The body also needs to be easy for citizens to engage with.

We have expanded on the role of the body below, to identify the functions, duties and powers (within devolved competence) we argue that it should have:

Overall Functions

- Oversee implementation in Wales of all domestic environmental law (adapting the definition from the Environmental Information Regulations), regardless of whether originally domestic or retained EU law, including the environmental principles and rights discussed above.
- Monitor compliance by the Welsh Ministers; Public Bodies & Authorities in Wales; business and other actors.
- Enforce environmental law by initiating investigations into possible breaches and responding to complaints from citizens and civil society organisations.
- Identify and act on breaches, with the application of appropriate remedies and sanctions (including legal and financial sanctions).
- Review and report information regarding both the state of the natural environment in Wales and performance against policy objectives.

- Publish environmental information fully and transparently.
- By way of referral or complaint, engage with planning decisions that raise issues of a significant and strategic nature.
- Play a role in overseeing compliance with international environmental agreements in Wales.
- Strategic advisory function could be developed, but would need to be carefully defined to ensure no duplication with other bodies.

Duties

- Statutory duty to take proportionate action against the Welsh Ministers and Welsh public bodies in the public interest for breaches of environmental law.
- Duty to review (and report to the Welsh Assembly) environmental planning and reporting carried out by Welsh public bodies.
- Review and report information regarding both the state of the natural environment in Wales and performance against policy objectives.
- Publish environmental information fully and transparently.
- Routine scrutiny of implementation of legislation and assessing whether it is on track, challenging apparent failure.

Powers

- Investigate potential breaches of environmental law in Wales.
- Consider and investigate citizen complaints about breaches of environmental law in Wales from members of the public.
- Issue advisory notices for failure to implement environmental law in Wales, and identify corrective action.
- Issue binding notices requiring breaches of environmental law in Wales to be remedied and setting out how this is to be remedied (for example through the publication of action plans, the implementation of certain policies or compensation payments).
- Initiate legal proceedings. Issue (or apply to the High Court/ Specialist Environmental Tribunal) for sanctions if an authority fails to comply with a binding notice/court order. These could include fines or introducing 'special measures' or mandatory orders. These could also include structural injunctions setting out the steps needed to be taken by a public body to comply with a binding notice issued by the new body.
- Fund litigation in Wales, or related to Wales, and other activities relating to its functions.
- In line with current EU level emergency powers, issue interim measures and stop notices to prevent irreversible environmental damage where the power to do so lies outside the remit of other regulatory bodies (such as NRW).
- Accept enforcement undertakings (an offer or promise to carry out certain activities, made by the regulated entity to the regulator in charge of enforcement, as an alternative to a criminal charge or other administrative sanctions). The details of such undertakings would be publicly available.
- Apply remedies similar to those under the Environmental Liability Directive, such as preventative measures, remedial action and compensatory measures.
- Undertake formal investigations into potential breaches of environmental law in Wales (including an own-initiative power in keeping with the majority of ombudsman schemes).

- Conduct inquiries into systemic problems in particular Welsh policy areas and make recommendations to the Welsh Government, including in relation to any policy changes that may be necessary as a result.
- Require information from competent bodies where this relates to an issue relating to the Welsh environment, especially where this relates to information that may be commercially sensitive or not in the public domain.
- Produce public reports on compliance with international law in Wales, and any other matter it thinks is important (respecting the devolution settlement).
- Ability to conduct investigations into any body within its remit without a complaint being raised.

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

WEL recommends that the scope of new governance arrangements should include all policy areas which have an impact upon the environment, e.g. economic, transport, social and health policies. We welcome the intent set out in the consultation document for the scope of governance arrangements to include all natural resources (as set out in the EWA) and other policy areas that intersect with them, e.g. climate change, chemicals, and agriculture. We assume the same would apply to e.g. land use and marine planning, fisheries management and forestry. We recommend further careful analysis to ascertain this captures all aspects of the environment and all relevant requirements to ensure equivalence to the European model, whereby the Commission considers environmental impacts across all areas of competence.

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

WEL does not think that this list of bodies is sufficient on its own. See answer to question 10 for a further indication of bodies that we recommend the scope of the new governance body should cover.

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

The new body must be a champion for the environment and one which is responsible for advising on, investigating and enforcing compliance to environmental law. Given this, its oversight remit should be appropriately extended so it can, at the very least, support all public bodies covered by the proposed extension to the SMNR duty.

In line with our answer to question 4 we believe the remit should apply to all public authorities operating in Wales, including reserved bodies with functions falling within devolved competence, and to public-body/private-sector coalitions such as City/Regional Growth Deals. The remit needs to be worded in such a way that it captures any public bodies which might be created after the passing of the Act.

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

WEL agrees with the proposal to make any new body transparent, accountable to the National Assembly for Wales, independently audited, and independent of Government with regard to

appointments and funding. This represents a significant improvement on many bodies in Wales and is welcome. We do not, at this time, have a strong view on the specifics of how it is constituted in terms of whether to be a Commission, or any other such structure. Our priority is that it should be able to deliver upon the functions, duties and powers outlined in response to Question 7, that it is well-resourced and employs the right level of expertise, and that it delivers (perhaps in cooperation with other UK oversight bodies):

1. A co-ordinated transboundary approach to managing shared environmental resources
2. A race to the top, with no backsliding
3. International credibility
4. Accountability, transparency and access to justice

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

WEL suggests that the body could act in a strategic advisory capacity, but this role should be clearly and carefully defined, and should avoid duplication with other advisory bodies.

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

WEL agrees that an oversight body should be able to scrutinise implementation of environmental legislation – in fact it is vital that it does so. It should also be able to scrutinise non-environmental legislation if it has an impact on the environment.

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

The extent of this scrutiny function should not be limited to environmental legislation alone. The body needs to be free to make maximum use of its expertise to become a champion for the environment. This includes conducting thematic reviews (and other duties listed in response to Question 7) to evaluate whether a particular piece of legislation is being effectively applied, or a public body as a whole is sufficiently contributing to improving the state of the Welsh environment. This function must also not be limited to responding to complaints, or requests.

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 ability for any new body to receive and investigate public complains on the environment is a vital function which WEL strongly supports. We listed the powers that we believe the body should have in our response to question 7. In particular, to effectively investigate citizen complaints and provide equivalent enforcement options, we believe the body would need powers to:

- Investigate potential breaches of environmental law in Wales.
- Issue advisory notices for failure to implement environmental law in Wales, and identify corrective action.
- Issue binding notices requiring breaches of environmental law in Wales to be remedied and setting out how this is to be remedied (for example through the publication of action plans, the implementation of certain policies or compensation payments).

- Initiate legal proceedings. Issue (or apply to the High Court/ Specialist Environmental Tribunal) for sanctions if an authority fails to comply with a binding notice/court order. These could include fines or introducing 'special measures' or mandatory orders. These could also include structural injunctions setting out the steps needed to be taken by a public body to comply with a binding notice issued by the new body.
- In line with current EU level emergency powers, issue interim measures and stop notices to prevent irreversible environmental damage where the power to do so lies outside the remit of other regulatory bodies (such as NRW).
- Accept enforcement undertakings (an offer or promise to carry out certain activities, made by the regulated entity to the regulator in charge of enforcement, as an alternative to a criminal charge or other administrative sanctions). The details of such undertakings would be publicly available.
- Apply remedies similar to those under the Environmental Liability Directive, such as preventative measures, remedial action and compensatory measures.
- Require information from competent bodies where this relates to an issue relating to the Welsh environment, especially where this relates to information that may be commercially sensitive or not in the public domain.
- Conduct investigations into any body within its remit without a complaint being raised.

There is no existing body in Wales which has a sufficiently strong remit to replace the complaints function of the EU, so this will need to be created to avoid regression. We also welcome the recognition that in line with the current system, a new Welsh citizen complaints mechanism should also be simple and free for citizens to use. In addition to that it also needs to be free of any civil or financial repercussions for the citizen making the complaint.

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

WEL agrees that a new body should have informal and formal enforcement methods akin to those available within the EU. We refer to some of these in the list of powers in questions 7 and 15. A key improvement which could be made to the status-quo would be to improve the transparency and speed of the informal methods. Under the current system, informal methods can go on for several years without a public statement on progress. We would recommend a publicly accessible log of the details of all informal processes underway, and frequent updates on work underway in relation to them.

These processes need to be responsive to the scale and severity of the case at hand, with swift action being taken to stop any damaging action while a longer investigation can be conducted.
A key point in the effectiveness of the current structures is the knowledge that the enforcement structures are strong and carry with them a 'stick' (both financial and reputational) which is sufficient to discourage bad behaviour so much so that cases do not arise. WEL is concerned that environmental enforcement procedures are currently weak in Wales, with enforcement in response to agricultural pollution events being a case in point. It is also critical that the body has the power to refer matters to a court or tribunal for a judgment where necessary.

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

WEL agrees that recourse to the courts/tribunals should be a last resort. We also argue that Judicial Review is significantly weaker than the processes available as part of the EU, and welcome recognition in the consultation that a better process is required to prevent regression.

Please also see our answer to question 5 on enforcement mechanisms.

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

Given that the environment does not respect borders it is logical that a shared set of common environmental principles across the UK brings benefits. It would be especially advantageous given the current devolution settlement and the scope of the proposed UK Bill on reserved functions in Wales, providing coherence of approach.

There is a potential scope for a degree of 'dynamic alignment' between the nations of the UK were there to be core principles agreed, and an overarching objective to improve the environment, but at an operational level, each were free to pursue a slightly different approach to achieving that objective.

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

WEL recognises that this issue is not unique to the environment and that Brexit has exposed new challenges in the way that the countries of the UK function and work together. We also recognise the attempts to grapple with these challenges by the Welsh Government in Brexit and Devolution: Securing Wales' Future.

WEL's view is that there clearly needs to be collaboration between the governments of the UK to ensure non-regression, a complaints procedure which enables a disputes resolution function between governments, and a way to collaborate to meet our international commitments.

Ideally, a governance body that operates across the four countries of the UK, accountable to devolved parliaments as well as UK Parliament, would be the best option to achieve this. We believe such a body would be more independent, more robustly resourced and better able to hold the four governments to account. This body would need to be co-owned and co-designed by all four UK governments. However, if this is not possible, then we believe a new Welsh oversight body that collaborates closely with its UK counterparts, and which has access to a clear dispute resolution mechanism when dealing with cross-border issues, will be necessary.

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 connecting 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 paper 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.

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Consultation response: Environmental Principles and Governance in Wales Post European Union Exit.

09 June 2019

CLILC • WLGA

INTRODUCTION

1. The Welsh Local Government Association (WLGA) represents the 22 local authorities in Wales. The three national park authorities and the three fire and rescue authorities are associate members.

2. It seeks to provide representation to local authorities within an emerging policy framework that satisfies priorities of our members and delivers a broad range of services that add value to Welsh Local Government and the communities they serve.

3. WLGA welcomes the opportunity to respond to the consultation 'Environmental Principles and Governance in Wales Post European Union Exit

4. WLGA welcomed the opportunity to attend the stakeholder events to help inform the consultation process.

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

- **Rectification at Source**
- **Polluter Pays**

5. The Precautionary Principle and the Preventative Principle are covered within the Environment (Wales) Act 2016 within the Sustainable Management of Natural Resources (SMNR), neither Rectification at Source nor Polluter Pays principles are covered by existing primary legislation in Wales.

6. WLGA agrees that there is a need to include these two principles within primary legislation for Wales.

Question 2: Do you think there are other principles, which may also need to be included?

7. No. The overarching context of sustainable development is currently provided through the Well-being of Future Generations (Wales) Act 2015, (WFG) so there is no need to include any additional principles.

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

8. The Environment Act defines the general purpose of how Natural Resources Wales undertakes its role.
9. The Environment Act does not place a duty on any other public bodies to 'pursue sustainable management of natural resources'.
10. To have Natural Resources Wales as the only public body on the Public Services Boards with responsibility for SMNR is difficult to rationalise as the PSB is a collective body with joint responsibility to deliver for the social, economic, cultural and environmental wellbeing for its area.
11. The Environment Act s6 does place a duty on public authorities to maintain and enhance biodiversity and promote the resilience of ecosystems.
12. To facilitate a consistent approach to the management of Wales' natural resources and to help enable collective decision-making, WLGA consider there would be benefit in extending the requirement to apply SMNR principles to additional public bodies falling within devolved competence.

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

13. The Environment Act section 6 (subsection 9 and subsection 10) defines the public authorities who are required to seek to maintain and enhance biodiversity and promote the resilience of ecosystems.

14. To deliver these requirements it will be necessary to follow the principles of SMNR, therefore all those identified under s6(9) (10) should be subject to the duty to pursue SMNR.
15. Furthermore, the meaning of'public body' in the Environment Act s6(9)(e) should be clarified and be as specified within the WFG s6(l).

Accountability

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

16. On exiting the EL), environmental law and policy which was derived from the EL), will no longer be subject to the oversight of EL) institutions and the European Union Court of Justice. (CJEU)
17. The functions of the EU Commission to provide monitoring and scrutiny of implementation; receiving citizen complaints and; enforcement (including referral to the G EU) will be lost.
18. There are monitoring and reporting mechanisms under the Well-being of Future Generations Act and the Environment Act.
19. The EU are required to deliver under International Frameworks (e.g. Sustainable Development Goals, Climate Change etc.) Wales has the WFG and the Environment Act which deliver against these frameworks, this will need to continue post-EU exit.
20. The Statutory Instruments received by the National Assembly and through UK Parliament will ensure that the environmental law will be functionable immediately post- EU exit.
21. There is ultimate recourse to Judicial Review, to challenge failures in the implementation of environmental law, or a decision by a public body, including Welsh Government.
22. There is a significant gap between what will be available (as identified in 20 and 21 above) and what we currently have available within the EU.

23. It is essential that whatever oversight body is determined for environmental governance it must be independent and impartial, and will maintain and enhance environmental standards.

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

24. As Wales has a bespoke legislative framework there is a need to have an environmental governance structure to take account of this.
25. No single accountability body, within the existing mechanisms for environmental accountability, has the necessary specialised skills nor functions (equivalent to EL) Commission) nor independence.
26. There is a wealth of relevant, collective and complementary expertise which could be utilised, to inform a Natural Resources Commissioner. This could be an SMNR Advisory Panel established on a similar basis as the Advisory Panel to the Future Generations Commissioner.
27. The SMNR Advisory Panel could include representation from several of the existing accountability /oversight bodies to advise the individual 'commissioner' or oversight body
28. Although the five Ways of Working apply across the development of policies, and the SMNR principles are applied in the delivery of policies, the role of'guardian of natural resources' would not be appropriate to be undertaken by the Future Generations Commissioner (FGC)

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

29. WLGA agree that the role of a body would be to provide independent oversight and be the 'guardian of Wales' natural resources' in ensuring policy and legislation is developed in accordance with the principles set out in the Environment Act
30. The five objectives:

i. To ensure policy and legislation is developed in a way which maintains and enhances Wales' natural resources in line with the principles in Welsh legislation;

ii. To ensure legislation is implemented effectively and delivery is in line with the aim of maintaining and enhancing Wales 'natural resources;

iii. To act in an advisory capacity on the SMNR for public bodies;

iv. To act impartially in assessing the effective implementation of Welsh Legislation relating to the environment;

v. To act impartially in receiving complaints from citizens, would be appropriate.

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

Field Code Changed

31. The Environment Act s2 clearly defines 'natural resources'.

32. To fully protect, maintain and enhance the environment in Wales ~~all~~ ~~of thcsc~~these need to be within the all-encompassing scope for the body.

33. The scope must also ensure that all elements currently under the oversight of the European Union Commission (namely: provides monitoring and scrutiny of implementation; receiving citizen's complaints and; enforcement, including referral to EU Court of Justice) are included and not overlooked.

34. There would need to be connection and consistency between the scope for Wales and the other nations of the UK.

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

35. WLGA agree that the scope of the body also relates to the bodies it may be able to oversee and agree with the proposed list of Welsh Ministers; NRW; Welsh local authorities; Ministers of the Crown (consistent with their responsibilities within the Environment Act)

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

36. There are other public bodies (see response to question 4) defined in the Well-being of Future Generations Act s6(l) to be considered to fall within the remit of an oversight body (e.g. Local Health Boards and National Parks Authorities.)

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

37. The WLGA agrees that the oversight body must be independent of government - since Welsh Government is a defined public authority and may need to be held accountable as defined under s6(9) of the Environment Act, as being subject to biodiversity and ecosystem duties.
38. Furthermore, under WLGA response to question 4 within this consultation Welsh Government should also be subject to the duty to pursue SMNR
39. The oversight body must include a Legal Expert Advisor in environmental law.
40. There must be an appropriate range of environmental expertise to cover all elements of the definition of natural resources (Environment Act s2).
41. There should be representatives of other bodies already undertaking accountability and oversight roles on public bodies.
42. If Wales has a separate oversight body from the other nations within the UK - consistency would be essential and could be achieved by having senior representation from that body(s)

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

43. Yes, in the same way that the FGC can act in an advisory role.
44. The five Ways of Working should be applied by the oversight body in how it operates. Through advice and guidance public authorities can be assisted to prevent a situation or mis-management of natural resources; in the same way that a scrutiny committee can act in an advisory capacity as well as 'calling to account'

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

45. Yes, but not to duplicate what other accountability bodies undertake.
46. The FGC 'scrutinises' Public Service Boards through their annual reports and well-being plans, to ensure compliance with the WFG legislation, so likewise current reporting mechanisms by e.g. NRW could be utilised to scrutinise the implementation of environmental legislation.

Question 14: What should be the extent of its function?

47. Current accountability bodies with a scrutiny role have a range of 'tools' at their disposal to call public bodies to account for their actions and inactions or perceived infringements.
48. Having been called to account any findings on issues in the implementation of extant legislation as a result of complaints could then prompt thematic reviews and investigations

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?

49. The oversight body would need to be able to:
    i. Conduct investigations and require the provision of information;
    ii. Assess the validity of complaints and have discretion to exercise powers to act in appropriate cases, rather than a duty to act in response to all complaints;
    iii. Make recommendations arising from its findings
50. The complaints procedure must be simple, accessible and free for citizens to use. (in line with current EL) complaints procedure;

51. A complaints procedure must not duplicate or conflict with the complaints function of Welsh Public Bodies including the role of the Public Services Ombudsman Wales, the role of Assembly Members or the National Assembly's own complaints procedure.

There must be no reduction in citizen's rights as a result of exiting EL).

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

52. As with the EL) Commission there must be both informal and formal mechanisms to seek solutions. Seeking to retain similarity with the EL) Commission approach would be beneficial
53. In Wales we have the WFG and five Ways of Working, an oversight body and the government or other public bodies could work collaboratively with a range of other parties to seek long term preventative solution.
54. Formal methods could be applied in cases where a resolution has not been achieved through informal measures; The EL) Commission's use of issuing formal notices requesting information and a time limit has proved successful; this can be escalated to issuing a notice of its opinion and recommendations, requesting a time limited response for actions to be taken; continuing failure to comply would result in the matter being referred to the courts

Question 17: What enforcement action do you consider need to be available?

55. The whole 'toolkit' of deterrents should be made at the disposal of the oversight body
56. There is a need to ensure that any deterrents are relevant, significant, enforceable and meaningful.
57. It is acknowledged that only a small number of cases are heard by the EL) Court of Justice.
58. WLGA agree that recourse to the courts should be the final method of enforcement only where all other methods have failed. Although Judicial Review may be seen in the context of a 'sledgehammer to crack a nut.'

OTHER

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

59. The advantage of having a shared core set of common environmental principles would provide consistency and a clarity of function and purpose across the UK whether there is an oversight body specific to Wales or for the ~~UK as a whole~~UK.
60. If there are separate bodies, yet common principles, the opportunity to have representation on each other's oversight body would assist consistency.
61. There are already degrees of commonality between the four administrations as well as bespoke devolved competency which recognises reserved competency and devolved competency. It would be advantageous to retain these.
62. Where commonality does exist, the approach must be shared but acknowledgement where there are differences which require different approaches across the Devolved Administrations.
63. Consistency across borders would be advantageous for both devolved and UK economic growth and trade agreements.

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

64. After EU exit the UK will continue to remain a party to all international environmental treaties it has ratified in its own right.
65. The UK Government reserves competence for matters relating to international relations. Consequently, international reporting obligations post-EU exit will rest with the UK. It should be noted that the implementation of international obligations falls within devolved competence.
66. International treaties and conventions will still require regular reporting on the implementation of environmental law across UK.
67. ~~In order to~~~~T~~o establish governance structures to facilitate collaboration the following key issues need to be addressed:

i. What areas of reserved competence and devolved competence are relevant, appropriate and applicable?
ii. What areas of reserved competence could have an impact upon areas of devolved competence?
iii. What areas would benefit from a collective UK-wide approach whilst also acknowledging and respecting the current devolved legislative landscape:
iv. Where areas of commonality and consolidation are apparent, it is essential that all four nations are respected as equal partners in co-determining the appropriate governance structure; acknowledging and respecting the unique frameworks in each nation and the collective delivery for the benefit of the whole of the UK.

Environmental principles and governance in Wales post European Union exit

Environmental principles

Q1. Question 1 : Do you agree the following principles should be included within legislation for Wales?

The UK Chemical Industries Association (CIA) supports the inclusion of these two additional principles within primary legislation. We concur with the Welsh Government's approach to retaining the current framework that places sustainable development as the overarching strategic principle and have encouraged both England and Scotland to do the same in our responses to their consultation processes. CIA firmly believes sustainability to be of paramount importance to enabling a more holistic approach to environmental policy-making.

We also note that the Welsh Government does not intend to incorporate an additional policy statement on how the principles should be applied, as the Environment (Wales) Act already provides for their application. This is in contrary to England and Scotland's proposed approaches; CIA has supported the inclusion of such a policy statement in order to ensure environmental principles are understood consistently and coherently. We firmly believe such a statement can prove to be a powerful tool for ensuring that all principles are applied mutually rather than in isolation, so that decisions taken are balanced, protecting both society and the environment in a sustainable way. A policy statement should also serve to promote consistency in the application of the principles between "Area Statements" as defined under in the Environment Act and other activities.

Q2. Question 2: Do you think there are other principles, which may also need to be included?

Yes. We believe inclusion of an innovation principle would enable Wales to better address societal and economic challenges, thereby helping to more effectively achieve the United Nations Sustainable Development Goals. The benefits that science and innovation can bring, not only to the environment but also to society and the economy, should be very much part of the policy decision making process. For more information seethe European Commission's web page (https://ec.europa.eu/info/research- and-innovation/law-and-regulations/innovation-friendly-legislation_en) and CIA's Position Statement "Innovation Principle - Why Now?" (https://www.cia.org.uk/Portals/0/Documents/Policy%20Position%20Statements/Innovation%20Principle_June2019.pdf?ver=2019-06-04-164044-443).

Q3. Question 3: Do you agree the duty to pursue sustainable management of natural resources and the application of the SMNR principles should be extended?

CIA supports extending the duty to pursue sustainable management of natural resources and the application of the SMNR principles to additional Welsh public bodies. We suggest that the application of the SMNR principles should primarily only apply to policy formation and making proposals for legislation. In relation to the number of principles, we have proposed a further principle for inclusion - see answer to Q2.

Q4. Question 4: On which Welsh public bodies, within devolved competence, do you consider a duty to pursue SMNR should apply?

The duty should only apply to those public bodies involved in policy formation and making proposals for legislation.

Accountability

Q5. Question 5: Do you agree with the gaps identified, or do you consider there are other gaps, which need to be considered?

Yes, we believe this to be a good analysis.

Q6. Question 6: What role should existing accountability bodies provide in a new environmental governance structure for Wales?

We believe the existing accountability bodies would have a vital role to play in any new environmental governance structure. The details of this would need to be determined by the actors involved.

Q7. Question 7: Is the outlined role and objective appropriate for a body responsible for overseeing the implementation of environmental law in Wales?

We believe it is important to have a mechanism in place whereby public bodies and the Welsh Government can be questioned on their actions. In terms of the role of the oversight body and its objectives, there needs to be a clear boundary between the regulators' responsibilities and that of the proposed new body. We do not believe, nor see the practical usefulness to 'mix' the roles between the regulator(s) and the new proposed body. The role of the body is not only to hold the government to account but also the regulators as well, particularly considering the devolved nature of environment legislation in the UK.

Q8. Question 8: Which policy areas should be included within the scope of new governance arrangements?

CIA supports the proposed scope listed in the consultation document.

Q9. Question 9: Do you consider the proposed list of bodies to be appropriate?

The oversight body should oversee all public bodies whom have a remit covering the intended scope.

Q10. Question 10: Do you consider there are other Welsh bodies, which should also fall within the remit of an oversight body?

CIA does not have a view on which other public bodies should be included. Also, see answer to Q9.

Q11. Question 11 : What should be the status, form and constitution of an oversight body?

CIA concurs with the consultation view that such an oversight body should be as independent from government as possible. Since it would be a public body, we believe it must be clear to stakeholders that it is as independent from government as possible recognising that it needs to be 'owned' by a government department as such in order to receive funding. For an oversight body to be truly effective in upholding environmental law and being able to openly provide views whether negative or positive, the body must have the autonomy to do so. This also applies to its composition / form, both in terms of its 'Board' and supporting employees - a point we have also made in our response to the England and Scotland consultations.

Q12. Question 12: Should an oversight body be able to act in an advisory capacity?

Yes, providing the oversight body has the expertise to do so.

Q13. Question 13: Should an oversight body be able to scrutinise implementation of environmental legislation?

Yes.

Q14. Question 14: What should be the extent of this function?

We would expect this to be determined by the actors involved.

Q15. 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?

Whilst CIA believes there should be a process in place to investigate appropriate complaints about compliance and environmental law, there also needs to be a clear distinction on the role of the new body and the regulators. CIA believes public complaints can in many cases be more effectively dealt with by the regulator at the local level with industry working with them to resolve any issue arising.

Q16. 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?

We believe a pragmatic approach towards enforcement is important and where possible we encourage close working between private and public sectors to resolve. A good existing example of this is the UK's strategy for REACH enforcement. The measured approach to enforcement, as described in the consultation document seems appropriate.

Q17. Question 17: What enforcement actions do you consider need to be available?

To be effective in holding the Welsh Government and public bodies to account, the proposed new oversight body would need to be able to issue binding notices. We would also stress that whilst the body should have this power, use of this enforcement mechanism may not always be the most appropriate at the policy making level since a holistic and integrated approach is often needed to address environment issues that can involve several government departments, industry, NGOs and other stakeholders. Therefore, actions taken by the oversight body should first try to assist in resolving issues rather than seeking to adopt punitive measures.

Other

Q18. Question 18: Would there be advantages in having a shared core set of common environmental principles?

Whichever way forward is decided upon, we believe there should be ajoined-up approach, at least to a certain extent, between all devolved administrations in respect to upholding environmental law. This is further elaborated on in our answerto Q19.

Q19. Question 19: What potential governance structures do you consider are needed to enable collaboration and collective decision-making to enable interface between administrations?

In addition to our answer to Q18, CIA has already expressed its support in principle for an oversight body in England and in Scotland to ensure environmental protection is upheld. However, we believe consideration should be given to whether one oversight body for the UK would be more appropriate in terms of resources and decision-making, thereby providing more effective environmental protection.

Submit your response

Q20. You are about to submit your response. Please ensure you are satisfied with the answers you have provided before sending.

Name

Organisation (if applicable) Chemical Industries Association (CIA)

Q21. If you want to receive a receipt of your response, please provide an email address. Email address

Q22. Responses to consultations may be made public. To keep your response anonymous (including email addresses) tick the box.

No Response

Environmental principles and governance in Wales post European Union exit

Environmental principles

Q1. Question 1: Do you agree the following principles should be included within legislation for Wales?

LARAC agrees Rectification at Source and Polluter pays are important elements to be included in Welsh legislation to ensure that the EU environmental principles are fully considered. EPR reforms, currently under consultation which aims for full net cost recovery for packaging waste has been welcomed by LARAC as a National approach to adhering to the the Polluter pays principle.

Q2. Question 2: Do you think there are other principles, which may also need to be included?

LARAC consider application of the waste hierarchy as applied in the EU Waste Framework Directive is a high priority principle for environmental policy making as it is fundamental to improving waste and recycling performance from industry to the consumer.

In accordance with waste hierarchy principles, encouraging leaner manufacturing processes and designing products and packaging which prioritises for reuse and recycling not only directly influences the disposal, recycling or reuse of waste, it also has a strong influence over other wider national targets such as resource use, carbon reduction and energy efficiency.

Q3. Question 3: Do you agree the duty to pursue sustainable management of natural resources and the application of the SMNR principles should be extended?

LARAC agree the application of SMNR principles should be extended to other public bodies. Sustainability has the potential to be integrated across the delivery of all public services. Therefore, in order to achieve true sustainability, the responsibility for delivering against SMNR principles should fall with a range of public bodies and not just those which the Environment/Natural Resources as the key remit.

Q4. Question 4: On which Welsh public bodies, within devolved competence, do you consider a duty to pursue SMNR should apply?

LARAC does not have an opinion over which public bodies should have a duty to pursue SMNR. LARAC wishes to emphasise any additional burdens should be fully funded and not require resources to be diverted from other essential services.

Accountability

Q5. Question 5: Do you agree with the gaps identified, or do you consider there are other gaps, which need to be considered?

LARAC agrees with the gaps identified. It is currently unclear how the Circular Economy principles will be adopted in to domestic legislation. For Circular Economy principles to be adhered to additional accountability will be required to ensure that the government is held to account to achieve the challenging targets.

Q6. Question 6: What role should existing accountability bodies provide in a new environmental governance structure for Wales?

LARAC believe that existing accountability bodies should continue to provide similar services as currently provided. Any additional burdens should be managed by a new independent body to allow a coherent and coordinated approach.

Q7. Question 7: Is the outlined role and objective appropriate for a body responsible for overseeing the implementation of environmental law in Wales?

LARAC supports the objective that the body would act in an advisory and as an independent body to hold the government to account for the development and implementation of policy and legislation.

Q8. Question 8: Which policy areas should be included within the scope of new governance arrangements?

Resource use and Waste along with the circular economy concept are essential policy areas for inclusion in the scope for governance arrangements.

Q9. Question 9: Do you consider the proposed list of bodies to be appropriate?

LARAC does not support the body having scrutiny functions for local authorities. The existing bodies which have oversight of local authorities are sufficient to ensure Regulations are adhered to at a local level.

Q10. Question 10: Do you consider there are other Welsh bodies, which should also fall within the remit of an oversight body?

No Response

Q11. Question 11 : What should be the status, form and constitution of an oversight body?

It is essential that the regulatory body can act independently from government and have the power to hold the Government to account. Without suitable powers such a body has the potential to be seen as toothless and ineffective. If the government are serious about their ambitions for world leading environmental policies they must to be subjected to scrutiny when the policies fall short of this ambition.

Q12. Question 12: Should an oversight body be able to act in an advisory capacity?

The new body should have the ability to provide advice so long as this is not in conflict with holding the Government to account. This could take binding and non-binding levels depending on the situation.

Q13. Question 13: Should an oversight body be able to scrutinise implementation of environmental legislation?

The body should be able to advise the government in terms of making recommendations to it based on evidence it has gained through a scrutiny and review process in much the same way as the National Audit Office and other similar bodies might. This might include for example advisory notices that have the back up of a structured process similar to those issued by the Health and Safety Executive.

Q14. Question 14: What should be the extent of this function?

See question 13

Q15. 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?

LARAC believes there should be an independent body which acts as a contact point for the aggrieved members of the public who believe environmental law has been breached. The governance for this could be similar to that of the Local Government and Social Care Ombudsman which impartially investigates complaints against local authorities.

Q16. 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?

LARAC supports the proposal that the oversight body should be able to carry out informal and formal mechanisms to seek solutions and support the proposals made in the consultation.

Q17. Question 17: What enforcement actions do you consider need to be available?

A range of enforcement actions need to be available so that a proportionate response to a failing can be used by the oversight body. These could range from non-binding advisory notices, up through binding correction notices to potential fines or other court action. LARAC believes that processes used by regulatory bodies such as NRW and HSE may help to form a draft template of enforcement action for further consultation.

Other

Q18. Question 18: Would there be advantages in having a shared core set of common environmental principles?

Shared common principles will allow for a consistent approach to applied nationwide and potentially avoid abuse of the system, particularly if more stringent principles are applied Wales. To deliver on Circular Economy principles there will need to be cross boundary collaboration as waste management is not determined by geographical boundaries. Having a core set of common principles will allow greater partnership working to apply pressure to achieve consistent solutions.

Q19. Question 19: What potential governance structures do you consider are needed to enable collaboration and collective decision-making to enable interface between administrations?

LARAC has no particular governance structures to suggest. Any potential structures should be lean and have the ability to make suitable decisions and not act as an extra step in existing processes.

Submit your response

Q20. You are about to submit your response. Please ensure you are satisfied with the answers you have provided before sending.

Name

Organisation (if applicable) LARAC (Local Authority Recycling Advisory Committee)

Q21. If you want to receive a receipt of your response, please provide an email address.
Email address

Q22. Responses to consultations may be made public. To keep your response anonymous (including email addresses) tick the box.

No Response

Environmental principles and governance in Wales post European Union exit

Environmental principles

Q1. Question 1: Do you agree the following principles should be included within legislation for Wales?

Yes.
These principles would not continue to apply when the UK left the European Union, and should be included in primary legislation within Wales.

Q2. Question 2: Do you think there are other principles, which may also need to be included?

No.
The Sustainable Management of Natural Resources (Environment Act) and the Well-being of Future Generations Act include other important environmental principles - such as Scale and Integration - which go further than current European and UK law. We support the continued application of these principles.

Q3. Question 3: Do you agree the duty to pursue sustainable management of natural resources and the application of the SMNR principles should be extended?

Yes.
It is important the UK's exit from the European Union does not lead to a weakening of environmental protections in Wales - which includes the full extent of environmental liability and the duties of regard.

Q4. Question 4: On which Welsh public bodies, within devolved competence, do you consider a duty to pursue SMNR should apply?

Notionally, there is no reason why the duty to pursue SMNR should not apply to all public bodies within Wales - although for some it will be a negligible part of their function.

It would be especially beneficial for the duty to apply to those public bodies with direct responsibility for spatial planning or land use decisions. This would include bodies under the umbrella of the central Welsh Government, such as Transport for Wales, and Local Planning Authorities.

However, at a minimum, it must cover all the "public authorities" which would currently be within scope of the relevant European legislation, to ensure that environmental protections are not weakened.

Accountability

Q5. Question 5: Do you agree with the gaps identified, or do you consider there are other gaps, which need to be considered?

We agree with all three gaps identified.

Sitting below the principles are a range of organisations and methods for delivering and monitoring accordance with the principles. A gap analysis looking at this process would be worth undertaking, to ensure full alignment. For example, NRWs SoNNAR (pg25 Table 3: Monitoring and Reporting under the Well-being of Future Generations and Environment Acts) currently monitors change to natural resources. It could say more about the significance of this change and inform mechanisms that direct action to support the 'prevention' and 'rectification at source' principles.

Q6. Question 6: What role should existing accountability bodies provide in a new environmental governance structure for Wales?

Existing accountability bodies should continue to play their current roles with respect to environmental matters. What is essential is that the functions currently undertaken by European-level bodies (including the European Court of Justice) can be replicated, to ensure that there is no governance gap in the event of Wales leaving the European Union.

Those functions include receiving and processing complaints from members of the public, having powers to call-in cases and scrutinise public policy, and having appropriate enforcement and penalty mechanisms.

Undertaking these functions will require some expertise in environmental matters, and impartiality with respect to policy-making and public intervention into meeting environmental targets. As such, they are likely to be most appropriately carried out by a new body.

Q7. Question 7: Is the outlined role and objective appropriate for a body responsible for overseeing the implementation of environmental law in Wales?

Yes.

Q8. Question 8: Which policy areas should be included within the scope of new governance arrangements?

All the policy areas listed should be included within scope.

As the consultation document rightly notes, there is a close relationship between many areas of policy, and it important not to limit the purview of the new body by being overly prescriptive. Policy initiatives in other areas - for instance housing, transport, or energy - will have obvious environmental impacts and should be in scope.

Q9. Question 9: Do you consider the proposed list of bodies to be appropriate?

Yes.

Q10. Question 10: Do you consider there are other Welsh bodies, which should also fall within the remit of an oversight body?

As well as Welsh Government, the new governance arrangements should clearly include subsidiary organisations of the Welsh Government, such as Transport for Wales.

There should also be flexibility for the governance arrangements to cover bodies which are created in the future, such as Development Corporations, or any new public body involved in consenting to or inspecting Developments of National Significance.

Q11. Question 11 : What should be the status, form and constitution of an oversight body?

It is essential that a new oversight body is independent of those it is seeking to oversee. This includes an independent (and protected) revenue source, and transparent procedures for appointments.

Furthermore, it is also essential that the body has access to the appropriate skills and knowledge to undertake its function, and is protected from political cycles by having a firm basis in primary legislation.

Beyond that, we have no view as to the constitution of the body.

Q12. Question 12: Should an oversight body be able to act in an advisory capacity?

Partly.

There is a balance to be struck between:
a) Making the best use of expertise, especially in providing advice which could prevent a future breach of environmental law
b) Distracting from an oversight body's core function, and duplicating a function which is delivered elsewhere - e.g. by Natural Resources Wales, or by UK-wide bodies such as the JNCC

Questions about "howto contribute to sustainable management of natural resources" will, on a day-to-day basis, be most appropriately answered by an existing body (most obviously Natural Resources Wales) or by professionals in the private/third sector. Duplicating effort, or creating confusion amongst public bodies, is not useful.

There is also a concern about distracting from an oversight body's core function: both in terms of diverting resources away from its primary purpose, but also in terms of potential conflicts of interest (for instance if the body provides advice that was later found to be unsound, and therefore compromises its ability to hold government to account).

Where the body can most usefully provide advice is on the specific areas of its competence: e.g. the specific legal limits on environmental impact contained in domestic and international law. For instance: On the protection of designated areas. The designation of areas under the international Bern Convention (sites forming the so-called "Emerald Network") are delivered in European Union by the Natura 2000 sites. These in turn are delivered in the UK by SPAs or SACs, which often overlap with UK SSSIs (and sometimes other landscape designations like National Parks or AONBs). Legal protections for each of these designation "layers" exist at an international level (e.g. the Bern Convention) and a Wales level (e.g. the Environment Act). It is not useful for the new body to advise upon all environmental matters relating to designated areas - but it could be useful for it to advise on the precise legal parameters of their protection, and what would constitute a breech in that regard.

It would also be useful for the body to advise on both the application and future development of environmental legislation, as these are balanced against existing requirements.

Q13. Question 13: Should an oversight body be able to scrutinise implementation of environmental legislation?

Yes, as above. This would be a useful function of the body.

Q14. Question 14: What should be the extent of this function?

The primary aim of this new oversight body must be to replicate (and/or enhance) the environmental protections currently offered to Wales at a European level. The most important of these is the ability to police breaches of environmental law (expressed in national-level legislation) - for instance breaches of the Air Quality Directive.

Another function currently offered by the EU is advice - and to a lesser extent, ongoing scrutiny - on the transposition of EU Environmental Directives into national law. As this will no longer take place, there is no need for that specific function. However, it would be sensible to mirror that function by enabling the new oversight body to advise on new and extant environmental legislation - for instance its efficacy or on gaps in provision. It could also be useful for the oversight body to undertake some form of international benchmarking or best practice monitoring. In other words, to identify whether environmental legislation (e.g. air quality limits) in Wales is more or less stringent than other nations' - and make recommendations accordingly. This function is currently offered to some extent by the European Union.

The EU also funds advice, research, and guidance on environmental, social and cultural interventions. Many of these approaches have been influenced by UK input to date and the sharing of expertise from across Europe. The body should have a remit and budget to programme and oversee the development of Wales specific guidance in partnership with university research groups, WG, NRW and the appropriate professional institutes.

Q15. 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?

As per the Government's recommendations, the new oversight bodies should have the powers to:

- conduct investigations and require the provision of information;
- assess the validity of complaints and have the discretion to exercise its powers to act in appropriate cases, rather than a duty to act in response to all complaints. This would be important to ensure the use of its resources is prioritised to the most significant concerns;
- make recommendations arising from its finding.

Q16. 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?

Whilst advisory notices are a useful mechanism for day-to-day environmental accountability, and we hope that the majority of cases would be resolved through this means, the oversight body must have more robust tools at its disposal if it is to be successful. We support all options given in the consultation. Binding legal notices, and the ability to intervene in legal cases, are two important mechanisms. The most vital function is an ability to enforce the cessation of harmful activity and restoration of any resulting damage. In line with the principles of the Future Generations Act, it is not enough to simply identify when a body has failed in its legal environmental duties: the legal system must be able to ensure any resulting damage to Wales's natural resources are reversed. The new oversight body should play a role in this, alongside the courts - for instance advising on the scope of any restoration activity.

Q17. Question 17: What enforcement actions do you consider need to be available?

Currently, the "backstop" disincentive provided at a European level is the ability to levy fines upon national governments for a breach of environmental rules or a failure to meet targets. In reality this is uncommonly used, and would be hard to replicate at a national level (without, for instance, simply moving funds from one part of government to another).

Nevertheless, this mechanism does provide a strong incentive for national governments to meet agreed environmental targets, and the ambition of any new Welsh governance arrangements must to ensure no weakening of this.

We would support the development of a new comparable mechanism of financial penalties within Wales. One way to achieve this is may be to notionally place funds raised through fines in a pot that can be used for environmental projects or green impact investment, controlled by an independent financial trust (comparable to the funds established under Big Society Capital through the UK Dormant Bank and Building Society Accounts Act 2008).

Other

Q18. Question 18: Would there be advantages in having a shared core set of common environmental principles?

Yes. The shared principles developed at European level have been invaluable at creating better approaches to cross-border environmental issues. This includes discrete cross-border matters (such as designated areas spanning two jurisdictions, e.g. the Wye Valley) and international priorities such as climate change and biodiversity loss.

These shared principles should act as a "floor" for the development of national ambitions, not a "ceiling". In most cases, Wales has a more coherent and better integrated framework for environmental protection.

Q19. Question 19: What potential governance structures do you consider are needed to enable collaboration and collective decision-making to enable interface between administrations?

N/A

Submit your response

Q20. You are about to submit your response. Please ensure you are satisfied with the answers you have provided before sending.

Name

Organisation (if applicable) Landscape Institute

Q21. If you want to receive a receipt of your response, please provide an email address.
Email address

Q22. Responses to consultations may be made public. To keep your response anonymous (including email addresses) tick the box.

No Response

Environmental principles and governance in Wales post European Union exit

Environmental principles

Q1. Question 1: Do you agree the following principles should be included within legislation for Wales?

CIEEM supports the four principles outlined in the consultation document:
- Prevention principle
- Precautionary principle
- Polluter Pays principle
- Rectification at Source principle

Whilst we support these four principles, we would also like to see additional principles added (see Q2).

Q2. Question 2: Do you think there are other principles, which may also need to be included?

We would like to see non-regression (IUCN definition 1) included as a principle. Non-regression is increasingly acknowledged as a key parameter in environmental decision-making, as reflected by its inclusion in the proposed United Nations (UN) Global Pact for the Environment 2, and in sustainable development, use and integration, the ecosystem approach, natural capital and access to environmental information under the Aarhus Convention 3.

There must be no regression of environmental legislation and commitment to international agreements, particularly regarding the human right of access to justice for the environment, which is a fundamental component of the role of the European Commission.

On principles and standards, there must be no regression on what Wales accepts as best practice and minimum standards for the environment. There must not only be no regression, but a net environmental gain is also needed to meet many of the Aichi targets in 2020 4.

The new duty should also include the environmental principles enshrined in international conventions and agreements, including:
- the principle of sustainable development
- public access to environmental information
- public participation in environmental decision-making
- access to justice in relation to environmental matters
- the principle that environmental protection requirements must be integrated into the definition and implementation of policies and activities

This is important for the development of common frameworks within the UK, as the draft Environment (Principles and Governance) Bill introduced by Defra includes all nine environmental principles.

The new duty should allow the inclusion of new principles as appropriate to enable Wales to keep pace with EU developments, but also to incorporate international environmental principles to improve the existing biodiversity duty.

The application of these principles is essential in meeting the UN's Sustainable Development Goals.

1 The Principle of Non-Regression is an International Law Principle known by Human Rights specialists requiring that norms which have already been adopted by States not be revised, if this implies going backwards on the subject of standards of protection of collective and individual rights. https://www.iucn.org/content/non-regression-principle-knowledge-forum

2 https://globalpactenvironment.org/uploads/EN.pdf

3 http://ec.europa.eu/environment/aarhus/index.htm

4 https://www.cbd.int/doc/world/gb/gb-nr-oth-p2-en.pdf

Q3. Question 3: Do you agree the duty to pursue sustainable management of natural resources and the application of the SMNR principles should be extended?

Yes. This would be in line with the existing biodiversity duties under Sections 6 and 7 of the Environment (Wales) Act 2016, which requires public authorities to maintain and enhance biodiversity and to maintain and enhance agreed priority species and habitats.
This must also extend to large companies, large organisations and large landowners, who have a responsibility for application of the SMNR principles as well. This could potentially be achieved through a public goods and services scheme or similar.

Q4. Question 4: On which Welsh public bodies, within devolved competence, do you consider a duty to pursue SMNR should apply?

The duty should be applied to all public bodies, including all government departments, government agencies, non-departmental public bodies and local authorities that exercise authority in environmental matters.

Accountability

Q5. Question 5: Do you agree with the gaps identified, or do you consider there are other gaps, which need to be considered?

In addition to the gaps identified in the consultation document in para. 3.22, we recommend that the governance architecture should allow a new environmental body to instigate its own investigations, and provide advice to Welsh Government on relevant matters.
Wthin the remit of "independent accountability", we recommend that the new environmental body is required to report to the Welsh Assembly on government performance in relation to the environment.

Q6. Question 6: What role should existing accountability bodies provide in a new environmental governance structure for Wales?

Existing bodies should continue to carry out their duties as noted in Annex 5 of the consultation document. It is critical that they communicate and cooperate effectively with a new environmental body and with each other.
Crucially, none of these existing bodies have any enforcement powers. The new environmental body must have meaningful enforcement powers and the resources to implement them, which can be used in conjunction with advice and evidence provided by the existing bodies.

Q7. Question 7: Is the outlined role and objective appropriate for a body responsible for overseeing the implementation of environmental law in Wales?

CIEEM agrees with the objectives as set out in the consultation document, namely to:
- Ensure policy and legislation is developed in a way which maintains and enhances Wales' natural resources in line with the principles in Welsh legislation (e.g. that already specified within the Environment (Wales) Act);
- Ensure legislation is implemented effectively and delivery is line with the aim of maintaining and enhancing Wales' natural resources;
- Act in an advisory capacity on the sustainable management of natural resources for public bodies;
- Act impartially in assessing the effective implementation of Welsh legislation relating to the environment;
- Act impartially in receiving complaints from citizens.

In order to effectively deliver these objectives, the body must have powers to investigate non-compliance with the law and enforce rulings.

Q8. Question 8: Which policy areas should be included within the scope of new governance arrangements?

CIEEM is pleased to see the scope of a body operating in Wales will be guided by the integrated approach provided in the Environment (Wales) Act 2016, and that it will include (but not be limited to): (a) animals, plants and other organisms; (b) air, water and soil; (c) minerals; (d) geological features and processes; (e) physiographical features; (f) climatic features and processes. And that this will 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.

We agree that where other bodies already provide advice, there is no need to replicate this function. However, these bodies do not have enforcement powers and these will need to be provided by the new environmental body.

CIEEM advocates that the following areas (which could be included within the areas outlined above but are not explicitly so) are also included in the scope of the new governance arrangements:

a. transboundary pollution issues
b. environmental impact assessment and planning
c. access to environmental information and environmental justice
d. marine environment
e. flooding
f. radioactive substances
g. genetically modified organisms
h. biosecurity, including animal and plant diseases

Q9. Question 9: Do you consider the proposed list of bodies to be appropriate?

Yes. However, the remit of the body must go beyond advisory and scrutiny functions. It must also have investigative and enforcement functions.

Q10. Question 10: Do you consider there are other Welsh bodies, which should also fall within the remit of an oversight body?

The duty should be applied to all public bodies, including all government departments, government agencies, non-departmental public bodies and local authorities that exercise authority in environmental matters.

Q11. Question 11 : What should be the status, form and constitution of an oversight body?

CIEEM advocates a body accountable to the Welsh Assembly. It should be able to produce its own strategy and budget, which are approved by the Assembly. Additionally, appointments to the positions of Chair, Board members and CEO should be overseen by the Assembly.

Q12. Question 12: Should an oversight body be able to act in an advisory capacity?

Yes.

Q13. Question 13: Should an oversight body be able to scrutinise implementation of environmental legislation?

Yes.

Q14. Question 14: What should be the extent of this function?

We agree that one of the general functions of an oversight body should be to scrutinise extant legislation in order to address any complaints about the implementation of environmental legislation, and that the body will need access to data and evidence from other bodies.
However, we also recommend that the body be able to scrutinize draft legislation as it is developed or passes through the Assembly, in order to inform the Assembly of potential issues in relation to environmental impacts.

Q15. 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?

We agree that the new body's investigative powers should replicate as far as possible those of the European Commission and that there should be no gap in this respect once the UK exits the EU.
We agree with the consultation document's proposal that an oversight body would need to be able to undertake the following:

- conduct investigations and require the provision of information;
- assess the validity of complaints and have the discretion to exercise its powers to act in appropriate cases, rather than a duty to act in response to all complaints. This would be important to ensure the use of its resources is prioritised to the most significant concerns;
- make recommendations arising from its finding.

Q16. 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?

CIEEM agrees that a new body should have similar functions to the European Commission, in that it should be able to carry out both formal and informal enforcement as set out in the consultation document.

Q17. Question 17: What enforcement actions do you consider need to be available?

We agree that judicial review is not the right course of action in most instances as it is prohibitively expensive and also only determines whether or not the law has been adhered to.
Enforcement actions that should be considered include enforcement orders and notices, and must include the power to require remediation work for environmental damage done.

Other

Q18. Question 18: Would there be advantages in having a shared core set of common environmental principles?

Yes. Wherever possible, we believe that the UK nations should work together on a framework for environmental performance and governance. This will have benefits for cross-border business and future UK trade agreements, as well as enabling better UK-level environmental reporting.
The application of a common set of environmental principles is essential to meeting the UN's Sustainable Development Goals, of which the UK is a signatory.

Q19. Question 19: What potential governance structures do you consider are needed to enable collaboration and collective decision-making to enable interface between administrations?

The UK nations should work together on a common framework for environmental performance and governance. This must be co-designed and co-owned.
CIEEM advocates that Wales (and the UK) should wherever possible continue to align with EU environmental standards, and work in collaboration with the European Environment Agency.
There should also be effective data sharing between equivalent bodies within the UK.

Submit your response

Q20. You are about to submit your response. Please ensure you are satisfied with the answers you have provided before sending.

Name

Organisation (if applicable) Chartered Institute of Ecology and Environmental Management

Q21. If you want to receive a receipt of your response, please provide an email address.
Email address

Q22. Responses to consultations may be made public. To keep your response anonymous (including email addresses) tick the box.

No Response

Environmental principles and governance in Wales post European Union exit

Environmental principles

Q1. Question 1: Do you agree the following principles should be included within legislation for Wales?

Yes

Q2. Question 2: Do you think there are other principles, which may also need to be included?

No, additional principles are covered by the Environment (Wales) Act and UK law includes underlying governance about proportionality. If any additional principles are included they should not act to restrict or specifically direct but should be maintained as a guide to influence future law and policy.

Q3. Question 3: Do you agree the duty to pursue sustainable management of natural resources and the application of the SMNR principles should be extended?

Yes, all Welsh public bodies and private business should have a duty to pursue SMNR as part of an integrated approach to sustainable development; it should not be left to NRW alone.

The incorporation of these principles into farming and land use form a significant element of the tool kit required to manage threats to Wales from climate change. The continued non-sustainable management as practiced through the protection of failed habitats is a prime example of where application of SMNR by NRW is failing and should fall to the land manager to lead the decision-making process.

Q4. Question 4: On which Welsh public bodies, within devolved competence, do you consider a duty to pursue SMNR should apply?

SMNR should apply to all public bodies, covering activities such as land use, construction, transport, procurement, waste and energy use.

Accountability

Q5. Question 5: Do you agree with the gaps identified, or do you consider there are other gaps, which need to be considered?

Yes, the gaps identified in 3.2.3 and the principles of rectification at source and polluter-pays principle are appropriate.

There is a need for an independent UK Body with specialised expertise in environmental issues and the ability to refer a public body to court.

Q6. Question 6: What role should existing accountability bodies provide in a new environmental governance structure for Wales?

The existing roles as outlined comprise a sensible continuation of responsibilities. As none of these bodies hold expertise to make decisions or advise on specific matters it would constitute significant change of purpose to change their role. It should be considered whether the Future Generation Commission should be able to enforce the law in a situation where no other new organisation takes this role.

Q7. Question 7: Is the outlined role and objective appropriate for a body responsible for overseeing the implementation of environmental law in Wales?

Yes, it if of key importance the body formed or identified is independent and is capable of enforcing or requiring enforcement of the primary legislation in Wales.

Q8. Question 8: Which policy areas should be included within the scope of new governance arrangements?

The all-encompassing scope proposed is a good approach. We have two observations on the examples of how natural resources and policy areas are described:

1. It must be clear that ‘protecting the natural environment of Wales’ must have global responsibility at its heart. For example, procurement or land-use policies which drive degradation of habitats or carbon emitting activities overseas will not protect Wales in the long run. The new governance should begin from the principle that environmental damage caused overseas is as serious as damage caused in Wales.

2. It must be clear that ‘urban’ activities have as great, or greater, environmental impact as ‘rural’ ones, so the impact of activities such as procurement or energy use on the land should be given equal importance with direct land-use activities.

This will help to ensure that activities on Welsh land are not at a competitive disadvantage to activities overseas where environmental standards and governance may be lower.

Q9. Question 9: Do you consider the proposed list of bodies to be appropriate?

No, it should include:
- Welsh Ministers;
- Natural Resources Wales;
- Welsh local authorities; and
- Ministers of the Crown (e.g. consistent with their responsibilities under the Environment (Wales) Act).
- Welsh Audit Office (where it may be held equally accountable if another public body fails an audit for more than 2 years running)
- Welsh Civil Service where Ministers are placed under scrutiny.

Q10. Question 10: Do you consider there are other Welsh bodies, which should also fall within the remit of an oversight body?

In addition to the bodies listed, consideration should be given to including other Welsh public bodies, which should not be exempt from a duty of environmental protection in their activities. For example, a ‘Welsh timber first’ policy should apply to all public sector construction projects to drive forward the development of low-carbon renewable construction. Bodies with responsibility for industry and construction should have a duty to develop the zero-carbon circular bioeconomy for Wales which delivers the SMNR.

Q11. Question 11 : What should be the status, form and constitution of an oversight body?

There should be one oversight body for the whole of the UK. Divergence in environmental regulations is liable to result in confusion, wasted resources and lowering standards.

Q12. Question 12: Should an oversight body be able to act in an advisory capacity?

Yes, where appropriate but not be limited to it and should retain full legal capacity to enforce national and domestic legislation.

Q13. Question 13: Should an oversight body be able to scrutinise implementation of environmental legislation?

Yes, this scrutiny should then be subject to debate within the Welsh assembly with acceptance or rejection within a reasonable period.

Q14. Question 14: What should be the extent of this function?

We believe that this body should be able to insight review and where appropriate make recommendation to change legislation where sufficient challenges are brought either through public or private sector applicants and/or the legislation shall not be deemed fit for purpose.

Q15. 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 powers should be in line with powers of investigation by other bodies, for example the Public Ombudsman, for complaints of comparable severity in other areas.

Q16. 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?

The proposed methods appear appropriate.

Q17. Question 17: What enforcement actions do you consider need to be available?

The option of taking public bodies to courts should be available, and the body will require sufficient resource to be able to do this. This is a better option than providing it with extra-judicial powers to issue fines, for example.

Other

Q18. Question 18: Would there be advantages in having a shared core set of common environmental principles?

Yes. Divergence in environmental standards across the UK would be detrimental to development of a sustainable economy.

See also our response to the UK-wide consultation on environmental governance in July 2018, available at: http://www.confor.org.uk/media/247069/environmental-principles-and-governance- response-july-2018.pdf

Q19. Question 19: What potential governance structures do you consider are needed to enable collaboration and collective decision-making to enable interface between administrations?

Retain European regulatory framework (General Binding Rules) as common standard across the UK.

Submit your response

Q20. You are about to submit your response. Please ensure you are satisfied with the answers you have provided before sending.

Name

Organisation (if applicable) Confor - promoting forestry and wood

Q21. If you want to receive a receipt of your response, please provide an email address.
Email address

Q22. Responses to consultations may be made public. To keep your response anonymous (including email addresses) tick the box.

No Response

Environmental principles and governance in Wales post European Union exit

Environmental principles

Q1. Question 1: Do you agree the following principles should be included within legislation for Wales?

Needs to go further

Q2. Question 2: Do you think there are other principles, which may also need to be included?

Regulation to increase biodiversity

regulate local authorities to directly contribute in environmental goals

Q3. Question 3: Do you agree the duty to pursue sustainable management of natural resources and the application of the SMNR principles should be extended?

yes

Q4. Question 4: On which Welsh public bodies, within devolved competence, do you consider a duty to pursue SMNR should apply?

local authorities, natural resources Wales, water and seweragge undertakers. Welsh government. Also

to private enterprise

Accountability

Q5. Question 5: Do you agree with the gaps identified, or do you consider there are other gaps, which need to be considered?

others

Q6. Question 6: What role should existing accountability bodies provide in a new environmental governance structure for Wales?

No Response

Q7. Question 7: Is the outlined role and objective appropriate for a body responsible for overseeing the implementation of environmental law in Wales?

No Response

Q8. Question 8: Which policy areas should be included within the scope of new governance arrangements?

flood and water management planning

Q9. Question 9: Do you consider the proposed list of bodies to be appropriate?

no to limited

Q10. Question 10: Do you consider there are other Welsh bodies, which should also fall within the remit of an oversight body?

No Response

Q11. Question 11 : What should be the status, form and constitution of an oversight body?

regulation and enforcement.

Q12. Question 12: Should an oversight body be able to act in an advisory capacity?

yes

Q13. Question 13: Should an oversight body be able to scrutinise implementation of environmental legislation?

yes

Q14. Question 14: What should be the extent of this function?

regulation and enforcement

Q15. 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?

powers to sequester information, powers to caution and interview.

Q16. 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?

criminal sanctions

Q17. Question 17: What enforcement actions do you consider need to be available?

criminal sanctions

Other

Q18. Question 18: Would there be advantages in having a shared core set of common environmental principles?

yes

Q19. Question 19: What potential governance structures do you consider are needed to enable collaboration and collective decision-making to enable interface between administrations?

legal duty

Submit your response

Q20. You are about to submit your response. Please ensure you are satisfied with the answers you have provided before sending.

No Response

Q21. If you want to receive a receipt of your response, please provide an email address. Email address

No Response

Q22. Responses to consultations may be made public. To keep your response anonymous (including email addresses) tick the box.

Keep my response anonymous

Environmental principles and governance in Wales

Environmental principles

Q1. Question 1 : Do you agree the following principles should be included within legislation for Wales?

Some of which

Q2. Question 2: Do you think there are other principles, which may also need to be included?

The control of asbestos regulations should be brought in to include domestic households. In addition to this asbestos should be completely removed from all public buildings in Wales. This would allow wales to truly lead in the field and safety to the public, our sick and our children.

Q3. Question 3: Do you agree the duty to pursue sustainable management of natural resources and the application of the SMNR principles should be extended?

Yes

Q4. Question 4: On which Welsh public bodies, within devolved competence, do you consider a duty to pursue SMNR should apply?

HSE

Accountability

Q5. Question 5: Do you agree with the gaps identified, or do you consider there are other gaps, which need to be considered?

I do not - there are more

Q6. Question 6: What role should existing accountability bodies provide in a new environmental governance structure for Wales?

No Response

Q7. Question 7: Is the outlined role and objective appropriate for a body responsible for overseeing the implementation of environmental law in Wales?

No Response

Q8. Question 8: Which policy areas should be included within the scope of new governance arrangements?

No Response

Q9. Question 9: Do you consider the proposed list of bodies to be appropriate?

No Response

Q10. Question 10: Do you consider there are other Welsh bodies, which should also fall within the remit of an oversight body?

No Response

Q11. Question 11 : What should be the status, form and constitution of an oversight body?

No Response

Q12. Question 12: Should an oversight body be able to act in an advisory capacity?

No Response

Q13. Question 13: Should an oversight body be able to scrutinise implementation of environmental legislation?

No Response

Q14. Question 14: What should be the extent of this function?

No Response

Q15. 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?

No Response

Q16. 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?

No Response

Q17. Question 17: What enforcement actions do you consider need to be available?

No Response

Other

Q18. Question 18: Would there be advantages in having a shared core set of common environmental principles?

No Response

Q19. Question 19: What potential governance structures do you consider are needed to enable collaboration and collective decision-making to enable interface between administrations?

No Response

Submit your response

Anonymous

Environmental principles and governance in Wales post European Union exit

Environmental principles

Q1. Question 1: Do you agree the following principles should be included within legislation for Wales?

We agree that the above principles should be included.

Q2. Question 2: Do you think there are other principles, which may also need to be included?

We consider that a clear commitment to a high level of environmental protection, the precautionary principle, the principle of integration and cross-border co-operation is required.

Furthermore, we seek clarification on the means by which these new principles will be enshrined in law. Will this be by the Well-being of Future Generations (Wales) Act 2015 or the Environment (Wales) Act 2016 or indeed a new Act? We would caution against a further Act where there is the potential for legislative 'gaps' between the relevant Acts referred to here.

Q3. Question 3: Do you agree the duty to pursue sustainable management of natural resources and the application of the SMNR principles should be extended?

Yes, this would ensure a consistent approach across the public sector.

Q4. Question 4: On which Welsh public bodies, within devolved competence, do you consider a duty to pursue SMNR should apply?

Local planning authorities in the context of setting overarching planning policy.

Accountability

Q5. Question 5: Do you agree with the gaps identified, or do you consider there are other gaps, which need to be considered?

Yes. We seek clarification on how far the jurisprudence of the Court of Justice of the European Union will be taken account in formulating the definitions of the principles (as required). For example, Case T-13/99 Pfizer Animal Health SAv Council [2002] and Case C-236/01 Monsanto Agricoltura Italia SpA and Others v Presidenza del Consiglio dei Ministri and Others [2003], which both considered the definition and application of the precautionary principle.

Q6. Question 6: What role should existing accountability bodies provide in a new environmental governance structure for Wales?

Public bodies should be accountable to an independent body when they are acting as competent authorities, that is when their decision-making functions and actions impact on the environment (either directly or indirectly). The Future Generations Commissioner's powers could be modified to include new powers but would the environment be subsumed amongst all the well-being goals.

Furthermore, it may be appropriate to provide for the appointment of an Environment Commissioner with specific focus on this area of legislation.

Q7. Question 7: Is the outlined role and objective appropriate for a body responsible for overseeing the implementation of environmental law in Wales?

Whilst we agree with the objectives outlined, the ability of a new body to succeed in holding government to account will depend on the extent of its powers beyond simply scrutiny and guidance.

We agree that the new body should be able to scrutinise, advise and report on the delivery of key environmental policies.

The new body should have the power to investigate and sanction/fine government for failure to adhere to its environmental obligations.

Furthermore, we submit that in addition the new body should have the ability to set up an independent inquiry and to appoint independent judiciary to such an inquiry.

However, the measure of success of a new body (and indeed that of government) in its oversight function, should not be measured by an increasing level of investigation and fines but rather by a low level of the same which would indicate successful ‘on the ground’ management of delivery and compliance with environmental objectives. If sanctions and/or fines are high then this would indicate a failure in the delivery and management frameworks adopted.

Q8. Question 8: Which policy areas should be included within the scope of new governance arrangements?

The definition of ‘natural resources’ in the Environmental (Wales) Act would appear to be the most appropriate legislation to underpin the ambit of the new body.

It could be interpreted broadly/narrowly but governance arrangements should also engage with the environmental dimensions of agricultural and food policy, human and environmental health and with planning authorities.

Also, the new body should have a role in overseeing the implementation and success of any existing agri-environment scheme or future land management scheme as part of the government’s schemes for meeting its obligations to the environment.

We do not consider that the remit of a new body should be as a statutory consultée in relation to planning matters and specifically, individual planning applications, however, it should have the ability to respond to national strategic planning policy.

Q9. Question 9: Do you consider the proposed list of bodies to be appropriate?

Yes

Q10. Question 10: Do you consider there are other Welsh bodies, which should also fall within the remit of an oversight body?

We are concerned with the ability of government to hold other public authorities to account should a new body direct the government accordingly; where the actions of another public authority result in the government failing to meet its obligations.

We therefore consider a new body should have the ability to hold other public authorities to account directly.

Q11. Question 11 : What should be the status, form and constitution of an oversight body?

The oversight body should be independent of government by being accountable to the National Assembly for Wales. It should have independent appointment structures and sources of funding.

Q12. Question 12: Should an oversight body be able to act in an advisory capacity?

Yes

An additional role for a new body should also be to advise on nationally applicable derogations in situations of significant environmental risk or climatic events.

Q13. Question 13: Should an oversight body be able to scrutinise implementation of environmental legislation?

Yes

Whilst there are mechanisms in place for compliance with international law, the new body would fulfil a useful function in having the powers to oversee the Government's compliance with, and as part of, the UK's wider international obligations.

Q14. Question 14: What should be the extent of this function?

We would suggest that the proposed model of the Office of Environmental Protection in England should be considered.

Q15. 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 new body should have a remit and powers to respond to and investigate complaints from members of the public on failures to implement environmental law.

Complaints should be free of charge; with the independant body having discretion to decided whether or not to accept the complaints; assessing both substantive and procedural grounds

Q16. 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?

In addition to that which is set out in the Consultation, we consider that a new body should have the power to appoint an independent judiciary panel which not only deals with issues of investigation and enforcement but also on any misinterpretation of policy by government and/or other public bodies; to include the power to set up a judicial inquiry.

Q17. Question 17: What enforcement actions do you consider need to be available?

In addition to stop notices, there should be a power to impose fines, on government where failures in environmental obligations have occurred that warrant such a remedy by the courts.

Other

Q18. Question 18: Would there be advantages in having a shared core set of common environmental principles?

Yes

Q19. Question 19: What potential governance structures do you consider are needed to enable collaboration and collective decision-making to enable interface between administrations?

Any new body created should be cross-UK not only simply Anglo-Welsh and duly represent Wales and the devolved administrations. This would assist in establishing a minimum baseline for oversight and enforcement.

Submit your response

Q20. You are about to submit your response. Please ensure you are satisfied with the answers you have provided before sending.

Name

Organisation (if applicable) Agricultural Law Association

Q21. If you want to receive a receipt of your response, please provide an email address.
Email address

Q22. Responses to consultations may be made public. To keep your response anonymous (including email addresses) tick the box.

No Response

Environmental principles and governance in Wales post European Union exit

Environmental principles

Q1. Question 1: Do you agree the following principles should be included within legislation for Wales?

Yes: rectification at source.
No;Polluter pays- public bodies shall operate as guidance and supporting roles to businesses in Wales, and use the expertise to influence business decisions and ways of working whilst acknowledging the value of increasing both the reputation of Welsh business and prosperity.

Q2. Question 2: Do you think there are other principles, which may also need to be included?

Yes: the ability to recognise economic gains to be considered within the principles will ensure we have a sustainable future.

Q3. Question 3: Do you agree the duty to pursue sustainable management of natural resources and the application of the SMNR principles should be extended?

Yes: all public bodies should be expected to establish and agree key performance indicators related wholly to delivery of SMNR and in particular the climate change state of emergency, as part of the grant in aid mechanisms.

Q4. Question 4: On which Welsh public bodies, within devolved competence, do you consider a duty to pursue SMNR should apply?

All Welsh public bodies would be charged with responsibilities to pursue SMNR- granted KPI's explicit within annual remit letters from the Welsh Government.

Accountability

Q5. Question 5: Do you agree with the gaps identified, or do you consider there are other gaps, which need to be considered?

Further gaps exist in respect of enhancing the separating the duties between regulator, advisor and those functions of the regulators in conflict due to the same bodies delivering operating duties on behalf of the Welsh Government.

Whilst being and advocate of public ownership of the existing national forest estate, the current arrangements often fail both the forest and processing sector in Wales, whilst causing continue conflict between the understandable public governance arrangements whilst trying to shoe-horn a trading account (as in timber and commercial activities on the forest estate).

Any yet solutions exist on an international scale, with reference to many of the New World Nations, each with bespoke operating models for each unique society and country.

Greater opportunities should be granted to public and private sector collaboration, in particular in managing the national forest, and facilitating growth of future woodland expansion.

International opportunities exist to create a platform in which to encourage much-needed new investment into Wales through the creation of opportunities to invite Environmental, Social and Corporate Governance (ESG)investment, akin to joint ventures, mutual investment models, -such as affordable housing, local authority operating functions, and the management of the national forest, in respect of the heartlands of Mid Wales.

Q6. Question 6: What role should existing accountability bodies provide in a new environmental governance structure for Wales?

The role of any environmental body should ensure consideration of balance between the environmental expectations and vision and that of the needs of society, (both now and in the future) and economic growth across all legitimate business in Wales.

Q7. Question 7: Is the outlined role and objective appropriate for a body responsible for overseeing the implementation of environmental law in Wales?

Agreed in part, as the narrative does not explain if this would be a new body or an additional role for NRW- and should not create greater preventative and bureaucratic public sector interference with society and business growth.

Q8. Question 8: Which policy areas should be included within the scope of new governance arrangements?

Governance arrangements should include ensuring woodland and forest expansion exists, to ensure we have a future proof generation and champion the climate change emergency challenge.
Whilst the bespoke Welsh legislation of the Environment Act and the Well-being of Future Generations Act are welcomed, the interpretation of the current public bodies contradicts the legislative ambition by being repeatedly opposed to woodland and economic forest expansion.

Q9. Question 9: Do you consider the proposed list of bodies to be appropriate?

The proposal may consider a role as independent arbitrator of decisions and performance on the public bodies listed.

Q10. Question 10: Do you consider there are other Welsh bodies, which should also fall within the remit of an oversight body?

National Parks and AONB's.

Q11. Question 11 : What should be the status, form and constitution of an oversight body?

Arbitrator

Q12. Question 12: Should an oversight body be able to act in an advisory capacity?

Facilitator and Advisor, followed by ensuring compliance and governance arrangements agreed to by the afore mentioned public bodies are met and delivered, and such bodies are held accountable for their actions and performance.

Q13. Question 13: Should an oversight body be able to scrutinise implementation of environmental legislation?

Yes, see above comment.

Q14. Question 14: What should be the extent of this function?

See comment to Q12.

Q15. 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?

No Response

Q16. 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?

Deterrent is best applied by education, collaboration and influencing businesses in Wales, and adopting prosecution only as a last resort.

Q17. Question 17: What enforcement actions do you consider need to be available?

No Response

Other

Q18. Question 18: Would there be advantages in having a shared core set of common environmental principles?

A review of the Forestry Act as part of a shared set of common environmental principles will ensure greater growth in the forest sector and woodland expansion, which is probably the greatest and most effective contribution to meeting the climate change challenge- the public sector cannot do this on its own, and need to create an investment platform in which to encourage new investment to Wales based on ESG principles.

Q19. Question 19: What potential governance structures do you consider are needed to enable collaboration and collective decision-making to enable interface between administrations?

A review of the Forestry Act, to enable greater collaboration across the sector.
A move away from preventative measures which prevent or reduce economic and society benefits.
Empowerment of local communities to grow sustainable business and encourage local economic growth.

Submit your response

Q20. You are about to submit your response. Please ensure you are satisfied with the answers you have provided before sending.

Name

Organisation (if applicable) -

Q21. If you want to receive a receipt of your response, please provide an email address.
Email address

Q22. Responses to consultations may be made public. To keep your response anonymous (including email addresses) tick the box.

No Response

Environmental principles and governance in Wales post European Union exit

Environmental principles

Q1. Question 1: Do you agree the following principles should be included within legislation for Wales?

No Response

Q2. Question 2: Do you think there are other principles, which may also need to be included?

No Response

Q3. Question 3: Do you agree the duty to pursue sustainable management of natural resources and the application of the SMNR principles should be extended?

No Response

Q4. Question 4: On which Welsh public bodies, within devolved competence, do you consider a duty to pursue SMNR should apply?

No Response

Accountability

Q5. Question 5: Do you agree with the gaps identified, or do you consider there are other gaps, which need to be considered?

I write this response to identify a gap that needs consideration.

I do so having erstwhile been privileged to serve as both a member of the Environment Agency Board, and as a Forestry Commissioner appointed by Her Majesty The Queen.
Since the merger in Wales of the functions exercised by the Environment Agency, the Forestry Commission and the Countryside Council for Wales, I have followed with interest the operations of its successor organisation- Natural Resources Wales. This has included the successive Reports of the Wales Audit Office, scrutiny by the National Assembly's Public Accounts Committee, and the Grant Thornton internal Review of its timber contracting process.
I have also attended a number of the NRW Board meetings that have been held in public, including the ones held at Bangor, Brecon, Swansea, Cardiff, Abergavenny and Merthyr Tydfil. I welcome the opportunity that these events offer the people of Wales to observe the Board in its decision making process, and to be able to question Board members on its priorities.
My sole objective through the means provided by this Consultation, is to do all that I can to assist NRW in addressing its flawed corporate governance structure, so painfully and publicly exhibited through its timber sales contracts. It was no surprise that the Chair of NRW departed from her post so soon after the Wales Auditor General announced that he had qualified the Annual Accounts of NRW for the third successive year.
It is unfortunate that the Grant Thornton internal review commissioned by NRW was not a comprehensive review of the forestry function within NRW. That weakness was made more evident when the Grant Thornton review specifically identified the fact that the corporate governance arrangements within NRW were not included within its remit.
The narrowness of the terms of reference threw the searchlight of the review on such a limited area of activity
that it may have lulled the Board into a belief that improving the timber sales contracts is both a

necessary and sufficient condition to address the governance deficit within the organisation. It is neither.
After careful consideration, I have formed the view that a radical solution is necessary- and soon.
While sorting out the timber sales contracts is a welcome step towards satisfying the requirements of the Wales Audit Office and the Public Accounts Committee of the National Assembly for Wales, it will not change the fundamental need to improve the governance of the forestry function within NRW.
The segregation of duties between the Welsh Government's Environmental Body (NRW) and the establishment of a separate Trading Body is a vital systemic change that will raise morale, while also enabling the Wales Audit Office to regain confidence in NRWs corporate commercial governance.
The creation of the new Trading Body would not change the responsibility held within NRW for all aspects of strategic planning and determination. This retention of responsibilities would ensure the continuous Sustainable Management of Natural Resources.
Instead, its objective would be focused on changing the management of the land based estate: and thus repair its ruptured Achilles Heel.
The Trading Body would be given freedom to manage the assets with the objective of maximising returns, whilst providing evidence that is it delivering its functions in a sustainable way.
(Of course, UKWAS will continue to underpin the sustainability aspect through its role in independently auditing woodland management)
Planning for the public woodland estate could be subject to NRW approval in the same way as the Forestry Commission formerly authorised Forest Enterprise's Forest Design Plans. Other developments on the Estate, such as Energy, Recreation and Tourism, are already subject to scrutiny and consenting by Local Planning Authorities, and, as NRW is a stautory consultée, that extant relationship, would continue.
NRW might wish to "buy" from the Trading Body certain environmental improvements, for example, paying for the managed retention of trees in certain areas that would otherwise be felled and sold. Another possible example would be the purchase of peat restoration.
By buying such services, there is the advantage of true transparency as to the cost to the public purse of delivering these environmental objectives.
Thus the Trading Body would have ring fenced funding for the buying of environmental services on the managed Public Woodland Estate, but would have the freedom to deploy the receipts generated through Forestry, Energy, Recreation and Tourism, by reinvesting in programmes agreed by the Welsh Government through the parent body.
The Trading Body would be answerable to NRW, but would operate at arm's length. The Chief Operating Officer of the Trading Body would report to the NRW Board.
If such a Model finds favour with the Welsh Government, the governance of NRW would need shaking up to ensure the appropriate oversight of the new Trading Body. It would be crucial that individuals with the appropriate skills and experience would be brought onto the NRW Board.

This is only one possible Model for the operation of the Trading Body.
The Welsh Government may decide, for example, to extend the remit of the Trading Body to enable it to bring in funding from the private sector. A possible step in that direction would be setting up the Trading Body as ajoint public and private sector partnership, with an ESG Investment Portfolio, which would inject much needed investment into the NRW Managed Public Woodland Estate.
I commend the creation of this new Trading Body to the Welsh Government.

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

No Response

Q7. Question 7: Is the outlined role and objective appropriate for a body responsible for overseeing the implementation of environmental law in Wales?

No Response

Q8. Question 8: Which policy areas should be included within the scope of new governance arrangements?

No Response

Q9. Question 9: Do you consider the proposed list of bodies to be appropriate?

No Response

Q10. Question 10: Do you consider there are other Welsh bodies, which should also fall within the remit of an oversight body?

No Response

Q11. Question 11 : What should be the status, form and constitution of an oversight body?

No Response

Q12. Question 12: Should an oversight body be able to act in an advisory capacity?

No Response

Q13. Question 13: Should an oversight body be able to scrutinise implementation of environmental legislation?

No Response

Q14. Question 14: What should be the extent of this function?

No Response

Q15. 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?

No Response

Q16. 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?

No Response

Q17. Question 17: What enforcement actions do you consider need to be available?

No Response

Other

Q18. Question 18: Would there be advantages in having a shared core set of common environmental principles?

No Response

Q19. Question 19: What potential governance structures do you consider are needed to enable collaboration and collective decision-making to enable interface between administrations?

No Response

Submit your response

Q20. You are about to submit your response. Please ensure you are satisfied with the answers you have provided before sending.

Name

Organisation (if applicable) -

Q21. If you want to receive a receipt of your response, please provide an email address.
Email address

Q22. Responses to consultations may be made public. To keep your response anonymous (including email addresses) tick the box.

No Response

Environmental principles and governance in Wales post European Union exit

Environmental principles

Q1. Question 1: Do you agree the following principles should be included within legislation for Wales?

Pollution of air, water and land is a significant and worsening problem in Wales. So definitely yes to both. For the polluter pays principle to work, It is essential that recovery costs and rectification are guided by the actual costs of the problem, not the ability to pay. Potential polluters should be encouraged in ways of prevention and to take out insurance

Q2. Question 2: Do you think there are other principles, which may also need to be included?

Wales is never shy of creating good environmental legislation. What we would like to see more of is mechanisms for dealing with the failure to enforce relevant regulations and legislation. Who is responsible for this? and what action can be taken when there are enforcement failures

Q3. Question 3: Do you agree the duty to pursue sustainable management of natural resources and the application of the SMNR principles should be extended?

Yes, all public bodies and those contracted to them (via any contract)

Q4. Question 4: On which Welsh public bodies, within devolved competence, do you consider a duty to pursue SMNR should apply?

All and as above

Accountability

Q5. Question 5: Do you agree with the gaps identified, or do you consider there are other gaps, which need to be considered?

We agree with the gaps identified at 3.22

Q6. Question 6: What role should existing accountability bodies provide in a new environmental governance structure for Wales?

We question whether an accountability body should be solely for Wales or applying to (whatever is left of) the UK. We are already witnessing unsustainable farming practices being used on welsh land by English contractors because the compliance with certain farming regulations is so lax or do not exist in Wales. In our view an independent all UK body would be the most appropriate. There are two failures here: poor regulations compared to England and poor enforcement. This allows short term gain but long term loss (of soil and environmental status) Central government should pay for it

Q7. Question 7: Is the outlined role and objective appropriate for a body responsible for overseeing the implementation of environmental law in Wales?

We persist with our view of an all UK body but the ideas outlined would be appropriate for that body

Q8. Question 8: Which policy areas should be included within the scope of new governance arrangements?

Agree with those proposed

Q9. Question 9: Do you consider the proposed list of bodies to be appropriate?

Yes,

Q10. Question 10: Do you consider there are other Welsh bodies, which should also fall within the remit of an oversight body?

Not sure

Q11. Question 11 : What should be the status, form and constitution of an oversight body?

Again, ideally an all UK body

Q12. Question 12: Should an oversight body be able to act in an advisory capacity?

Only as an occasional secondary role to 13 and not to be used as an alternative to what ever enforcement powers the body might have

Q13. Question 13: Should an oversight body be able to scrutinise implementation of environmental legislation?

Yes

Q14. Question 14: What should be the extent of this function?

A bit of 12, a lot of 13 and as described ahead

Q15. 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?

We commend the EC forms for complaints about failures in respect of EU Directives. With appropriate adaptations, these could fit the purpose. WG will already be fairly familiar with them! They require a degree of knowledge by the complainant and filter out frivolous and ill found complaints. A well directed complaint made this way would require powers to investigate and deliver judgement

Q16. 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?

We agree that JRs in our own courts fall well short of an ideal solution, largely because of cost. However, if the independent body is faced with the equivalent decision to that formerly adjudicated in the CJEU, a JR should be used and it should be funded by the offending party - a powerful incentive to resolve earlier. Informal enforcement could be agreement for prescribed resolution between offending party and the 'Body'

It is easy to see the power of an successful infraction by the EC. Money would have gone from the member state to the EU. In the post brexit scenario funds should go from the WG or offending body to the injured party.

Q17. Question 17: What enforcement actions do you consider need to be available?

Wales is seen to drag its feet in enacting and enforcing its environmental legislation. An independent body should be able to use the legal system as described above

Other

Q18. Question 18: Would there be advantages in having a shared core set of common environmental principles?

Yes: not least is ensuring that bad practices dont come to Wales because of lax enforcement and regulations but also complying with WTO rules and the like

Q19. Question 19: What potential governance structures do you consider are needed to enable collaboration and collective decision-making to enable interface between administrations?

We have already expressed the need for Wales to be part of a UK wide governance body. That would do it!

Submit your response

Q20. You are about to submit your response. Please ensure you are satisfied with the answers you have provided before sending.

Name

Organisation (if applicable) Afonydd Cymru Cyfyngedig

Q21. If you want to receive a receipt of your response, please provide an email address. Email address

Q22. Responses to consultations may be made public. To keep your response anonymous (including email addresses) tick the box.

No Response

Environmental principles and governance in Wales post European Union exit

Q1. Question 1 : Do you agree the following principles should be included within legislation for Wales?

The All Wales Polltuion Expert Panel agrees that the missing EU principles such as 'polluter pays' and 'rectificationat source' will need to be included within legislations for Wales.

Q2. Question 2: Do you think there are other principles, which may also need to be included?

The rights of the public established in the Aarhus Convention will still need to be delivered in decision making processes. Inclusion of regulatory principles will assist in transparency and fairness for public bodies with 'access to justice' allowing them to target interventions to reduce legal burdens.

Q3. Question 3: Do you agree the duty to pursue sustainable management of natural resources and the application of the SMNR principles should be extended?

Yes, the panel agrees.

Q4. Question 4: On which Welsh public bodies, within devolved competence, do you consider a duty to pursue SMNR should apply?

The panel would like to see duties for local government.

Accountability

Q5. Question 5: Do you agree with the gaps identified, or do you consider there are other gaps, which need to be considered?

Yes, the panel agrees.

Q6. Question 6: What role should existing accountability bodies provide in a new environmental governance structure for Wales?

The Public Services Ombudsman is able to investigate complaints and the Future Generations Commissioner can report on progress made by public bodies but a body will be required to look at issues affecting mulitple agencies and ensuring that the process is accountable.

Q7. Question 7: Is the outlined role and objective appropriate for a body responsible for overseeing the implementation of environmental law in Wales?

Yes, the panel agrees.

Q8. Question 8: Which policy areas should be included within the scope of new governance arrangements?

Water Companies have a major impact and NRW have increasingly limited their respons on some threats. Should we consider a limited governance arrangement but a similiar scope for water PLCs? Cleary it would create legal complications if the new oversight body had extra regulatory controls over water companies, however it woul dbe useful for them ot hold water compaies to account publicly for environmental issues within the general scope.

Q9. Question 9: Do you consider the proposed list of bodies to be appropriate?

Yes, the panel agrees.

Q10. Question 10: Do you consider there are other Welsh bodies, which should also fall within the remit of an oversight body?

Yes, Water Companies have an impact upon the environment and there is an opportunity to enable public accountability.

Q11. Question 11 : What should be the status, form and constitution of an oversight body?

The oversight body will need to be able to demonstrate that it is transparent by appointment and structural set up along with its impartiality. The body will need to have the ability to requie all parties to submit evidence at any time in order proivde robust responses to questions raised, targets set for example.

Q12. Question 12: Should an oversight body be able to act in an advisory capacity?

Given that the overarching aims of the body will be same as all other bodies i.e. Wellbeing and Future Generations Act 2015 there should be a capacity to advise bodies however, the regulatory aspect of the body must be robust and proportionate in penalising so that public/environmental interests are served.

Q13. Question 13: Should an oversight body be able to scrutinise implementation of environmental legislation?

Yes, the panel agrees. The ability to scrutinise implementation will enable the body to assist in appropriate delivery and use of new legislation.

Q14. Question 14: What should be the extent of this function?

For a body to able to undertake scrutiny adequately it would need the ability to request data, procedures from the various statutory service providers. The assessment/examination phase would need to below followed by open debate/discussion to ensure openess/fairness of public bodies.

Q15. 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 panel agrees that a complaint system should be simple and free for citizens to use. The extent of powers and how they are implemented would need to be determined by the new body. As mentioned

Q15. 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?

above, the body will need to be able to demand/request evidence from all bodies to enable thorough investigation.

Q16. 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?

The panel agrees that informal methods in line with the '5 ways of working' - this would enable the appropriate actions are carried out to achieve compliance. As mentioned previously, the oversight body would require the formal methods for example formal notice, direction to carry out specified works, legal action where bodies have failed to comply with legislation.

Q17. Question 17: What enforcement actions do you consider need to be available?

Potentially similar to infraction proceedings, the oversight body should have the power to require all bodies to deliver their specified services. Consideration should be given to the relevant legislation/policies and their implementation to ensure that the public/environment issues are addressed.

Other

Q18. Question 18: Would there be advantages in having a shared core set of common environmental principles?

Yes, the panel agrees.
A common ground would enable consistent and robust application across all sectors. Will also enable a benchmark for statutory standards.

Q19. Question 19: What potential governance structures do you consider are needed to enable collaboration and collective decision-making to enable interface between administrations?

It would be preferential to have the ability for any of the governance structures to overlap in a collaborative fashion when dealing with similar matters in different parts of the UK. There is much to be gained by learning from the different approaches taken, but retaining a core Welsh role.

Submit your response

Anonymous

Environmental principles and governance in Wales post European Union exit

Environmental principles

Q1. Question 1: Do you agree the following principles should be included within legislation for Wales?

Yes. Moreover these principles need to be enforceable.

Q2. Question 2: Do you think there are other principles, which may also need to be included?

1. Introduce a crime of Ecocide: We urge the Welsh Government to go well beyond current EU legislation and make ecocide a crime. Ecocide is the loss or damage to, or destruction of ecosystem(s) of a given territory(ies), such that peaceful enjoyment by the inhabitants has been or will be severely diminished. Such a law has the potential to radically alter how businesses make decisions involving action or inaction resulting in severe environmental harm and as such could be a game changer. Wales has shown itself to be a world leader in legislation with the Wellbeing of Future Generations Act, it now has the opportunity to do this again by making ecocide a criminal offence. For more information on this, we refer you to the work of the late Polly Higgins https://eradicatingecocide.com/.

2. In addition, Wales has an ideal opportunity here to be the first western nation to include the principle of Earth Rights.
https://therightsofnature.org/universal-declaration/

3. Highlight the important link between a healthy natural environment and the health and well-being of people.

Q3. Question 3: Do you agree the duty to pursue sustainable management of natural resources and the application of the SMNR principles should be extended?

Yes - but the focus needs to shift from seeing nature as a resource, as property that we own. We as humans are part of the natural world, part of the cynefin and we need to look after our cynefin, rather than seeing the natural world as a list of resources with financial value.
Wales has an opportunity here to take a truly progressive step by recognising in law that ecosystems, nature and indeed the earth as a whole have rights which we need to respect for our own well-being.
The Wellbeing of Future Generations Act, and its well-being goals, provides a unique opportunity to link environmental and social justice, health and well-being.

Q4. Question 4: On which Welsh public bodies, within devolved competence, do you consider a duty to pursue SMNR should apply?

Issues of concern here:
* What about public bodies working in Wales, and/or with power in Wales, that are not devolved ie UK bodies?
* What about private companies, including multinational companies?

Accountability

Q5. Question 5: Do you agree with the gaps identified, or do you consider there are other gaps, which need to be considered?

Yes - agree.

Q6. Question 6: What role should existing accountability bodies provide in a new environmental governance structure for Wales?

No Response

Q7. Question 7: Is the outlined role and objective appropriate for a body responsible for overseeing the implementation of environmental law in Wales?

No Response

Q8. Question 8: Which policy areas should be included within the scope of new governance arrangements?

No Response

Q9. Question 9: Do you consider the proposed list of bodies to be appropriate?

No Response

Q10. Question 10: Do you consider there are other Welsh bodies, which should also fall within the remit of an oversight body?

This needs to include businesses, not just public bodies. If the 'polluter pays' principle is to be adopted, then any businesses causing pollution need to be answerable to this body.

Q11. Question 11 : What should be the status, form and constitution of an oversight body?

No Response

Q12. Question 12: Should an oversight body be able to act in an advisory capacity?

Yes.

Q13. Question 13: Should an oversight body be able to scrutinise implementation of environmental legislation?

Yes.

Q14. Question 14: What should be the extent of this function?

It needs to be able to take a holistic, over-arching view, and not be pigeon-holed or restricted by departmental boundaries.

Q15. 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 needs to have bite, otherwise there's no point.
It needs to be independent and to work wholy in the interests of Wales' natural environment and ecosystems - including ordinary people.
It must not be influenced by pressure from multinational businesses - as NRW appears to have been in the radioactive mud-dumping scenario.
It needs to be protected from Westminster - we can't have the situation where a just and wise decision made by the body is then over-ruled by the UK government.

Q16. 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?

At least initially, it makes sense to follow the EU's system.

Q17. Question 17: What enforcement actions do you consider need to be available?

There need to be a range of options available so that each situation can be responded to in the best manner, eg speedily in urgent situations, or with time for community consultation and restitution in others.

Other

Q18. Question 18: Would there be advantages in having a shared core set of common environmental principles?

Yes it would be advantageous, but only if the UK-wide principles matched Wales' high standards and progressive approach; eg UK-wide standards must not undermine Welsh principles and legislation such as the Wellbeing of Future Generations Act.

Q19. Question 19: What potential governance structures do you consider are needed to enable collaboration and collective decision-making to enable interface between administrations?

An important question!
A level structure is needed where Wales has an equal voice and is not over-ridden.

Submit your response

Q20. You are about to submit your response. Please ensure you are satisfied with the answers you have provided before sending.

Name

Organisation (if applicable) Paramaethu Cymru / Permaculture Wales

Q21. If you want to receive a receipt of your response, please provide an email address.
Email address

No Response

Q22. Responses to consultations may be made public. To keep your response anonymous (including email addresses) tick the box.

No Response

Environmental principles and governance in Wales post European Union exit

Environmental principles

Q1. Question 1: Do you agree the following principles should be included within legislation for Wales?

Yes but use the Minister's language: 'Our breath-taking landscapes, from the mountains running down the spine of Wales, to the edges of our coastline and the sea beyond, are not only important environmentally, but are a key part of our identity and culture. The natural resources they contain also provide benefits which are vital to our prosperity.'

Q2. Question 2: Do you think there are other principles, which may also need to be included?

Recognition that 25% of Wales has protection through the 5 AONBs and 3 National Parks

Q3. Question 3: Do you agree the duty to pursue sustainable management of natural resources and the application of the SMNR principles should be extended?

Yes but you need to change the impenetrable language to get the messages over. 80% of Welsh land is managed by farmers NFU have recently produced Sustainable Agriculture Food, Farming and the Environment. That's the type of document and language that should be used as a template

Q4. Question 4: On which Welsh public bodies, within devolved competence, do you consider a duty to pursue SMNR should apply?

Section 85 and Section 62 organisations

Accountability

Q5. Question 5: Do you agree with the gaps identified, or do you consider there are other gaps, which need to be considered?

Consultation with Landowners 80% NFU have a special position as do the National Trust, whilst not public bodies are critical bodies

AONBs and National Parks, use them as the test for SMNR

Q6. Question 6: What role should existing accountability bodies provide in a new environmental governance structure for Wales?

No Response

Q7. Question 7: Is the outlined role and objective appropriate for a body responsible for overseeing the implementation of environmental law in Wales?

Yes

Q8. Question 8: Which policy areas should be included within the scope of new governance arrangements?

No Response

Q9. Question 9: Do you consider the proposed list of bodies to be appropriate?

I wonder whether the three regulators are key players
OFWAT
OFGEM
OFCOM

Q10. Question 10: Do you consider there are other Welsh bodies, which should also fall within the remit of an oversight body?

OFWAT
OFGEM
OFCOM

Q11. Question 11 : What should be the status, form and constitution of an oversight body?

No Response

Q12. Question 12: Should an oversight body be able to act in an advisory capacity?

No Response

Q13. Question 13: Should an oversight body be able to scrutinise implementation of environmental legislation?

No Response

Q14. Question 14: What should be the extent of this function?

No Response

Q15. 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?

Yes, considering the RSPCA currently pay to do some work that could be considered

Q16. 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?

No Response

Q17. Question 17: What enforcement actions do you consider need to be available?

No Response

Other

Q18. Question 18: Would there be advantages in having a shared core set of common environmental principles?

Yes

Q19. Question 19: What potential governance structures do you consider are needed to enable collaboration and collective decision-making to enable interface between administrations?

No Response

Submit your response

Q20. You are about to submit your response. Please ensure you are satisfied with the answers you have provided before sending.

Name

Organisation (if applicable) Clwydian Range and Dee Valley Area of Outstanding Natural Beauty

Q21. If you want to receive a receipt of your response, please provide an email address.
Email address

Q22. Responses to consultations may be made public. To keep your response anonymous (including email addresses) tick the box.

No Response

Environmental principles and governance in Wales post European Union exit

Environmental principles

Q1. Question 1: Do you agree the following principles should be included within legislation for Wales?

Yes.
NB: All principles, including the two additional ones, need to be enforcable.

Q2. Question 2: Do you think there are other principles, which may also need to be included?

1. Introduce Ecocide as a crime. See https://eradicatingecocide.com/
2. Add the principle of Earth Rights. See https://therightsofnature.org/universal-declaration/
3. Ensure all 7 Well-being goals are included in how the principles are understood.

Q3. Question 3: Do you agree the duty to pursue sustainable management of natural resources and the application of the SMNR principles should be extended?

Yes - but the focus needs to shift from seeing nature as a resource, as property that we own. We as humans are part of the natural world, part of the cynefin and we need to look after our cynefin, rather than seeing the natural world as a list of resources with financial value.
Wales has an opportunity here to take a truly progressive step by recognising in law that ecosystems, nature and indeed the earth as a whole have rights which we need to respect for our own well-being.
The Wellbeing of Future Generations Act, and its well-being goals, provides a unique opportunity to link environmental and social justice, health and well-being.

Q4. Question 4: On which Welsh public bodies, within devolved competence, do you consider a duty to pursue SMNR should apply?

Issues of concern here:
What about public bodies working in Wales, and/or with power in Wales, that are not devolved ie UK bodies?
What about private companies, including multinational companies?

Accountability

Q5. Question 5: Do you agree with the gaps identified, or do you consider there are other gaps, which need to be considered?

I agree with the gaps identified.

Q6. Question 6: What role should existing accountability bodies provide in a new environmental governance structure for Wales?

NRWs role and decisions regarding the dumping of mud containing radioactive material in Cardiff Bay raises questions about the suitability of NRW for this role.

Q7. Question 7: Is the outlined role and objective appropriate for a body responsible for overseeing the implementation of environmental law in Wales?

No Response

Q8. Question 8: Which policy areas should be included within the scope of new governance arrangements?

No Response

Q9. Question 9: Do you consider the proposed list of bodies to be appropriate?

No Response

Q10. Question 10: Do you consider there are other Welsh bodies, which should also fall within the remit of an oversight body?

This needs to include businesses, not just public bodies. If the 'polluter pays' principle is to be adopted, then any businesses causing pollution need to be answerable to this body.

Q11. Question 11 : What should be the status, form and constitution of an oversight body?

No Response

Q12. Question 12: Should an oversight body be able to act in an advisory capacity?

Yes

Q13. Question 13: Should an oversight body be able to scrutinise implementation of environmental legislation?

Yes

Q14. Question 14: What should be the extent of this function?

It needs to be able to take a holistic, over-arching view, and not be pigeon-holed or restricted by departmental boundaries.

Q15. 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 needs to have bite, otherwise there's no point.
It needs to be independent and to work wholy in the interests of Wales' natural environment and ecosystems - including ordinary people.
It must not be influenced by pressure from multinational businesses - as NRW appears to have been in the radioactive mud-dumping scenario.
It needs to be protected from Westminster - we can't have the situation where a just and wise decision made by the body is then over-ruled by the UK government.

Q16. 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?

At least initially, it makes sense to follow the EU's system.

Q17. Question 17: What enforcement actions do you consider need to be available?

There need to be a range of options available so that each situation can be responded to in the best manner, eg speedily in urgent situations, or with time for community consultation and restitution in others.

Other

Q18. Question 18: Would there be advantages in having a shared core set of common environmental principles?

Yes it would be advantageous, but only if the UK-wide principles matched Wales' high standards and progressive approach; eg UK-wide standards can't undermine Welsh principles and legislation such as the Wellbeing of Future Generations Act.

Q19. Question 19: What potential governance structures do you consider are needed to enable collaboration and collective decision-making to enable interface between administrations?

An important question!
A level structure is needed where Wales has an equal voice and is not over-ridden.

Submit your response

Q20. You are about to submit your response. Please ensure you are satisfied with the answers you have provided before sending.

Name

Organisation (if applicable) -

Q21. If you want to receive a receipt of your response, please provide an email address. Email address

No Response

Q22. Responses to consultations may be made public. To keep your response anonymous (including email addresses) tick the box.

No Response

Environmental Principles and Governance in Wales post European Union exit
The response of the Woodland Trust – Coed Cadw

Consultation Questions

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

- **Rectification at Source;**
- **Polluter-pays**

Question 2: Do you think there are other principles, which may also need to be included?

Yes. The principles set out in Question 1 and additional principles should be included as follows.

The consultation recognises that the principles are an integral part of the EU environmental law and therefore a crucial element in delivering legal continuity and carrying over the full EU environmental acquis, a commitment made by the UK and Welsh Government.

Article 191 (2) of the Treaty on European Union and the Treaty on the Functioning of the European Union) states that "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 shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay."

The treaty also includes a set of objectives for union policy on the environment, namely:

- preserving, protecting and improving the quality of the environment,

- protecting human health,

- prudent and rational utilisation of natural resources,

- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

The analysis in the consultation focusses on the four core principles in Article 151 the TFEU and principles in Welsh legislation, namely the Environment (Wales) Act 2016[1] and the Well being of Future Generations Act 2015[2]. It omits other crucial elements of the relevant articles in the Treaty including the set of objectives and the overarching aim that environmental policy should achieve a

1 http://www.legislation.gov.uk/anaw/2016/3/contents/enacted
2 http://www.legislation.gov.uk/anaw/2015/2/contents/enacted

'high level of environmental protection'[3] and these are therefore excluded from the proposals for legislation. Their inclusion would give the principles coherence and provide clarity on their interpretion and application. It would also be consistent with replacing the environmental acquis of EU law.

The consultation acknowledges that although some of the EU environmental principles are reflected in Welsh legislation that they might not be directly comparable in terms of drafting or their application. It is acknowledged that the principles are not applied in the same way as EU environmental principles, with the principles of the sustainable management of natural resources set out in the Environment (Wales) Act 2016 only applying to the functions of Natural Resources Wales (NRW) and to Welsh Ministers in the development, production and implementation of the natural resources policy, and are therefore more limited in their application that those in the Well-being of Future Generations Act 2015 (Paragraph 2.26).

The consultation proposes to legislate to incorporate the EU environmental principles that are identified as missing from Welsh law i.e. rectification at source and polluter pays, by incorporating them into those already included in the Environment (Wales) Act 2016 (The principles for the sustainable management of natural resources); and to expand the number of bodies to which the revised set of principles will apply.

This is based on the Welsh Government's opinion that:

- the prevention principle is present in the 5 ways of working in the Well-being of Future Generations Act 2015 and the principles of the sustainable management of natural resources in the Environment (Wales) Act 2016;
- that the precautionary principle, although not directly specified is "captured by the framework in the Environment (Wales) Act 2016" and that "key components provided for in the principles of sustainable management of natural resources (Environment Act)" (Table entitled Key concepts and principles, page 16); and
- "The EU approach is encapsulated within in SMNR principles" (Table 1 in the consultation document)

We disagree with this analysis and do not believe that the prevention and precautionary principles are included in Welsh legislation as equivalent to EU law. The precautionary principle is not comparable with the principle that it is important to "take account of all relevant evidence and gather evidence in respect of uncertainties" (Section 4, Environment (Wales) Act 2016), neither it is equivalent to the interpretation of the precautionary principle in the EU.

The environmental principles included in the UK Government's draft environment bill are also missing from the Welsh Government's analysis. The UK Government consulted on its proposals for environmental governance post Brexit in 2018[4], with the stated aim of strengthening and not simply maintaining environmental protection measures when we leave the EU. The UK Government committed to legal continuity and promised to carry over the full EU environmental acquis on exit

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[3] http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-the-functioning-of-the-european-union-and-comments/part-3-union-policies-and-internal-actions/title-xx-environment-climate-change/479-article-191.html

[4] https://consult.defra.gov.uk/eu/environmental-principles-and-governance/

day[5], as well a pledge to uphold all of its obligations under international environmental treaties[6], establishing a "world-leading body to give the environment a voice and hold the powerful to account" and "a pioneering new system of green governance". The UK Government published its draft environment bill[7] in December 2018.

As a requirement in the EU Withdrawal Act, Section 2 of the UK Government's draft environment bill[8] (Meaning of "environmental principles") contains 9 principles, namely:
(a) the precautionary principle, so far as relating to the environment,
(b) the principle of preventative action to avert environmental damage,
(c) the principle that environmental damage should as a priority be rectified at source,
(d) the polluter pays principle,
(e) the principle of sustainable development,
(f) the principle that environmental protection requirements must be integrated into the definition and implementation of policies and activities,
(g) the principle of public access to environmental information,
(h) the principle of public participation in environmental decision-making, and
(i) the principle of access to justice in relation to environmental matters

It is accepted that the sustainable development principle is already enshrined in Welsh legislation. However, the other principles included in the draft environment bill all merit consideration for inclusion in Welsh legislation. It is recognised that the list in Section 2 of the draft bill includes environmental principles and rights linked to the Aarhus Convention, an issue highlighted in Parliamentary pre legislative scrutiny. This could be resolved by clearly defining the principles and their intended interpretation in associated guidance.

Similar to the Welsh Government's proposals, the UK draft environment bill also omits the overarching objective that environmental policy should aim for a high level of environmental protection, and has therefore been criticised for failing to include the full environmental acquis provided for in the Treaty. The report of the Environmental Audit Committee on its inquiry into environmental governance and principles recommends that the legislation should include the environmental principles embodied in the European Treaties and provisions for all public bodies to act

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5 https://www.gov.uk/government/publications/the-repeal-bill-white-paper/legislating-for-the-united-kingdoms-withdrawal-from-the-european-union

6 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/714379/180511_EUWB_Environmental_Protections_factsheet_10_May_18.pdf

7 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766849/draft-environment-bill-governance-principles.pdf

8 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766849/draft-environment-bill-governance-principles.pdf

in accordance with them. It also recommends the inclusion of a principle in law that policy and public bodies will seek to ensure a high level of environmental protection, akin to the wording of the Treaty[9].

The principles as set out in the Treaty should be fully articulated in Welsh legislation including the aim for a high level of environmental protection. Consideration should also be given to including the principles set out in the draft environment bill.

Non regression

The Withdrawal agreement includes a commitment to non-regression, namely to ensuring that "the level of environmental protection provided by law, regulations and practices is not reduced below the level provided by the common standards applicable within the Union and the UK at the end of the transition period", in relation to a list of areas that cover all the main topics of EU environmental law, including pollution control, nature conservation, climate change and public participation.

The Welsh Government's Brexit policy Securing Wales' Future[10] identifies non regression of environmental rights and to provide continued citizens' right to hold Government to account as a priority. The consultation also states that there is an opportunity to develop a structure which supports a commitment to non regression, and more fundamentally a commitment to enhancing the environment to meet challenges faced (paragraphs 1.3 and 1.5)

The table on page 16 of the consultation includes the Welsh Government's analysis that non regression is "reflected in the objective of sustainable management of natural resources" (Environment (Wales) Act 2016). Whilst it is acknowledged that a commitment to maintain and enhance natural resources could be interpreted in this way, this drafting is not equivalent in its meaning to the principle of non regression. We would therefore recommend the inclusion of an unambiguous commitment to non regression or a principle of non regression in the revised legislation alongside the four core principles and the overall objective for a high level of environmental protection. The purpose of such a principle would be to ensure that there is no reduction in environmental protections and could also incorporate "progression". The principle of non-regression is already a principle of international law as acknowledged by the International Union for Conservation of Nature (IUCN). We have made the same recommendation in relation to amending the draft environment bill.

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

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

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9 https://www.parliament.uk/business/committees/committees-a-z/commons-select/environmental-audit-committee/news-parliament-2017/draft-environment-bill-report-publication-17-19/

10 https://gov.wales/sites/default/files/2017-01/30683%20Securing%20Wales%C2%B9%20Future_ENGLISH_WEB.pdf

We agree that there is a need to amend Welsh legislation to incorporate EU environmental principles as set out in our response to questions 1 and 2; and to extend the scope of their current application as set out in the Environment (Wales) Act 2016. However, the Welsh Government proposes to achieve this by revising the existing principles for the sustainable management of natural resources in the Environment (Wales) Act 2016 to incorporate two of the four core principles, namely polluter pays and rectification at source.

In contrast, we would advocate that once amended to incorporate EU environmental principles as set out in our response to Questions 1 and 2, we would support the extension of the the duty on environmental principles to all public bodies in Wales so far as they are relevant to the discharge of their functions.

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

The consultation states that "there is an opportunity for a wide discussion on environmental governance", and that the Welsh Government is seeking views on the most effective and coherent approach to improving environmental governance. Whilst the consultation does not make specific proposals on governance structures, it describes the functions that will be lost as a result of leaving the EU and outlines "the key elements that would be required to provide proportionate, independent, effective and robust oversight" "irrespective of the type of body, which may operate as an oversight body in Wales.". It also asks for views on the role of existing accountability bodies in an improved governance structure, and whether or not improvements could be made to existing structures or whether a specific oversight body is required.

The consultation (Paragraph 3.22) identifies three potential gaps in environmental governance that would emerge as a result of existing the EU, namely:

- Independent accountability
- A simple and inexpensive mechanism to raise complaints: – the simple and free citizen complaint procedure provided by the EU would no longer be in place
- Enforcement mechanisms – the EU has both formal and informal complaints procedures and mechanisms that enable disputes to be addressed via negotiations. It can also seek recourse to the CJEU , which can result in significant financial penalties where there is failure to comply with the courts judgements

We broadly agree with the Welsh Government's gap analysis and the list of key elements that will be required in a new system of environmental governance. In our response to other questions we have identified gaps in the consultation analysis namely, the UK draft environment bill, the full set of provisions relating to environmental principles in the TFEU and a clear and unambiguous commitment to non regression. We also note that in addition to considering the need to deliver legal continuity and carrying over the full EU environmental acquis that there is an opportunity here to strengthen existing provisions in Welsh legislation to establish the best model of environmental governance.

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

The consultation provides an overview of existing governance arrangements including the functions of UK and Welsh bodies. It acknowledges that whilst there are several bodies operating in Wales which hold public bodies to account, such as the Public Services Ombudsman and the Auditor General, that these bodies were established for different purposes and do not have the role of scrutinising the proper implementation of environmental law, nor do they have the required expertise or equivalent functions to undertake continuous monitoring or enforcement. These factors, as well as the intended purpose, objectives and functions of new governance arrangements as outlined in the consultation clearly indicate that a distinct oversight body is required rather than modifying existing structures. It will be important however to ensure that there is no duplication of roles.

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

The consultation proposes that there is an opportunity to establish a governance system in Wales which:
1. Aligns with the overarching context of sustainable development set by the Well-being of Future Generations (Wales) Act 2015;
2. Ensures delivery against the statutory framework for the sustainable management of natural resources set out in the Environment (Wales) Act 2016;
3. Compliments and is compatible with the existing Welsh bodies, established to scrutinise, advise or hold public bodies in Wales to account (such as the Future Generations Commissioner);
4. Aligns with existing reporting and monitoring mechanisms provided under the Well-being of Future Generations and Environment Acts;
5. Respects the role of the National Assembly as a legislature in holding the Welsh Government to account;
6. Provides a coherent framework designed to address governance at a national level;
7. Is independent and impartial; and
8. Helps to maintain and enhance environmental standards.

The consultation does not make specific proposals on structure but considers the key elements that would be required to provide independent, effective and robust oversight, irrespective of the type of body which may operate as an oversight body in Wales (Paragraph 3.28). It asks how such a body should be constituted, and whether it should take the form of a commission, a commissioner or another form best suited for the delivery of its role and objectives.

According to the consultation, the key elements that would be required are as follows:

- Provide independent oversight of the implementation of legislation relating to Wales' natural resources in a way which is aligned to existing welsh legislation
- The aim of such a body would be to act as a guardian of Wales' natural resources in ensuring policy and legislation is developed in accordance with the principles set out in the Environment (Wales) Act (including the missing EU environmental principles) and that delivery is in line with underpinning environmental regulations.

It is proposed (paragraphs 3.27 and 3.28) that the following objectives would help set a broad purpose for a body providing oversight, fully aligned to the Environment (Wales) Act 2016 and the Well-being of Future Generations Act 2015:

- Ensure policy and legislation is developed in a way which maintains and enhances Wales' natural resources in line with the principles in Welsh legislation (e.g. that already specified within the Environment (Wales) Act);
- Ensure legislation is implemented effectively and delivery is line with the aim of maintaining and enhancing Wales' natural resources;
- Act in an advisory capacity on the sustainable management of natural resources for public bodies;
- Act impartially in assessing the effective implementation of Welsh legislation relating to the environment;
- Act impartially in receiving complaints from citizens.

We broadly agree with the role and objectives for environmental governance as outlined in the consultation and set out more detailed comments on the role and functions of a new independent oversight body below.

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

The consultation states that the Welsh Government recognises that the environment is intrinsically linked to the economy and society and therefore their approach to the environment is cross cutting. It asks how the governance gaps can be addressed in a way which continues to drive environmental improvement, enhances Wales' reputation for high standards, provides a coherent governance framework and builds on Welsh legislation.

In this context, all areas of policy that interact with or have an impact on the environment should be included within the scope of new governance arrangements. This would be equivalent to the the European model whereby the Commission considers environmental effects across all areas of competence

Question 9: Do you consider the proposed list of bodies to be appropriate?
Question 10: Do you consider there are other Welsh bodies, which should also fall within the remit of an oversight body?

The consultation proposes that the remit of an oversight body's advisory and scrutiny functions should extend to the following bodies (paragraph 3.34):

- Welsh Ministers;
- Natural Resources Wales;
- Welsh local authorities; and
- Ministers of the Crown (e.g. consistent with their responsibilities under the Environment (Wales) Act).

We do not consider that the proposed list of bodies is sufficient. The remit of the oversight body's advisory and scrutiny functions should extend to all public bodies in line with the proposal to extend

the scope of the application of environmental principles and the sustainable management of natural resources.

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

Whilst the consultation does not propose a specific structure, it includes a set of criteria for the status, form and constitution of an oversight body and asks how such a body should be constituted, and whether it should take the form of a commission, a commissioner or another form best suited for the delivery of its role and objectives

We agree with the proposals in the Welsh Government's consultation that any oversight body should:

- be independent of government
- be accountable for its activities in Wales to the National Assembly for Wales
- be independently audited by a body such as the Auditor General for Wales
- Have independent appointment structures; and
- Have independent sources of funding.
- Operate in a transparent and impartial manner
  (paragraphs 3.35-3.36)

The Withdrawal agreement includes relevant provisions on environmental governance and in particular requirements for any new oversight body or bodies. Article 3 of Annex 4 to the backstop obliges the UK to ensure effective enforcement of its laws, regulations and practices relating to the common standards agreed to in Article 2, and this covers almost all environmental law. Specifically, the UK must "implement a transparent system for the effective domestic monitoring, reporting, oversight and enforcement of its obligations" relating to the environment by "an independent and adequately resourced body or bodies".

The Withdrawal agreement specifically requires that the new body or bodies must:

- Have powers to initiate enquiries about alleged breaches of compliance with the law;
- Have powers to receive relevant complaints;
- Have the right to bring a legal action before a competent court or tribunal in the United Kingdom;
- Be able to seek an "adequate remedy";
- Cover climate change law;
- Cover all four countries of the UK.
- Cover activities of all public bodies, not just Ministers of the Crown.

In order to meet the criteria of the Withdrawal Agreement and the Welsh Government in terms of its status, form and constitution, the new oversight body should be established as a fully independent body corporate, of similar status to the National Audit Office.

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

Yes.

The consultation suggests that an oversight body could provide expert advice on how public bodies can contribute to sustainable management of natural resources but also how they can deliver their other functions in a way which will further enhance ecosystem resilience and therefore help contribute to the well-being goals as provided in the Well-being of Future Generations Act 2015. We agree that the oversight body should include this function however there would appear to be some overlap with the functions of Natural Resources Wales and the Future Generations Commissioner. For example, the Office of the Future Generations Commissioner recently published guidance on the resilient Wales goal[11]. The new oversight body's advisory role will need to be carefully considered in reference to existing bodies to ensure that their functions are not duplicated.

The consultation states (Paragraph 1.5) that whilst exit from the EU means the loss of a number of governance mechanisms, it also provides an opportunity to put in place new governance arrangements, which reflect and support international commitments and build on the Welsh Government's approach to managing natural resources as provided in the Environment (Wales) Act 2016. It states that there is an opportunity to enhance our national governance arrangements by introducing new mechanisms and develop a structure which supports not only a commitment to non regression, but more fundamentally a commitment to enhancing the environment to meet challenges faced.

We agree with this sentiment, and believe that there is an opportunity here, not only to legislate on environmental principles and governance and address gaps arising from EU exit, but also to consider addressing weaknesses in the existing legislative framework for the environment and sustainable development. For example, provisions in the Well-being of Future Generations Act 2015 have been criticised for being weak in terms of enforcement[12], and provisions in the Environment (Wales) Act 2016 in relation to State of Natural Resources reporting and Area Statements could be strengthened from the current "have regard duty".

Question 13: Should an oversight body be able to scrutinise implementation of environmental legislation?
Question 14: What should be the extent of this function?

Yes. Independently scrutinising the implementation of environmental law should be a core function of an oversight body, including monitoring, reporting, oversight and enforcement of environmental obligations, as required under the withdrawal agreement. It should not however be limited to only scrutinising environmental legislation as this would exclude other areas of policy which have a direct impact on the environment. Extending its scrutiny function in this way would be equivalent to the European model whereby the Commission considers environmental effects across all areas of competence. Further detail on the functions and powers of a proposed oversight body are set out below.

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?

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11 http://futuregenerations.wales/a-resilient-wales/
12 https://www.bbc.co.uk/news/uk-wales-48272470

The Welsh Government's Brexit White paper Securing Wales' Future[13] identifies non regression of environmental rights and to provide continued citizens' right to hold Government to account as a policy priority. We agree with the consultation that the new complaints mechanism should also be simple and free for citizens to use but would add that it also needs to be free of any civil or financial repercussions for the complainant.

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

Article 3, Part 2 of the Withdrawal Agreement makes clear that sanctions need to be effective, proportionate and dissuasive and have a real deterrent effect". The consultation rightly acknowledges that judicial review has received criticism as an appropriate mechanisms to replace the infraction procedures available to the CJEU (Paragraph 3.53) and states that the Welsh Government wants to ensure that deterrents relating to compliance with environmental law are genuine and effective including interim measures to prevent additional damage (paragraph 3.54). In order to achieve equivalence with EU infringement proceeding new enforcement arrangements should incorporate the following mechanisms.

The oversight body's remit should include the following:

- Powers to investigate breaches of environmental law
- Powers to instigate its own investigations into breaches of environmental law or systematic problems, and issue guidance and recommendations. This would be consistent with the "power to investigate on own initiative" in the Public Services Ombudsman (Wales) Act 2019[14].
- Powers to issue interim measures and stop notices to prevent environmental damage
- Power to require damage to be corrected by the polluter, and for interim measures to be put in place to prevent additional harm while investigations are being conducted.
- Powers to issue binding decision notices/advisory notices and seek enforcement action for non compliance. Binding notices could include requirements for actions, policy implementation or financial compensation/ fines.
- Powers to seek enforcement action for non compliance with its binding decision notices/ advisory notices through the Environmental Tribunal
- Powers to initiate legal proceedings and refer cases directly to the Environmental Tribunal
- Powers to request information from competent authorities where it relates to the environment.
- Powers to intervene in legal proceedings relevant to its purpose

We agree that recourse to the courts should be a final method of enforcement or last resort.

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13 https://gov.wales/sites/default/files/2017-01/30683%20Securing%20Wales%C2%B9%20Future_ENGLISH_WEB.pdf
14 http://www.legislation.gov.uk/anaw/2019/3/enacted

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

Yes. The Welsh Government proposes that the four environmental principles of prevention, precaution, rectify at source and polluter pays could provide a core set to be applied in relation to areas of joint decision making and legislation between the administrations (paragraph 3.62). This is a sensible proposal and would be in keeping with the commitment to non regression as well as the requirement of the Withdrawal Agreement. A shared set of principles would facilitate consistency with international commitments and provide coherence for environmental governance across the UK. The draft environment bill could still be the most appropriate legislative vehicle to achieve this.

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

In addition to the governance gap emerging from exiting the EU, Brexit has exposed weaknesses in the UK's constitutional and intergovernmental arrangements and a need to establish new arrangements to facilitate collaboration and collective decision making. There is recognition across all of the administrations that new UK wide frameworks or agreements will be required to ensure the functioning of the UK internal market, as well as facilitating commitments to international agreements and securing trade deals.

The Joint Ministerial Communique[15] agreed in October 2017 includes a framework for the UK Government and the devolved administrations to work together to establish common approaches in areas that are currently governed by EU law. The Communique is focused on trade concerns and maintaining compliance with obligations under international agreements, but mentions the management of 'common resources', a reference to cross-border concerns around air and water. The Communique makes it clear that the need to maintain the current competence of devolved institutions is crucial, and specifically states that the aim will be to significantly increase their decision-making powers. The Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks[16] forms the basis of an agreed approach between the governments.

Whilst there has been a lack of transparency in the process, it is clear from public statements and written evidence from the Welsh and Scottish Governments that intergovernmental collaboration on these matters has been problematic. As early as 2017, in evidence to the Environmental Audit Committee's inquiry into environmental governance, papers submitted by the devolved governments

15 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652285/Joint_Ministerial_Committee_communique.pdf

16 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/702623/2018-04-24_UKG-DA_IGA_and_Memorandum.pdf

indicated that Scotland and Wales would be considering their own arrangements for environmental governance and principles[17].

Whilst the Welsh Government is proposing to legislate and develop its own arrangements for environmental governance and principles, it recognises the importance of the four administrations working more closely post EU Exit and advocates more sustained cooperation between governments in the exercise of individual but connected competences in its White paper – Brexit and Devolution: Securing Wales' Future.[18] It states that where there are common UK obligations or where there is an interface between the UK nations on environmental matters, a UK wide governance mechanism may be appropriate (paragraph 3.60). As things stand there could be a divergence of environmental principles and governance arrangements across the UK which in itself would represent a weakening of the current common legal and governance framework that exists across the UK as a member state.

The UK draft environment bill is intended to apply to England and reserved matters. The complex constitutional arrangements across the UK mean that the scope of reserved matters differs between the devolved nations. It is our understanding that the scope of reserved matters has not been defined or agreed, and as a result there remains a lack of clarity regarding the geographical scope of the bill and therefore the extent to which it is intended to or could be the legislative vehicle to include UK-wide provisions on governance and principles including intergovernmental arrangements.

As the Communique indicates, the need for management of 'common resources' cross-border and maintaining compliance with international obligations/ commitments will remain, and whilst the UK as the sovereign state is signatory to international treaties, the devolved administrations have full or partial responsibility for delivering on those commitments. Intra UK governance arrangements should be established on the basis of the principles set out in the Communique and the Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks[19] and will need to account for international commitments, non regression, and dispute resolution.

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17 https://www.parliament.uk/business/committees/committees-a-z/commons-select/environmental-audit-committee/inquiries/parliament-2017/environmental-governance-17-19/publications/

18 https://gov.wales/sites/default/files/publications/2018-10/white-paper-securing-wales-future.pdf

19 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/702623/2018-04-24_UKG-DA_IGA_and_Memorandum.pdf

The UK Environmental Law Association's Wales Working Party

Response to the Welsh Government Consultation on Environmental Principles and Governance in Wales Post European Union Exit

The UK Environmental Law Association aims to make better law for the environment and to improve understanding and awareness of environmental law. UKELA's members are involved in the practice, study or formulation of Environmental Law in the UK and the European Union. It attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.

UKELA prepares advice to government with the help of its specialist working parties, covering a range of environmental law topics. This response has been prepared by UKELA's Wales Working Party (UKELA WWP), following a consultation event with the wider membership in Wales and on the request of and in discussion with the Brexit Task Force.

UKELA WWP makes the following comments on the proposals.

Overview

1. UKELA WWP welcomes the consultation paper published by the Welsh Government in March 2019 entitled: *Environmental Principles and Governance in Wales Post European Union Exit* (EPGW Consultation). UKELA regards the matters discussed as being critical to UK environmental law, including EU derived law, post-Brexit. It is crucial to be clear at the earliest possible stage how environmental law and governance fits and supports the Welsh Government's long-term aspirations for environmental protection.

2. UKELA WWP welcomes Welsh Government's recognition that there will be governance gaps in environmental protection on EU exit and its approach in considering in broad terms what this might mean for environmental governance in Wales going forward. It is appropriate to start this process by asking for comment on the key issues around environmental principles and accountability before making progress on the design of any new arrangements that might result from this. Nevertheless, this means it will be prudent to also consult on proposals regarding the more concrete organisational structures that subsequently emerge.

ENVIRONMENTAL PRINCIPLES

1: Do you agree the following principles should be included within legislation for Wales? – Rectification at source; and Polluter pays

2: Do you think there are other principles, which may also need to be included?

3. UKELA WWP believe that all four EU environmental principles currently referred to in Article 191 Treaty on Functioning of the European Union (TFEU) should be supported within legislation in Wales following EU exit.

4. We note that Wales already has a number of principles contained in the Well-Being of Future Generations (Wales) Act 2015 and Environment (Wales) Act 2016 and we agree that we would wish to avoid any overlap. However, the principles contained in these 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).

5. We also disagree that these Acts sufficiently address the precautionary principle. In particular, the precautionary principle cannot be equated with the principle that it is important to “take account of all relevant evidence and gather evidence in respect of uncertainties” (s4 Environment (Wales) Act 2016). It is also significant that this only applies at present to the Welsh Ministers and NRW, but perhaps most importantly it is arguably not equivalent to the current interpretation of the precautionary principle in the EU.

6. The principle of a high level of environmental protection has also been significant in EU environmental law. It may be prudent to consider whether this should be included, if not as a principle within Welsh legislation then as an important objective. One criticism of the draft Environment (Principles and Governance) Bill proposed by the UK government has been that although it identified key environmental principles it appeared to discard the rest of Article 191 of the Treaty. This is especially problematic with respect to Article 191 paragraph 2 that refers to the fact that 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.

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

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

7. UKELA WWP supports the extension of these principles to all public bodies in Wales 'so far as they are relevant to the discharge of their functions'. A legislative provision to this effect 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.

ACCOUNTABILITY

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

8. The UKELA WWP agrees that there will be governance gaps relating to:

   - independent accountability;
   - a simple and inexpensive mechanism to raise complaints; and
   - enforcement mechanisms.

9. Specifically, we see gaps arising in the following respects:

- standards of reporting data and implementation information to the Commission.
- enforcement by the Commission, and the CJEU, including sanctions for persistent breach of environmental laws. There will no longer be a means of bringing government departments and public bodies to account and challenging non-compliance with environmental laws. Neither the bodies/agencies currently operating in Wales nor the National Assembly are in a position to deliver this.

- The legal requirement on government to ensure that penalties for breaches are "effective, proportionate and dissuasive".
  (see e.g. Water, Waste, Air Quality Framework Directives, REACH etc)
- Right of individuals to activate enforcement of environmental laws, at no cost, through complaints to Commission.
- Uncontentious, 'even' application of EU derived environmental laws and environmental principles throughout the UK.

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

10. UKELA WWP considers that this question cannot be answered without establishing what the new approach to environmental governance will be.

However, we also note that there are already a number of Commissioners operating in Wales, none of which, including the Future Generations Commissioner, are suited to take on this role.

11. We would not support this role being taken on by the Future Generations Commissioner (FGC) because this would result in the protection of the environment being subsumed into the wider role of the FGC. Nor does the FGC currently have the degree of independence that we would like to see for the new body.

12. To establish any body that is capable of bringing government departments and public bodies to account absolutely requires a strong measure of independence from the executive, and this can be best secured either through its relationship with the national Parliament (National Assembly for Wales) or through establishing it as part of the existing audit body. Therefore, we consider that the Commissioner for the Environment and Sustainable Development in Canada that conforms to the audit model might be a possible model.

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

13. UKELA WWP agrees that the role of the new body should not be confined to advocacy but involve scrutiny of the actions of Welsh Government regarding the implementation of environmental law. This will effectively extend to ensuring holding Welsh Government to account for the work of NRW.

14. It should be noted that ensuring legislation is developed in line with the principles in Welsh legislation is quite different to overseeing implementation and delivery on the objectives of environmental law. If this body is going to be involved in the development of environmental law in Wales it will need to have a statutory obligation to keep abreast of developments in science and law around the world, including the EU.

15. Careful consideration needs to be given to the prudence of providing the new environmental body with both a role in advocacy and legislative development and in the scrutiny of the implementation of environmental law in Wales.

16. It is especially important that the new body can receive and will respond to complaints from citizens, but it is also important that it should be able to take action of its own volition as the EU Commission currently does.

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

17. We agree that safeguarding Wales's natural resources should be the overall objective of the new body.

18. The remit of the new body should be all encompassing and extend to all policy areas that interact with the environment. This would mirror the current approach of the EU Commission that considers environmental effects across all areas of competence.

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

10: Do you consider there are other Welsh bodies, which should also fall within the remit of an oversight body?

19. It is our view that the environmental principles and the law applying these should apply to all public bodies and it follows, therefore, that accountability to the new environment body should also be extended in this way. Doing less than this is not full implementation of the *acquis communautaire* and is inconsistent with a principle of non-regression in environmental protection after EU exit. Where responsibility for the environment has been devolved,

as in Wales, responsibility for ensuring non-regression falls logically on Welsh Government.

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

20. The new environmental body should have the highest level of independence and strong connections with the Assembly. It should not be appointed by Welsh Government. Appointment might involve an Assembly Committee perhaps equivalent to the Environmental Audit Committee in Parliament. We note the Chair of Natural England is scrutinised by the Select Committee and we might do something similar in Wales but provide the Assembly with greater powers of scrutiny.

21. The budget of the new body should be fixed in legislation. Although there will clearly need to be the possibility of review, budget cuts should be subject to careful monitoring.

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

22. The role of this body in providing advice to government needs careful thought. It should not duplicate, or appear to duplicate, the work of NRW or that of the Future Generations Commissioner.

23. There is a significant difference between public bodies being able to request advice from the body (or indeed it being able to proffer advice) and the body

providing advice as part of its scrutiny and compliance functions.

24. As stated above, it is also important to consider the prudence of providing this body with both a role in advocacy and legislative development with scrutiny of the implementation of environmental law in Wales.

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

14: What should be the extent of this function?

25. Scrutiny can involve monitoring and reporting that includes data collection. It is important to recognise that environmental data collection can also feed into the development of environmental law and be important to environmental management. The different objectives of data collection will lead to very different approaches to the nature and extent of that process.

26. NRW function in data collection is to produce a State of Natural Resources Report that assists it in its role in the management of those resources and feeds into the development of the National Natural Resources Policy that provides strategic direction for SMNR in Wales.

27. Data collection is also an essential element of the process of monitoring and reporting to the EU Commission on the implementation of environmental legislation. This function is quite different to that provided by the State of Natural Resources Report.

28. The National Assembly for Wales has created a fairly strong system of scrutiny through its Committee system. Nevertheless, the inquiries tend to be general and thematic. The approach of the National Assembly for Wales reflects the fact that its role is to provide general oversight as a non-expert body.

29. The new body needs to be able to scrutinise, in an expert way (that expertise including knowledge and understanding of both the science and policy, legislation implementation context), the way in which specific pieces of legislation or targets are being met. An example would be air pollution targets.

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?

30. UKELA WWP believes that it is essential that citizens should be able to make a complaint to the new environmental body and that this route of complaint should be both simple in its operation and free of charge.

31. However, we also recognise that will be important that the environment body has the power to dismiss vexatious claims and discretion to decide on and

prioritise appropriate responses to citizen's complaints. Nevertheless, it is vital that procedures are clearly transparent. Citizen's complaints must also always be subject to some form of response if the new body is to gain legitimacy.

32. The idea of providing recommendations at this stage seems odd. Either the environment body will decide not to take up the complaint (in which case the individual will be notified of this) or the environment body will decide to take up the complaint and the informal process of consultation with the public body involved will begin.

33. The investigatory powers of this body must be clearly underlined to its purposes to ensure that there is no overlap with other bodies such as the Future Generations Commissioner and the Public Services Ombudsman. The introduction of a Citizens Complaints portal or some such device might be utilised to good effect.

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?

34. A system of informal communication followed should be adopted to replicate the current arrangements adopted by the EU, but it is vital in ensuring that recourse to the courts remains an avenue of last resort.

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

35. UKELA WWP believes that a mechanism for referral of cases investigated by the new environmental body to the courts is essential. We do not consider judicial review to be sufficient in itself in this context. In particular, the court should be able to review government decisions on their merits. Therefore, UKELA WWP advocates the use of court mechanism such as a tribunal as the preferred route of challenge for the new environment body, with access to judicial review available as a last resort.

36. We note that at present the General Regulatory Chamber of the First Tier Tribunal deals with environment cases. This is an England and Wales body. There may be merit in continuing to refer cases to this body where those involved are currently developing expertise in relation to such cases.

37. The tribunal mechanism is preferred because the approach is more investigatory and focused on providing solutions than simply focusing on procedural issues as is usually the case in judicial review.

38. Whatever judicial enforcement mechanism is decided upon considerable thought must be given to issues of access to justice. The problems that judicial review presents in environmental cases are well documented and the

need to comply with the Aarhus Convention is paramount.

39. Timely resolution of cases will also be an important consideration and the use of financial sanctions may also be prudent.

Working across the UK

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

40. Safeguarding natural resources is an objective that should be of importance to all four nations of the UK and, crucially, cannot be achieved, especially on the island of Great Britain, without full co-operation.

41. The core principles of EU environmental law have created a shared vision of the way forward for environmental protection for many years now and this approach is vital to the continued success of environmental policies and law.

42. UKELA WWP urges the UK Government and devolved administrations to achieve agreement or close cooperation with each other to ensure that (i) common environmental principles are adopted and (ii) that the environmental principles are applied in a similar way across the UK.

43. This will also help ensure consistent commitment to the UK's international environmental obligations. It will also present a common position on environmental protection to trading partners and third countries generally and set standards for international co-operation and collaboration.

44. The fact that the list of principles in the EU (Withdrawal) Act 2018 is different to that in existing relevant Welsh legislation adds complexity. So too will any commitment to provide a statement of those principles as there may be differences between the four nations in their interpretation.

45. It is essential to environmental protection and the safeguarding of natural resources across all four nations that they are able to act by mutual agreement and it is vital that institutional mechanisms are created to support this.

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

46. UKELA WWP suggests that one possibility is a common structure, such as the one for the UK Climate Change Committee. The new arrangements must fully respect national/devolved laws and differences, pools resource, set common frameworks of recognisable environmental principles and common standards and methods of applying them. It should also include machinery to challenge government departments and public bodies for non-compliance with environmental legislation.

47. Alternatively, we should at least provide a duty of collaboration with bodies with comparable functions in all other parts of the UK, and legislative provisions which will both allow and encourage the adoption and promotion of similar principles and standards.

48. Finally, there would be real merit in setting a duty to review these arrangements for common frameworks with counterparts in other parts of the UK, for example within 5 years.

22nd May 2019

UK Environmental Law Association Wales Working Party

Environmental Principles and Governance in Wales Post European Union Exit

Consultation response form

Your name: No Name

Organisation (if applicable): None

e-mail/telephone number: N/A

Your address: N/A

Responses should be returned by **9 April 2019** to

EU Exit & Strategy Unit
Department for Energy, Planning and Rural Affairs
Welsh Government
1st Floor East, Cathays Park 2
Cardiff
CF10 3NQ

or completed electronically and sent to:

e-mail: Environmental.Governance@gov.wales

Environmental Principles

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

Agree that rectification at source and the polluter pays principles should be included in legislation.

Question 2: Do you think there are other principles, which may also need to be included?

With the inclusion of rectification at source and polluter pays principles, the principle of justice needs better definition. The current EU model provides the ability for sanctions to be applied, yet from the consultation document, holding public bodies in Wales to account appears somewhat limited.

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

Extending SMNR principles does need to give proper consideration to effective monitoring and enforcement, particularly with the inclusion of principles relating to rectification at source and polluter pays. For public bodies in Wales, there would need to be commonality of approach and for this reason a national or UK solution may be more appropriate. This may be construed as not extending SMNR principles.

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

Based on the response to question 3, viewed that the list of existing public bodies listed in annex 2 is appropriate in pursuing SMNR principles.

Accountability

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

Annex 6 of the consultation document makes reference to scrutiny, identifying that at present bodies in Wales do not have sufficient knowledge or expertise in environmental matters.

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

As existing bodies are recognised as not having sufficient expertise, it may be that environmental governance is provided through the creation of a new independent body, as inferred in point 7 of paragraph 3.23.

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

Not sure that policy and legislation setting should form part of the remit for the body.

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

Agree with the areas listed in para 3.30 as defining the scope.

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

Yes

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

No

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

Does the Information Commissioner's Office provide a guide to how the environmental governance body should be formed and constituted? It is recognised that this implies a UK wide approach to environmental governance, but would permit governance on particulars specific to the devolved administrations.

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

Yes.

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

Yes.

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

No comment to make.

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?

While it is recognised that the ability to lodge a complaint should be free and relatively straight forward, the potential for members of the public to generate

As an example, there is a danger that the body could be used by individuals or communities to use existing environmental laws as an attempt to prevent local development applications from proceeding. For example if access to health care or education was viewed as compromised by a development, would the body be placed in a situation of having to arbitrate on planning guidelines as well as environmental legislation?

A further example would be difference in charges or

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?

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

Other

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

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