

# **ENVIRONMENTAL GOVERNANCE IN WALES POST EXIT FROM THE EUROPEAN UNION**

**REPORT from the ENVIRONMENTAL GOVERNANCE STAKEHOLDER GROUP**

**MARCH 2020**

## Executive Summary

After the closure of the Welsh Government consultation on [Environmental Principles and Governance in Wales post exiting the European Union](#) in June 2019, a stakeholder task group was established to provide expertise and technical advice in the consideration and development of potential options for a new environmental governance framework for Wales (see Annex A for members).

The group met between July 2019 and January 2020 to discuss recommendations on addressing gaps, which would arise in EU environmental principles and oversight, when the EU Treaties and institutions no longer applied in the UK. The group also proposed a set of interim measures to address gaps arising in the event of a 'no deal' scenario, which are not included in this report.

This report sets out the Group's recommendations for a new environmental governance framework in Wales. There were some areas where there was not unanimous consensus and the report illustrates where this arose and also identifies some areas where further work is required on the specific details of some of the recommendations. The key recommendations are:

1. The Welsh Government should address the governance gaps in both environmental principles and oversight through the introduction of primary legislation. A Welsh response to environmental governance should address the gaps as they arise from the end of the transition period (1 January 2021).
2. Principles:
  - a. The four EU environmental principles (rectification at source, polluter-pays, prevention and precaution) should be provided for in Welsh legislation. These principles should support an overarching objective, which sets out environmental ambitions in Wales, including the connections between environmental policy and other policy areas (integration);
  - b. There should be a duty on the Welsh Ministers to apply the principles in the development of policy and legislation rather than the publication of a policy statement on principles;

3. The Sustainable Management of Natural Resources duty, which applies on Natural Resources Wales, to be extended to a wider group of public bodies, including the Welsh Ministers. Further work is required to determine the scope of the definition of public bodies, with consideration of the definition provided in the Well-being of Future Generations Act, where bodies discharge functions relating to the environment.
4. The Aarhus Convention rights (access to information, public participation and access to justice) should be articulated in any forthcoming legislation for environmental governance.
5. Governance:
  - a) A Commission for the environment, independent from the Welsh Government, should be established to oversee the implementation of environmental law in Wales.
  - b) The Commission should be provided with certainty of finance and be audited by the Auditor General and report on its activities.
  - c) Acknowledging the size of Wales, the Commission to be constituted in a manner which is appropriate for Wales with permanent staffing but with the ability to draw upon an Expert Panel to add to its functionality allowing for a flexible approach and allowing the body to draw on a wide range of expertise. The Commission should be provided with appropriate functions to not only receive and respond to complaints from citizens in Wales but also to carry out inquiries where systemic issues have been identified through investigations and scrutiny. It should have powers to escalate matters where necessary to stop or prevent environmental damage.
  - d) The Commission should be able to address issues in an appropriate manner from advising public bodies in Wales through to enforcement and employing mechanisms of environmental review before the Upper Tribunal
  - e) The Commission should be able to work cooperatively with other bodies.

## **Future Work**

The Task Group considered there was merit in considering the role of targets within environmental governance and this was a matter for further discussion.

## 1 Background

### 1.1 The impact of Brexit

1.1.1 The purpose of the Environmental Governance Task Group is to help develop a new governance framework for Wales which should become effective on departure from the European Union (EU). The greater part of environmental law and policy in the UK emanates from the EU, which had in place mechanisms for oversight and enforcement of EU law generally. The EU (Withdrawal) Act 2018 provides for the retention of most of this substantive law, but **when the oversight mechanisms of EU law no longer apply, there is a danger of a governance gap in the application and enforcement of environmental law in Wales, which ought to be remedied.**

1.1.2 In addition, although the EU (Withdrawal) Act 2018 allows for a new body of retained EU Law, provisions on principles and oversight which were captured in the Treaty on the Functioning of the European Union (TFEU) are not copied over. In particular, environmental principles written into Article 191 of the Treaty would fall away. A decision needs to be made on how to make governance changes to environmental policy in Wales. An earlier paper on *No Deal Preparedness – Environmental Governance Interim Measures Options* was prepared for the Minister for Environment, Energy and Rural Affairs on 23 October 2019, outlining the implications for environmental governance in light of a ‘no deal’ scenario. UK membership of the European Union ended on 31 January 2020 and the transition period, which followed will end on 31 December 2020 so **the shortfalls referenced in this paper need to be faced by 1 January 2021. The recommendations made will require legislation and if we are to avoid complex and awkward interim measures, legislation to fit this timetable is strongly advocated for by the Task Group.**

1.1.3 In considering the wider context of the nature and climate crises, the group discussed the importance of articulating ambition to drive environmental improvement and reverse biodiversity decline. Provisions around target-setting within the Westminster Environment Bill 2020 were noted with interest by some members of the Group. However,

this fell out of the remit agreed by the Task Group but it was agreed this was an area for future discussion and for recommendations to be considered by the Group going forward post publication of the Report.

## **1.2 The role of the Task Group**

1.2.1 The Environmental Governance Task Group brought together stakeholders representing organisations with an interest in the operation of environmental law in Wales under an independent Chair, Professor Robert Lee of the University of Birmingham. (See **Appendix A** for membership). The purpose of the Group has been to provide expertise and technical advice in the consideration and development of potential options for a new environmental governance framework, particularly in areas where there was not complete consensus arising out of the stakeholder meetings and responses to the consultation paper, *Environmental Principles and Governance in Wales Post European Union Exit* published on 18 March 2019. The terms of reference of the Group are reproduced as **Appendix B** but in particular the Group was charged with:

1. Addressing gaps in environmental principles, building upon the existing legislative framework in Wales;
2. Further developing key components for a coherent and effective environmental governance framework for Wales, which complements existing mechanisms;
3. Potential interim measures, where such measures may be required.

The final task (3) above on interim measures in the event of a no deal Brexit has already been addressed by the Task Group as a whole in the submission of a paper on short-term *interim measures referenced above* (1.1.2). The Task Group additionally reviewed tasks (1) and (2) in the light of consultation responses attempting where possible to work in harmony with these responses where there appeared to be clear consensus and a lack of principled objections. This allowed the construction of a broad agenda for further work. In order to address the remainder of the terms of reference, it was decided to convene three subgroups of the Task Group to address following issues (i) environmental principles; (ii) the functions of any governance body; and (iii) the form and legal status of any such body.

## **2 Environmental principles**

## 2.1 Overarching objective

2.1.1 It was agreed **a carefully worded objective should express the ambition for the environment in Wales and sit above existing environmental governance architecture** (see figure 1 below). An overarching objective could provide a similar focus for policy development as currently provided within the Treaty on the Functioning of the European Union, which frames the application of the four EU environmental principles (see figure 1 below). Key elements to be captured ***include how this will contribute to sustainable development by achieving a high level of environmental protection***, together with the integration of environmental policy within all policy areas and a commitment to build upon environmental standards and the maintenance and enhancement of the environment in Wales. This objective would guide the new governance body as well as Welsh Ministers and it will be necessary to articulate the position of the new body in the existing legal framework and the role of that body in relation to legal duties under that framework.

2.1.2 It may be worth bearing in mind there could be occasions, under the statutory instruments correcting retained EU law, when the Secretary of State, with the consent of the Welsh Ministers, would seek to carry out functions for Wales. In such an event any consent would in part be predicated on an accurate articulation of Welsh legal principles. It would be helpful to state in Welsh legislation the principles and objectives of Welsh environmental law including commitments to sustainable development and environmental policy integration to ensure that these are clear to Ministers of the Crown operating in Wales.

## 2.2 Environmental Principles in Wales after withdrawal from the EU

2.2.1 The Task Group considered how environmental principles needed to be re-stated in Welsh legislation. The consultation responses and the Task Group were in broad agreement that **the four key environmental principles found in Article 191(2) TFEU should underpin law and policy in Wales; these principles are:**

- **precautionary;**
  - **prevention ;**
  - **principle that environmental damage should as a priority be rectified at source;**
- and**

- **polluter pays.**

The Group also considered whether other principles might need to be reflected in Welsh legislation. There was some consideration whether sustainable development should be captured but the Task Group felt it was already represented in Welsh Law in the Well Being of Future Generations (Wales) Act 2015 and on sustainable management of natural resources (SMNR) in the Environment (Wales) Act 2016. It was agreed by the Group that including sustainable development as a principle would add little, and might serve only to confuse.

2.2.2 Another potential principle considered was integration. Whilst the Task Group agreed environmental considerations should be integrated into policy development across all sectors in Wales, it was felt by the majority that integration could be better captured in the objective. It was acknowledged by the Group, integration was already operationalised in Welsh legislation as the basis of the Environment (Wales) Act 2016 is to plan and manage the natural resource base, upon which Wales depends, in a sustainable and integrated manner. The Well-Being of Future Generations (Wales) Act 2015 demands that public bodies take an integrated approach to delivery of their well-being objectives in recognition of the interdependence that exists between economic, social, environmental and cultural well-being. The two Acts combined form part of a systemic and integrated approach. There was majority agreement within the group that while the environmental principles could prove a force for integration, it was not necessary as such to include an integration principle. However, it was felt that **the opportunity to strengthen the clarity and effectiveness of integration should be taken in forthcoming legislation, perhaps within the overarching objective, which should require the integration of environmental requirements in other policy areas.**

2.2.3 Quite lengthy consideration was given to the principle of non-regression, by which was meant a commitment to not dilute present levels of environmental protection from current EU standards. The suggestion that this principle should be included in legislation arose out of concerns that the form of Brexit, and trade negotiations in its aftermath, might jeopardise current standards and targets for environmental protection. Against this, there

were doubts in the Sub-Group about whether this was a ‘principle’ which might be seen to have the same level of clarity as those copied over from article 191(2) of the TFEU. There was also a view that Wales might in the future wish to apply different metrics in the meeting of standards or targets in a manner different to those employed historically in the EU, for example in further developing sustainable management of natural resources. It was felt by some that a commitment to non-regression might produce some inertia in which maintenance rather than improvement of environmental standards could be thought to be sufficient.

2.2.4 The Government of Wales Act 2006 makes clear the necessity for Welsh Ministers to conform to requirements of international law, which might include future bilateral or multilateral treaties on international trade. In the event that there were proposed changes to environmental standards (whether EU derived or domestically inspired) in order to avoid distorting the UK’s internal market, there could be circumstances in which this might become a matter for discussion between governments in the UK in order to reach agreement. However, the UK Government could issue regulations in accordance with section 12 of the EU (Withdrawal) Act 2018 in an attempt to restrict devolved legislatures from legislating contrary to restrictions as specified by a Minister of the Crown in regulations (a so-called “Section 12 Order”). This suggests that any commitment to non-regression by Welsh Government could not be guaranteed absolutely when considering the functioning of an internal market in the UK.

2.2.5 The Group expressed the hope and expectation that environmental standards would not be diluted as a result of Brexit, and Wales would continue to build upon its standards, bearing in mind how potential changes would need to be considered in light of implications within some sectors in light of potential new trade deals and the operation of the new internal market within the UK. Doubts were raised about the inclusion of a principle of non-regression within any new legislation. The majority of group members opposed the direct incorporation of non-regression as a principle, in favour of an appropriately worded overarching objective that would capture the spirit of non-regression while expressing a greater ambition for Wales

2.2.6 The conclusion was that the four EU environmental principles from Article 191, which formed the subject of the consultation, should be restated in Welsh legislation and that **these principles should continue to underpin law and policy in Wales.**

2.2.7 Consideration was given as to whether these principles should be the subject of a policy statement similar to the approach provided in clause 17(1) of the Environment Bill 2020, which requires the Secretary of State to prepare such a statement. On the whole, it was felt that **it is not necessary to produce a statement of these principles.** There is a reasonable body of jurisprudence in international and EU law on the meaning of these principles and they are already well represented in the substance of law in Wales. It is understood that conversations are ongoing regarding a consistent set of principles with the different administrations to enable consistency when appropriate. This was welcomed by the Group as it expressed concern that an English statement of principles might depart from or elaborate upon existing understandings of the principles. This is especially pressing given the combined jurisdiction of England and Wales and the Group expressed a desire to maintain consistency, across the four administrations, in terms of common understanding of the four environmental principles, albeit that the working of these principles might be further articulated in due course by Welsh legislation.

2.2.8 There is also a question of how the objective and the principles sit together and how these will link into the elements of the existing Welsh legislative framework. This can be represented Figure 1. The overarching objective would express Welsh ambition for the environment to be pursued by the application of the environmental principles, inclusive of the aim to maintain and enhance the environment through policy in Wales. There was general agreement that the four EU environmental principles should continue to sit above, and subsequently inform, the existing Welsh principles on Sustainable Management of Natural Resources (SMNR) as presented in the Environment (Wales) Act.

In addition, there was some discussion of which bodies should be required to apply the principles with some group members considering that all public bodies should be subject to this requirement. However there was majority accord that **the four principles (and**

overarching objective) should apply to Welsh Ministers at the policy and law development stage of discharging their functions, such that they would inform future Welsh legislation. Writing these principles into Welsh law would require clarity as to their scope.

**Figure 1**



2.2.9 Existing Welsh environmental legislation was introduced under the umbrella of objectives and principles in the EU Treaty, so that writing these back into Welsh law will ensure the continuity of their application and the accompanying benefits. The revised structure could help draw the connections between Welsh legislation in this area, including the introduction of an objective and principles. It would also allow for a reaffirmation of the underlying aims and goals of the Well-Being of Future Generations (Wales) Act 2015, as it was felt that their practical applications are still in the process of being realised. From a broader perspective, this would entail fostering a culture change rather than rigidly proscribing ways of working. The Environment (Wales) Act is not as such a framework for environmental governance but should be viewed as a blueprint for SMNR that might be developed on an iterative basis over time. The implementation of the principles within the context of post-Brexit governance would therefore need to ensure a broader application of the relevant duties. On this basis, the desirability of reinforcing the accessibility and clarity of the principles to stakeholders was deemed to be essential. A structure that begins with objectives and principles may allow for a systematic approach which avoids overcomplicating existing legislation. The four principles provide clarity in terms of

discussions with other UK administrations for a consistent approach. We could not rely on the application of SMNR principles alone in this context as these state only one (prevention) while reflecting key steps of a second (precaution). SMNR continues to have operational application alongside these four environmental principles operating at a higher policy level. This framework should offer greater clarity on the interconnections between existing Welsh laws in this area.

### **2.3 The duty to pursue SMNR**

2.3.1 Closely related to this framework, then, is the question posed in the Consultation Paper on whether SMNR duties under the Environment (Wales) Act 2016 might be extended more widely to public bodies in Wales, and, if so, which public bodies might be included. The vast majority of respondents accepted the case for the extension of these duties but there was a need to consider the appropriate public bodies given the references to the definition of ‘public body’ contained in section 6 the Wellbeing of Future Generations (Wales) Act 2015 and the broad definition of ‘public authority’ in section 6(9) of the Environment (Wales) Act 2016, which includes a large number of ‘reserved bodies’ under the Government of Wales Act 2006. Discussion within the Sub-Group on principles led to a majority consensus that **the SMNR duties under the Environment (Wales) Act 2016 should apply to public bodies in Wales where those bodies were exercising the discharge of functions relating to the environment** (for example in estate management). There were some concerns to avoid any duplication, where existing domestic regulators already undertook enforcement of private entities. This would need to be clearly expressed in legislation such that the bodies in question (including, for example, statutory undertakers and regulators) were in no doubt as to when the duty applied. It was accepted that this may require careful wording but the extension of the duty sits well with the overarching objective and reflects agreement on how SMNR might be pursued in the future. This is an area of further work to clarify the extended scope of this duty.

### **2.4 Summary**

2.4.1 The four EU environmental principles should be reflected in Welsh legislation and they should support an overarching objective, which sets out clearly the ambitions in Wales on a high level of environmental protection, inclusive of the aim to maintain and enhance

the environment through policy in Wales, so as to contribute to sustainability. This emphasis would seek to protect, where possible, against dilution (or regression) of environmental standards in Wales. Integration, too, was not included as a separate principle but it was thought that any Bill should articulate the value of ensuring that the environment is at the heart of policy making in all sectors. There was a desire to maintain consistency in terms of the understanding of the four environmental principles across the UK.

### **3 Environmental Governance**

#### **3.1 The position within the EU**

3.1.1 The European Commission supervises the implementation of EU law, including environmental law on the part of Member States, drawing as necessary on information, submissions and reports from those States, alongside its own evidence and that generated by the European Environment Agency (EEA). Individuals and organisations from Member States can freely register complaints concerning breaches of EU law. This may lead to investigation by the EU Commission and enforcement action where it appears that there is some failure to apply EU law on the part of a Member State. Infraction proceedings may be taken before the Court of Justice of the European Union (CJEU) with interim measures in advance of full judgment and fines for further non-compliance. It is this level of oversight and scrutiny which will fall away on exit from the EU. That being so, the Task Group was asked to consider:

- What type of governance model/ system would be suitable for Wales?
  - Taking into consideration the existing accountability mechanisms in Wales – do any existing mechanisms provide a role in this governance model?
  - Where does a new model/system fit in the current landscape?
- How should such a model be constituted?
  - Taking into consideration types of governance mechanisms, purpose, form and constitution.

3.1.2 As explained above, after initial meetings of the whole Group, two further sub-groups were formed to consider the functions to be discharged by any new oversight body and the nature of that body, which was described as its 'form' to indicate questions of its constitutional status and *modus operandi*.

#### **3.2 Functions**

3.2.1 Beginning with functions, question 5 of the Consultation Paper had solicited views on what governance gaps might be left on departure from the EU. At the first sub-group meeting to discuss functions, drawing on existing knowledge of the EU framework, the stakeholder and consultation responses and reviews of present governance frameworks in Wales, a list of key functions was drawn up. This was as follows:

1. *Advisory*: Two specific advisory functions were identified:
  - a. Addressing complaints – to rectify complaints at an early stage, or avoid complaints coming forward on a specific issue, there may be a role for the body in advising public bodies in Wales on matters of environmental law. Immediately post EU exit, there may be a greater need for clarity as the legislative framework will be much more complex in the form of corrected, retained law post-Brexit. It was felt that a balanced approach to the design of the advisory functions of the body might need to be considered because, if a body was to supervise the implementation of law on which it had previously advised, there was a significant danger of a conflict of interest. It was thought, however, that the advisory function would allow for compliance assistance, therefore helping to avoid environmental damage. A further consideration was to ensure there were no duplication or conflict with the advisory functions of other bodies such as Natural Resources Wales (NRW);
  - b. Systemic - The body may identify systemic issues relating to the workings of environmental law and policy as a result of its complaints handling and other functions and might wish to undertake further investigation followed by recommendations (below).
2. *Complaints-handling*: The group agreed with the consultation responses for the retention of a complaints procedure but also recommended the procedure was open and transparent. Such thinking had already been reflected in the options paper on *Interim Measures*. It was agreed that clarity would be needed in relation to the subject matter of complaints and body's remit to avoid jurisdictional conflicts with other agencies and to ensure redirection of complaints as necessary. It would be a matter for the body to set out the procedure under which complaints can be made. There would need to be certain duties placed on the body to investigate complaints, which it considered were substantive. To address current issues within the current EU structure, the Group also recommended complainants should be kept informed of progress.
3. *Investigation*: Complaints-handling will necessarily involve a degree of investigation and may require information to be passed over to the body. It was thought from the outset that the body might screen complaints in order to identify those which require further action, but conversely it might consolidate or aggregate certain complaints where these related to similar issues or seemed to point to systemic

problems. Discussion provided majority agreement that the body should be able to undertake investigations on its own initiative, potentially as a result of issues identified through the monitoring function. Once statutory powers are given, the body itself might determine how it wishes to proceed with investigations.

4. *Scrutiny*: Scrutiny implies that examination or oversight of environmental governance issues in Wales should be informed by critical observation of its functioning. The body may wish to pick up on trends or developments in environmental law and policy implementation in Wales and further investigate these where this might inform environmental governance in Wales.
5. *Enforcement*: Replication of the Commission's enforcement powers was thought necessary in order to ensure and incentivise a basis for corrective action. It was hoped that enforcement objectives might be met by early remedial action. It was felt that early corrective action on the part of public bodies was favoured ahead of an enforcement response, perhaps with agreed undertakings as to remedial action. If necessary, however, determinations by the body might need to be court or tribunal supervised in the final stages of enforcement (see below).
6. *Implementation*: where statutory duties were placed on public bodies in Wales the body should have oversight of the effective implementation of environmental law. It was accepted that this would need to be the subject of further consideration of the remits of the body and might in practice be best achieved through proactive cooperation through memoranda of understanding with other bodies and agencies.
7. *Reporting*: It was felt that if the body was to be the recipient of regular complaints and other flows of information, it might report on matters of concern. The new body should have the freedom to devise its own work programme (bearing in mind its resource base) and would need to produce an Annual Report to the Senedd as part of its transparent working.
8. *Principles*: The above consideration feeds into wider governance issues considered by the Task Group such as environmental objectives and principles. The working of these should be reviewed in order to chart the achievement and working of these principles.
9. *Partnering*: The Task Group agreed the Welsh body should, as necessary, partner with expert and equivalent bodies across the UK (e.g. in England the Office for Environmental Protection) and the UK Committee on Climate Change in the discharging of its functions.

**3.2.2 The new governance body should pursue the nine functions** though it might be necessary to prioritise within these functions. Prioritisation should be a matter for the body

itself, rather than for statute, in the light of experience such as the extent of the complaints-handling portfolio, the resources of the body and the environmental law landscape post-Brexit. It was felt that the remit of the body might go beyond merely securing compliance with law but careful drafting will be needed to lay down the essential functions of the body and which functions are ancillary while allowing for sufficient leeway for the body itself to establish priorities. The building of a new body will need to be an iterative process and imperatives for the body may change over time. The establishment of a new body will allow some thinking as to how it fits within existing governance mechanisms both in Wales and the UK.

3.2.3 The Task Group also noted there may be significant work involved in start-up given the need for agreements with other bodies which might also discharge similar functions and the need for such bodies to work cooperatively. These may be better developed by understandings between the bodies themselves. The body would require clear and transparent principles for its operation. Similarly, a complaints procedure with appropriate time frames, resolution procedures and reporting back may take time to develop but is better developed by the body itself. Further consideration will be required in order to establish the essential mechanisms needed to address issues in England that negatively affect the environment in Wales and, as stated elsewhere, the advisory functions attaching to compliance and complaints resolution require careful thought. It may also take time to develop partnering relationships, though interestingly, the Environment Bill 2020 envisages in clause 24(4) that the Office for Environmental Protection (OEP) under the Bill will need to work with other, devolved governance bodies. Welsh legislation should carry a mirror provision. The group viewed that the body would need to exercise its functions transparently, and within specified timescales, in order to avoid administrative uncertainty and confusion/duplication of resources.

3.2.4 Careful thought will need to be given to this and to the size of and necessary expertise within any new body. **While the new body will require staff (for example for complaints investigation and resolution) on a full-time basis this could be supplemented by the establishment of a pool of expertise, such as an expert panel,** which the group strongly recommend. The expert panel would ensure the body could draw on specialist

advice as and when required for the discharge of particular functions (such as reporting). This will need to be considered alongside resources for the new 'body' and the scale of activity that should be considered when establishing possible solutions that is appropriate for Wales. The Sub-Group felt that it was imperative to ensure that the pool of expertise available to the body is not limited in order for demonstrable independence to be assured. The body would be required to establish the process of selection to prevent conflicts of interest that may arise.

3.2.5 From some considerable discussion about functions two broad areas of concern emerged. The first was that public bodies including regulatory agencies require a level of certainty about what a body can or cannot do. Although the body will be independent (below), the workings of the 'body' should be amenable to a certain level of control and will need to be accountable to the Senedd. Although it is envisaged that the body could be subject to judicial review proceedings, there may need to be some simpler mechanisms to question decisions taken. This might be accommodated in part by resort to the tribunal structure (below at 3.3).

3.2.6 The parameters of any advisory function were considered at length. It was clear that patterns of complaints might lead to the body appropriately addressing and reviewing systemic governance issues, for example, in the light of complaints-handling experience. It was accepted that there may be benefits of having an advisory function available on invitation to a wide range of bodies in Wales, including the Welsh Government and the Senedd in the context of environmental matters. In this way the body would be able to offer advice on risks of compliance failure at an early stage reducing the risk of said failure and the associated environmental damage, while reducing the number of complaints (that would likely have resulted from the compliance failure). At the same time, it was felt that if the body were to be also proffering advice on policy, there could be a conflict of interest for a body charged with an enforcement function. It was noted that under the Environment Bill 2020, the proposed OEP has a policy arm in that it has the power to advise on changes to environmental law derived from its monitoring and reporting functions. One can see the merit of this but demarcation lines would have to be very clear to ensure that there is no confusion as to the appropriate discharge of functions. Natural Resources Wales (NRW) as

part of its statutory functions provides, and charges for, advice but there is no necessary conflict here as the body would advise NRW but not usually the type of organisation that NRW itself would be advising. Nonetheless precision is important here and as it needs to be clear to civil society and to public bodies in Wales quite what functions the body will discharge.

### **3.3 Form**

**3.3.1 Any new body would need to be independent of Welsh Government with appointments made by the Senedd. It would require certainty of budget** across an extended period of time, similar to the budgetary provision for the Wales Audit Office, provided by the Welsh Consolidated Fund. The performance of the body should be audited by the Auditor General for Wales.

3.3.2 The issue of the form of the new body began with a list of characteristics which it was thought might represent good governance, drawing on what was said in the paper on *Interim Measures*. There were as follows:

1. Independence;
2. Ability to discharge multiple functions;
3. Fit within existing infrastructure;
4. Whether legislation is required to proceed;
5. Operability/end to end tracking;
6. Adequate political capital;
7. Reach;
8. Expertise;
9. Effectiveness.

3.3.3 We then considered various forms of body that might discharge the functions emanating from the Functions Sub-Group. These included:

- (a) Audit
- (b) Commission
- (c) A Commissioner
- (d) Independent Expert Panel
- (e) Split model (Different functions of the system carried out in different places)
- (f) Hub Model (a body but with certain functions delegated)
- (g) An Office
- (h) A Sub-committee of the Assembly or similar
- (i) A Tribunal

3.3.4 Without offering a long explanation of models which the Form Sub-group discarded, the form that scored most highly against the governance criteria, with double the weighting of other contenders, was the idea of a Commission. By way of explaining the difference between a Commissioner and a Commission, the model often referred to in discussion was that of the Equality and Human Rights Commission (EHRC). This is not a perfect comparison in that its work in enforcing the Equality Act 2010 extends to the private sector, but it was thought that its multi-functional approach while expressly promoting equality provided an attractive point of reference. A Commission should exhibit the qualities referred to in 3.3.2 (above) and be seen as an advocate on behalf of the environment. **It was also felt that a Commission for the Environment could be constituted on a scale and in a manner appropriate for Wales. It could draw on the Expert Panel to add to its functionality allowing for a flexible approach and allowing the body to draw on a wide range of expertise,** potentially from other public bodies, as long as no conflict of interest is identified. In addition supporting expertise could be requested from appropriate UK agencies with the idea that the relationship established would be of a reciprocal nature.

3.3.5 While the Task Group wished to fill in the gaps left in environmental governance structures post-Brexit, it did not see any necessary reason to merely mimic the work of the European Commission. Rather it sought a body that would fit well into the existing public landscape in Wales. When the Form Sub-group reviewed the functions, it saw more effective working of environmental law and policy, to foster environmental improvement, at the heart of all of the functions. There is no body as such in Wales charged with these functions in a holistic way in overseeing the activities of public bodies in Wales. In discharging functions such as monitoring, reporting and review of implementation and existing reports, the body needs to have a clear enforcement remit. As all of the functions identified conveyed some aspects of enforcement it was thought that there was some merit in having a single body discharge them rather than splitting them up. The group recognised further work was required in mapping out any potential overlaps with other public bodies, which would need to be clarified prior to a new Commission commencing its operations.

3.3.6 Considerable discussion followed in terms of what the oversight and enforcement might look like in practice, especially at the point at which the Sub-groups on Form and Functions convened together. It was agreed that the implementation function might need

to be carefully circumscribed, but that it would be necessary for the body to scrutinise whether devolved environmental law powers are being used correctly and effectively. Further thought might be given as to how this sits alongside the ability of the new body to launch investigations. **As part of any enforcement function, there would need to be clarity on how and when activity, including complaints handling might be escalated in the face of urgent threats to the environment. Although the Commission might decide its own priorities, powers to escalate matters might require statutory backing.**

3.3.7 There was significant consideration of the extent of the application of the Commission's powers and in particular the bodies subject to these. It was noted that in the UK Bill 'Public Authorities' is the term used. Some members considered this to be an extremely long list of bodies, which could include authorities with little day-to day involvement in environmental matters. It was thought that the problem may be overcome by appropriate wording that refers to authorities acting in discharging functions relating to the environment.

3.3.8 A major focus was on the extent to which sanctions might prove necessary to drive a matter to a binding resolution and how the activity of the Commission would fit into the court system in England and Wales. From the outset, the hope was expressed that **the Commission could work cooperatively with other public bodies to secure compliance, but it was thought that the Commission might need to serve notices to secure that compliance if more conciliatory approaches fail.** These might be modelled on existing powers under the Regulatory Enforcement and Sanctions Act 2008. These allow notices to be served demanding compliance with law, restoring the environment and stopping further pollution (stop, compliance, and restoration notices). In addition, enforcement undertakings may be agreed to guarantee corrective action. Ultimately, however, the regulator under the 2008 Act can prosecute and much discussion was given over to whether any Commission action should be backed by fines, in the manner used by the Court of Justice of the European Union in infraction proceedings against member states of the EU.

3.3.9 The view of Professor Richard Macrory, who attended the joint Form and Function Meeting, was that in practice public bodies comply with court determinations so that it ought to be sufficient to extend the ordinary remedies attaching to judicial review without the need for fines, which, in any event would be paid over to the Treasury. Remedies for

judicial review include the award of damages in appropriate cases as well as orders that would quash decisions or mandate actions. The Upper Tribunal would have ordinary powers of contempt of court where a decision was not respected, so that enforcement could be backed by financial penalties. This approach was accepted by the majority of the Group but some members did not agree with Professor MacRory, and still expressed concerns about more limited powers available to the Upper Tribunal. It is accepted by the Group as a whole that the sanctions proposed here are not at the same level as those previously available under the regime of the European Union.

3.3.9 It was the view of the Group that matters would be better dealt with within the tribunal system. Clause 35 of the Environment Bill 2020 introduces the possibility of an environmental review before the Upper Tribunal. Under that clause an environmental review is a review of—

- (a) alleged conduct of the authority that is described in the decision notice as constituting a failure to comply with environmental law; or
- (b) alleged conduct of the authority occurring after the notice was given that is similar, or is related, to the conduct described in the notice.

The Group welcomes these **mechanisms of environmental review before the Upper Tribunal which (it hopes) could apply to enforcement in Wales.**

### **3.4 The pillars of the Aarhus Convention**

3.4.1 One final issue that sits between governance and principles but which the Group placed under the Governance heading are the rights under the Aarhus Convention. This UNECE Convention relating to environmental governance is usually referred to as the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998). Article 1 of the Aarhus Convention states that:

“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*

in environmental matters in accordance with the provisions of this Convention.”

3.4.2 This list contains what is widely referred to as the three pillars of the Aarhus Convention and they are not as such principles but rather rights conferred on citizens. The Aarhus Convention was signed by the EU on behalf of member states and certain of its provisions, particularly on information and participation, now appear in (retained) EU environmental law. The UK ratified this Convention in February 2005. As we have seen above, the EU (Withdrawal) Act and the draft Environment (Governance and Principles) Bill included these rights within the set of principles to be included in the statement of environmental principles though they do not now appear in the 2020 Bill. Arguably inclusion is not necessary since the UK has Treaty obligations to ensure that these rights are extended to citizens. Nonetheless, the question arises as to whether there may be value in rearticulating the three pillars in the context of a new governance framework for Wales. The new governance structures explained above are very much about the provision of environmental information, encouraging participation in environmental decision making and offering remedial measures as necessary. Consequently the group felt that **the Aarhus Convention rights should be articulated and highlighted in any forthcoming legislation so that the Commission could oversee the working of these rights in Wales**

### 3.5 Summary

3.5.1 The preference of the Task Group was for an independent Environment Commission supported by expert panels as needed, discharging a range of functions beginning with complaints-handling and advice and extending into enforcement activity following appropriate scrutiny and investigation (see 3.3.8 above). The Commission would review the workings of devolved environmental law in Wales under its ‘implementation’ function and would undertake wider monitoring and responding to environmental policy in Wales, keying in as necessary to existing structures. In addition to an annual report, it would have the capacity to produce expert reports on systemic issues relating to the implementation and workings of environmental law in Wales. It would have an oversight function in relation to environmental objectives and principles within Wales and would partner as appropriate

with other governance bodies in the UK. It was thought that there was room to articulate the Aarhus Convention rights alongside the principles and the new governance framework

#### **4 Conclusion**

Given the varied interests of the stakeholders represented on the Task Group these findings necessarily represent compromise. Nonetheless there was a good degree of consensus on many issues and we tried at all times to work with respect to views represented through the consultation exercise. On some points of detail there may remain issues which will need further consideration. Nonetheless on key issues the Group was and remains united. The departure from the European Union leaves a gap in the system of environmental governance in Wales and that gap should be closed. This would be best done not by a slavish adherence to EU structures, or by mimicking the work undertaken in the UK Bill, even if these were possibilities. Rather, we look forward to the creation of a structure which fits appropriately well within existing Welsh architecture and which reiterates the longstanding commitment, post devolution, to conserve and improve the environment within Wales.

Robert Lee

February 2020

#### **Recommendations**

- 1. When the oversight mechanisms of EU law no longer apply, there is a danger of a governance gap in the application and enforcement of environmental law in Wales which ought to be remedied. (para. 1.1.1)**
- 2. The shortfalls referenced in this paper need to be faced by 1 January 2021. The recommendations made will require legislation and if we are to avoid complex and awkward interim measures, legislation to fit this timetable is strongly advocated for by the Task Group. (para. 1.1.2)**
- 3. A carefully worded objective should express the ambition for the environment in Wales and sit above existing environmental governance architecture. (para. 2.1.1)**

4. The four key environmental principles found in Article 191(2) TFEU should underpin law and policy in Wales; these principles are: the precautionary principle; the prevention principle; the principle that environmental damage should as a priority be rectified at source; and the polluter pays principle.
5. These principles should continue to underpin law and policy in Wales. (paras. 2.2.1)
6. It is not necessary to produce a policy statement of these principles (para. 2.2.6)
7. The opportunity to strengthen the clarity and effectiveness of integration could be improved in forthcoming legislation, perhaps within the overarching objective, to promote the integration of environmental requirements in other policy areas and how this is articulated across environmental legislation in Wales. (para. 2.2.2)
8. The four principles (and overarching objective) should apply to Welsh Ministers at the policy and law development stage of discharging their functions, such that they would inform future Welsh legislation. (para. 2.2.8)
9. The SMNR duties under the Environment (Wales) Act 2016 should apply to public bodies in Wales where those bodies were exercising the discharge of functions relating to the environment. (para 2.3.1)
10. The new governance body should pursue the nine functions of: advice; complaints-handling; investigation; scrutiny; enforcement; implementation; reporting; oversight of principles; and partnering. (para.3.2.1; 3.2.2)
11. While the new body will require staff (for example for complaints investigation and resolution) on a full-time basis this could be supplemented by the establishment of a pool of expertise, such as an expert panel. (para. 3.2.4)
12. Any new body would need to be independent of Welsh Government with appointments made by the Senedd. It would require certainty of budget. (para. 3.3.1)
13. A Commission for the Environment could be constituted on a scale and in a manner appropriate for Wales. It could draw on the Expert Panel to add to its functionality allowing for a flexible approach and allowing the body to draw on a wide range of expertise (para. 3.3.4)

14. The Commission could work cooperatively with other public bodies to secure compliance, but it was thought that the Commission might need to serve notices to secure that compliance if more conciliatory approaches fail. (para. 3.3.4)
15. As part of any enforcement function, there would need to be clarity on how and when activity, including complaints handling might be escalated in the face of urgent threats to the environment. Although the Commission might decide its own priorities, powers to escalate matters might require statutory backing (para 3.3.6).
16. Mechanisms of environmental review before the Upper Tribunal could apply to enforcement in Wales. (para. 3.3.9)
17. The Aarhus Convention rights should be articulated and highlighted in any forthcoming legislation so that the Commission could oversee the working of these rights in Wales. (para. 3.4.2)

## **Annex A:** Membership of the Environmental Governance Task Group

<b>Robert Lee (Chair)</b>	<b>University of Birmingham</b>
<b>Alan Hunt or Sarah Williams</b>	<b>NRW</b>
<b>Anne Meikle</b>	<b>WWF Cymru</b>
<b>Annie Smith</b>	<b>RSPB</b>
<b>Gary Rees or Eve Read</b>	<b>Dŵr Cymru (Welsh Water)</b>
<b>Huw Rhys Thomas</b>	<b>NFU Cymru</b>
<b>Lori Frater</b>	<b>Welsh Government</b>
<b>Neville Rookes</b>	<b>WLGA</b>
<b>Steve Ormerod</b>	<b>Cardiff University</b>
<b>Tegryn Jones</b>	<b>National Parks of Wales</b>
<b>Ludivine Petetin</b>	<b>Cardiff University</b>
<b>Matthew Quinn</b>	<b>Place Research Institute</b>

## **Annex B: Terms of reference of the Environmental Governance Task Group**

### **Terms of Reference**

#### **Background**

The Welsh Government's consultation on 'Environmental Principles and Governance post EU Exit' considered matters relating to the impacts on environmental governance as provided currently under the EU Treaties as a result of the UK exiting the EU. The consultation started an open conversation with stakeholders on the role of environmental principles and governance structures for Wales, which reflect the existing legislative framework and complement existing accountability mechanism.

The consultation period concluded on 9 June and the next step is to use that feedback to develop options for the new system.

As this is a complex matter, a collaborative approach with stakeholders can assist in taking forward this important agenda and the Welsh Government wishes to establish an Environmental Governance Stakeholder Task Group which enables the collective experience and expertise of stakeholder organisations to develop further the responses to the consultation.

This group will have the ability to establish subject specific sub groups, draw on and commission research and develop options for consideration by the Minister for Environment, Energy and Rural Affairs.

#### **Purpose of the Group**

The purpose of the Group will be to provide expertise and technical advice in the consideration and development of potential options to present to the Minister for Environment, Energy and Rural Affairs in areas where there is no general agreement on approach or which require further development in relation to:

- Addressing gaps in environmental principles, building upon the existing legislative framework in Wales;
- Further developing key components for a coherent, effective environmental governance framework for Wales, which compliments existing mechanism;
- Potential interim measures, where such measures may be required

#### **Objectives of the group**

The objectives of the Environmental Governance Stakeholder Task Group will be to provide independent advice to Welsh Government officials on further developing proposals to address the environmental governance gaps arising from exiting the EU and to:

- Develop a work programme of areas for further consideration and development;
- Produce a report or reports on the different packages relating to the work programme identified by the Group;
- Provide updates on progress to the Minister's Brexit Roundtable

### **Membership**

The Task Group will be chaired by Professor Bob Lee of Birmingham Law School, with Lori Frater from the Welsh Government deputising.

The membership of the Group will be:

<b>Member</b>	<b>Organisation</b>
Alan Hunt or Sarah Williams	NRW
Annie Smith	RSPB
Anne Meikle	WWF
Eve Read or Gary Rees	Dwr Cymru
Steve Ormerod	Cardiff University
Ludivine Petetin	Cardiff University
Neville Rookes	WLGA
Matthew Quinn	Place Research Institute
Tegryn Jones	Pembrokeshire Coast NP
Huw Rhys Thomas	National Farmers Union Wales

### **Approach**

The group will work together in different ways either face to face and/or as a virtual team to advise the Welsh Government.

In addition to the core group, sub groups may be convened to undertake specific areas of work. Membership of those group will be flexible, with additional representatives invited to complement the objectives. Members are encouraged to identify colleagues within their respective organisations that can bring additional expertise to discussions and compliment the membership of the sub groups.

### **Key Tasks:**

- Produce a work programme and timetable for delivery;
- Establish, where relevant, sub-groups to assist in the delivery and identify where additional expertise is required;
- Review work of sub-groups;
- Commission, where appropriate, research that can support the work of the groups
- Building upon the consultation develop options relating to environmental principles and governance as outlined in the work programme;

### **Ways of working**

In keeping with the principles of our **Well-being of Future Generations Act** and the principles of sustainable management of natural resources under the Environment (Wales) Act, the group will:

- Work collaboratively – across organisations, but also with other stakeholders and other Roundtable sub-groups;
- Take account of all relevant evidence;
- Seek to achieve integrated long term solutions and take account of the short, medium and long term consequences of actions; and
- Work with integrity and respectfully challenge each other to consider how we can do things differently/better.

All outputs and recommendations from this group should be justified by reference to a sound evidence base or draw attention to the limitations of the evidence where this not available.

### **Timeframe**

The Environmental Governance Task Group will provide a report to the Minister for Environment, Energy and Rural Affairs by early 2020.

We anticipate the core group may wish to meet regularly as outlined in Table 2.

Extra meetings may be arranged as required for additional discussion on those topics or on additional topics that may emerge.

<b>Meeting</b>	<b>Task</b>	<b>Date</b>
1	Establish membership, work programmes and identify required sub groups and lead	18 July 2019
2	Update on progress and review work plan.	September 2019
3	Update on progress and review work plan.	October 2019

4	Update on progress and review work plan.	November 2019
5	Update on progress and review work plan.	December 2019
6	Final report presented for agreement	January/February 2020