

Written Response by the Welsh Government to the Climate Change, Environment and Rural Affairs Committee's report '*Environmental governance arrangements and environmental principles post-Brexit*'

November 2019

Recommendation 1

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

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

Response: Accept in Principle

We are working closely with stakeholders through my Environmental Governance Stakeholder Task Group to identify how we address the gaps in environmental principles, not only what principles we include in our legislative framework but how we achieve this in a way, which complements our existing legislation.

I accept the recommendation in principle, as Wales already has legislated for sustainable development as an overarching context in the Well-being of Future Generations (Wales) Act 2015 it is important how we address gaps in principles and include any additional overarching environmental objectives need to be compatible with our existing architecture in this Act as well as our approach to managing our natural resources sustainably as provided in the Environment (Wales) Act 2016.

In addition, our approach in Wales has been to build upon our environmental standards rather than merely stand-still, which a non-regression approach implies. Our Environment (Wales) Act reflects this in the definition of sustainable management of natural resources, which seeks not only to maintain but enhance the resilience of ecosystems as well as the multiple benefits functioning ecosystems provide – such as clean air and fresh water. I, therefore would be seeking to ensure we can continue to build upon our standards rather than apply a stand-still approach.

Recommendation 2

The Welsh Government should assess the benefits of including the EU and international principles within a future Welsh Bill, and report back to the Committee on its findings.

Response: Accept

As per our response to Recommendation 1, the Environmental Governance Stakeholder Task Group will be providing its recommendations in early 2020 including on which, if any, additional principles may be included within Welsh legislation.

As the Environment (Wales) Act 2016 drew from international best practice, in Wales we already have a number of international principles which go over and above the EU four core principles. These include resilience, adaptive management, scale, participation, long-term implications and value.

The Minister has committed to the continuation of the application of EU environmental principles post exit, this will be achieved in the immediate term through the continuing applicability of our domestic legislation.

An Environmental Governance Task group was convened in July which has been further divided into sub-groups. The principles sub-group will be reflecting on the *Environmental Principles and Governance in Wales Post European Union Exit* consultation responses and considering the benefits of including any additional principles. The Stakeholder Task Group is scheduled to report on its findings early next year.

Recommendation 3

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

Response: Reject

Under the EU system, the environmental principles listed in Article 191 of the Treaty on the Functioning of the European Union apply only on the EU institutions and do not apply to Member States, which in turn means the EU environmental principles do not apply on any public bodies within the Member States. The purpose of the four EU environmental principles is to provide guidance for the EU institutions by helping guide the shape and development of environmental law and policy at the EU level. For example, when developing policies on licensing and permitting of polluting activities, the polluter-pays principles can be given effect in the requirement for the party carrying out the polluting activity, to pay.

In our consultation document, we asked stakeholders to provide their views on extending the duty to pursue sustainable management of natural resources, including its principles (as provided in sections 3 and 4 of the Environment (Wales) Act 2016) on a wider set of public bodies. Responses, including from a number of public bodies, in the main, were in favour of this, and we are working with the Environmental Governance Stakeholder Task Group in the development of proposals.

Recommendation 4

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

Response: Accept in Principle

As detailed in the response to Recommendation 3, the proposal presented in the consultation document was on the extension of a duty of sustainable management of natural resources and its accompanying principles as provided in the Environment (Wales) Act. Discussions with stakeholders will continue on whether and on whom this duty could be extended to a wider group of public bodies.

Discussions were being held with the UK Government on the extent of any duty relating to the application of environmental principles upon the Ministers of the Crown. An amendment was made to the now fallen UK Environment Bill on the basis of Welsh environmental principles applying on UK Ministers of the Crown. These discussions will continue with a new UK Government post the General Election.

In relation to other non-devolved public bodies, we will discuss with the UK Government the extension of the duty of sustainable management of natural resources also applying more broadly.

Recommendation 5

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

Response: Accept

In relation to the agreed principles and bodies to be included within this new framework, we accept the above recommendation to enable the list of principles to be updated as well as the bodies on whom a duty may apply.

Recommendation 6

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

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

Response: Accept

We are, with the UK Administrations, considering a cooperative approach to environmental principles which will ensure a coherent set of principles across the UK, whilst allowing each administration to determine the appropriate measures for their national circumstances.

In light of the General Election, we will of course ensure these discussions continue with any new UK Government.

Within our overarching sustainable development sit a number of environmental principles, drawn from international best practice, which already guide policy and decision-making. These include prevention, scale, resilience, public participation, collaboration, long-term, value, evidence and adaptive management. A cooperative approach to environmental principles will allow us to determine what the correct Welsh legislative response is to environmental principles so we complement, rather than cut across, our existing legislation.

Recommendation 7

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

Response: Accept

As stated in previous responses, the model presented in the now fallen UK Environment Bill was not a model suitable for Wales. It was designed to address the gaps identified for England including overseeing its 25 Year Environment Plan. This was not a response designed to address governance at a UK-wide level.

However, the UK Government is only one party in the considerations of a UK-wide approach and as such our discussions have been not merely limited to the UK Government but also the other devolved administrations. The Scottish Government presented its response to environmental governance in its consultation, which closed in May of this year.

I have always stated I am willing to engage with the other administrations on how to address any gaps at a UK-wide level and on how this could be addressed in a way, which respects the devolution settlement and the role of devolved bodies with responsibility for accountability, including the role of the National Assembly for Wales. We were the only administration to seek the views of stakeholders on a UK-wide approach to environmental governance.

Addressing any gaps at a UK-wide level can be achieved in many different ways and our discussions with the other administrations have considered the opportunities for cooperation between potentially different approaches in different administrations. There are opportunities for cooperative working, for example the sharing of data and information and the ability to address cross-border issues. From a citizen's perspective, it will be important to enable a complainant to raise a complaint in one

administration and where appropriate for this complaint to be considered cooperatively with another governance body where appropriate.

Our consultation provided a number of key characteristics, which we sought views on from stakeholders, these characteristics would apply whether the response is Welsh only or UK-wide.

Recommendation 8

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

Response: Accept

As outlined in Recommendation 7 discussions have been on-going with the other administrations, including what cooperative approaches could be achieved. The UK Bill, as introduced but now fallen, had been amended to enable the UK Office for Environmental Protection to consult with other like entities.

Officials will continue to engage with the other UK administrations.

Recommendation 9

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

Response: Accept

We have been clear in our approach to future environmental governance arrangements; we must ensure our response in Wales is one which complements, rather than cuts across, duplicates or conflicts with existing Welsh bodies.

Existing bodies may have an important role to play in an effective and coherent governance structure and it will be important to ensure the roles and responsibilities are clearly defined.

Recommendation 10

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

Response: Accept

As outlined in responses to Recommendations 7 and 8, discussions had been on-going in relation to cooperative approaches between governance arrangements in the respective administrations.

As stated in response to Recommendation 8, the UK Bill, before it fell, had been amended to enable the UK Office for Environmental Protection to consult with other like entities.

Discussions are continuing with the other administrations.

Recommendation 11

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

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

Response: Accept

We accept this recommendation and agree any new environmental governance model in Wales should be independent.

From the outset we have stated the requirement for any new governance model to act independently and we will continue to consider the qualities any new governance model will require in achieving an outcome which ensures a good governance approach is taken.

I sought views about these considerations in our consultation document and they were broadly supported by respondents.

Recommendation 12

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

Response: Accept

The functions to be undertaken in respect of environmental governance are being considered by the Environmental Governance Stakeholder Task Group, who will be reporting on initial findings in early 2020.

In general, we accept this recommendation as it will be important for there to be a clear distinction in functions to provide a coherent and effective governance

structure. How this may be achieved will be for discussion with stakeholders and also with representatives from existing accountability bodies in Wales.

Recommendation 13

The Welsh Government should ensure that the scope of the new governance body should extend to all Welsh public bodies who will be required to apply the environmental principles.

Response: Accept

In relation to the environmental principles please see the response to Recommendation 3.

In relation to the bodies subject to the remit of environmental governance, we are currently considering this remit with stakeholders, in particular on the linkages with environmental law rather than specifically the application of environmental principles.

Recommendation 14

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

Response: Accept

The Withdrawal Act 2018, on exit day from the EU, will convert EU directly applicable legislation into domestic law and save domestic law introduced under the European Communities Act 1972. The extensive programme of EU Exit correcting subordinate legislation has addressed deficiencies in this EU derived legislation, including transferring reporting functions of the EU Commission into domestic law. The aim of the programme of EU Exit correcting legislation was to maintain the status quo on exit day.

Where the EU Commission reported to International Conventions, the Secretary of State would be responsible for this duty.

We are currently looking at all of the monitoring and reporting requirements within the legislation. In undertaking this work NRW will be consulted.

We will identify risks and where our reporting requirements and broader evidence base may be impacted.

In addition, to the monitoring and reporting requirements under EU legislation, we have also introduced new reports in both the Well-being of Future Generations Act and the Environment Act as are outlined in the consultation document such as the Well-being of Wales Annual Report and the five yearly State of Natural Resources report.

Recommendation 15

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

Response: Accept

Please see the response to Recommendation 14, which outlines the way in which the reporting requirements in EU legislation have been retained.

Recommendation 16

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

Response: Accept

As the UK is the party to the international agreements, the international reporting functions of the EU Commission have been transferred to the Secretary of State in the relevant EU Exit correcting legislation.

Discussions are on-going in relation to the post EU-exit intergovernmental relations across the UK, including how the four administrations will work together on international matters.

Where a particular policy area has been identified by four UK administrations as requiring a Common Framework following exit of the EU, then one of the principles applied in its development is to ensure compliance with international obligations.

Recommendation 17

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

Response: Accept

As stated in response to Recommendation 12, the functions to be undertaken in respect of environmental governance are being considered by the Environmental Governance Stakeholder Task Group, who will be reporting on initial findings in early 2020.

In relation to reporting on international obligations, as the UK is the party to international conventions and international relations is a reserved matter for UK Government, the duty to report on international obligations will, post exit, be with the Secretary of State.

Recommendation 18

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

Response: Accept

We agree remaining a member of the EEA and other agencies would be beneficial in terms of the access to evidence, expertise and key developments.

We will continue discussions with the UK Government on continued partnership with EU bodies and agencies with which future collaboration is of significance in achieving our international goals.

However, continued membership will depend on the model of the future relationship between the EU and UK and the agencies delivering functions on our behalf.

Recommendation 19

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

Response: Reject

As covered previously, the appropriate functions for an environmental governance system are under discussion with stakeholders including what enforcement functions may be required.

Our consultation stated, the focus of good governance should be on reducing non-compliance with enforcement considered as a last resort. Our intention is to focus on an effective governance model, which does not rely solely on punitive measures such as fines.

We seek to develop a model, which helps to address and rectify the issues, which cannot be achieved by a system based solely on fines. Under the current EU system, fines are classed as a last resort mechanism with the focus on rectifying issues rather than issuing fines.

Work is also on-going in relation to assessing models in other jurisdictions, taking into account the purpose of these models and the specific constitutions of these jurisdictions.

Recommendation 20

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

Response: Reject

Please see response to Recommendation 19 as the same considerations will apply.

Recommendation 21

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

Response: Accept

As a government we are committed to maintaining citizens' rights including access to raising any issues on the implementation of environmental law.

We will continue discussions with stakeholders and representatives from existing accountability bodies in Wales on the appropriate approach to providing this mechanism.

Recommendation 22

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

Response: Accept

As stated in our consultation, the Welsh Government believes these should also be elements of any new complaints function. We remain engaged with stakeholders in developing proposals for how a complaints process could operate in Wales.

Recommendation 23

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

Response: Accept

The Environmental Governance Stakeholder Task Group is currently considering different types of models, including the form such a model should take. Therefore, at present no definite type of entity has yet been recommended. As part of defining a preferred model, work will be undertaken to assess any likely resources required.

Recommendation 24

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

Response: Accept

Discussions are ongoing with the UK Government, however we are concerned about the lack of transparency and meaningful engagement with the Devolved Administrations over what replaces EU funding.

We expect any UK Government to honour its commitment to respect the devolution settlement and to ensure Wales will not be a penny worse off after we leave the EU. This money and the flexibility to manage it must be transferred to Wales in full, without precondition.

Recommendation 25

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

Response: Accept

If, following the General Election on 12 December, there is a deal agreed with the EU, followed by a transition period, we will remain under the jurisdiction of the EU institutions for the duration of the transition

Whilst there is now an extension to Article 50, a no-deal scenario could still emerge which will result in the need for interim measures. The Environmental Governance Stakeholder Task Group have provided advice on interim measures and I have agreed an approach to complaints management to be adopted in the event of no deal.

I remain in constructive discussion with my stakeholders on the development of recommendations for any interim measures, which will be put to my consideration. As such, at this moment in time I am not in a position to share timelines for the development of any preferred approach, however, I will happily engage the Committee once I have considered their proposals.

Recommendation 26

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

Response: Accept

If, following the General Election on 12 December, there is a deal agreed with the EU, followed by a transition period, we will remain under the jurisdiction of the EU institutions for the duration of the transition. There will be no additional costs incurred.

Whilst there is now an extension to Article 50, a no-deal scenario could still emerge which will result in the need for interim measures, the Environmental Governance Stakeholder Task Group have provided advice on interim measures and I have agreed an approach to complaints management to be adopted in the event of no deal. The costs of this initial procedure will be met from existing resources. This would be a simple complaints mechanism for citizens to raise any complaints in a no deal scenario.

We have taken an open approach to the development of interim measures by working with stakeholders and officials and the Task Group are further developing additional elements where interim measure are required until a permanent solution is provided. I expect to be provided with further details on these additional elements in early 2020 for my consideration. Following my decision, associated costs and comprehensive impact assessments can be considered but the timing will be dependent on if or when the UK leaves the EU. I am happy to share this information with the Committee when this has been undertaken.