

Wales

Challenges and opportunities for post-Brexit environmental governance

OCTOBER 2018

* BREXIT
* & ENVIRONMENT
* * *



This brief should be cited as: Cowell, R., Burns, C., Carter, N., Eckersley, P., Farstad, F., Gravey, V., Jordan, A., Moore, B. and Reid, C., 2018. Wales: Challenges and opportunities for post-Brexit environmental governance.

Cover photograph courtesy of [Roman Grac](#).

This brief has been funded by the Economic and Social Research Council's UK in a Changing Europe programme, which highlights the major challenges and opportunities of Brexit across the UK. The brief is based on interviews and workshops with a wide range of stakeholders¹ in December 2017 and July 2018 on the options available for future Welsh and UK environmental governance, as well as the growing body of parliamentary evidence, academic publications and think tank reports on these issues.



¹ Workshop stakeholders included representatives from local and devolved government, public agencies, and environmental NGOs.

Executive Summary

Brexit represents a major change to environmental governance in Wales and the United Kingdom (UK), raising both opportunities and challenges. Welsh stakeholders are worried that English interests will predominate in the design of environmental governance after Brexit and are also concerned about the prospect of greater instability and weaker environmental protections. Crucially, the key planks of the UK government's 'Green Brexit' strategy—the 25 Year Environment Plan (25 YEP) and Defra's environmental governance and principles consultation—do not cover governance in the devolved nations. This gap in coverage raises the prospect of policy divergence and inconsistent implementation and enforcement across the UK. Most importantly, there is a strong fear in Wales that Welsh environmental policy ambition will be thwarted by Brexit and deregulatory pressure emanating from England.

Key points

- Environmental policy works best when policy-makers can take account of local conditions and allow local communities to get involved. Cooperation and coordination are also required on transboundary problems.
- There are many incentives for the Welsh Assembly government and the UK government to cooperate on environmental policy in ways that allow Wales to develop policies sensitive to local conditions whilst cooperating on areas of shared concern.
- However, the absence of trust between the Welsh and UK governments may jeopardise the future development of post-Brexit environmental governance structures.
- The current machinery for coordinating policy (the Joint Ministerial Committee) is not fit for purpose and should be reformed.
- New environmental governance structures (i.e. watchdogs) must be coordinated across the nations of the UK and be transparent and accountable to legislatures and citizens.
- Environmental policy must be properly resourced to enable the development of new policies and the implementation and enforcement of existing policies.

Contents

Executive Summary	3
1. Introduction	5
2. Brexit, Devolution and Welsh Environmental Policy	7
3. Challenges to Welsh Environmental Governance and Ambition after Brexit.....	12
3.1 Policy Co-ordination	13
3.2 Trade.....	17
3.3 The Governance Gap	19
3.4 Resources	21
4. Future Directions.....	23
4.1 Recommendations.....	23
References	25

1. Introduction

The most effective environmental policy facilitates transnational cooperation to deal with transboundary and shared environmental problems, while simultaneously remaining sensitive to local conditions and issues. Public awareness and participation have also long been regarded as essential ingredients of good environmental policy-making. Citizens need to feel a sense of ownership of environmental goals if they are to act to protect the environment, and it is often through citizenship engagement that environmental problems are brought to the attention of policy-makers and the wider public.

These features mean that to be effective, post-Brexit environmental policy must enable the UK government and the devolved administrations to engage in international/regional environmental cooperation, and to coordinate their own policies whilst using local knowledge to create enforceable environmental policies that are transparent and accountable to UK citizens. There is also increasing emphasis within environmental science upon policies designed around landscape features (such as water catchments), which do not respect political boundaries such as national borders. Hence, transnational intra-UK cooperation, communication and coordination are essential for environmental protection.

For decades, these balances between coordination and local sensitivity have been struck within the context of European Union (EU) membership, which has profoundly shaped environmental policy and governance across the UK.² Brexit will therefore have a significant impact upon Welsh environmental governance. Environmental policy is a devolved matter and the ways in which powers will be exercised after Brexit has become a site of constitutional disagreement. The EU Withdrawal Act states that powers that are currently exercised at the EU level should generally be repatriated to the devolved administrations, but gives the UK government the ability to restrict the administrations' policy-making authority in areas where common UK-wide frameworks are determined to be necessary.³ This has led to complaints that the devolved administrations may be restricted from amending laws that fall within their competence for up to 5 years.

² Burns, C., Jordan, A. and Gravey, V., 2016. [The EU referendum and the UK environment: The future under a 'hard' and a 'soft' Brexit.](#)

³[European Union \(Withdrawal\) Act](#), Clauses 10-12. For further information, see: House of Commons, Public Administration and Constitutional Affairs Committee, 2018. [Devolution and exiting the UK: Reconciling differences and building strong relationships](#), especially paragraphs 48-50.

Brexit also creates opportunities to reform and improve Welsh and UK environmental policy ambition, coherence, and coordination to deliver well-designed policy that is fit for 21st century environmental challenges. The UK government’s 25 Year Environment Plan (25 YEP), environmental principles and governance consultation, and the Welsh government’s commitments in *Securing Wales’ Future* all demonstrate a desire and willingness to develop and improve environmental policy and governance. Yet a key risk that arises from the on-going uncertainty surrounding the Brexit process is that the environment will be downgraded on the policy agenda.

Moreover, on-going political and constitutional disagreements mean that the opportunities for reform presented by Brexit may not be realised. A major risk is that the UK government will seek to ‘muddle through’ by making minor adjustments to policies and structures that are already unfit for purpose. Doing so may compromise both UK and Welsh environmental policy ambition.

This policy brief draws together the insights of practitioner workshops organised by Brexit and Environment—including a session on Wales held in Cardiff under Chatham House rules—to discuss the implications of Brexit for environmental policy with a specific focus upon devolution, an issue which has all too often been overlooked in policy debates. The views of practitioners from the devolved nations are central to this work. We hope we have captured their concerns whilst also developing recommendations that offer practical remedies. We identify several core challenges to the future of environmental governance in Wales and suggest recommendations for delivering well-coordinated, coherent and effective environmental governance after Brexit.

2. Brexit, Devolution and Welsh Environmental Policy

Devolution in the UK is asymmetrical. England does not have its own representation (instead it is governed directly by Westminster). Scotland, Wales and Northern Ireland enjoy varying degrees of autonomy, but each has responsibilities for the environment, agriculture, fisheries and energy. These devolution settlements were created in the context of EU membership, and therefore the EU's minimum standards for environmental protection applied to all parts of the UK.⁴

Under the EU environmental guarantee principle, enshrined in Article 193 of the Treaty on the Functioning of the European Union, territories within member states can adopt 'more stringent protective measures' than those stipulated in European Union legislation.⁵ The intersection of the devolution settlements with EU membership has allowed for 'upward divergence' in environmental policy across the four UK nations. In particular, the Welsh government has sought to create more ambitious environmental policies than the UK, in relation to climate change and waste (see Box 1).⁶

The Welsh government has also passed innovative environmental legislation, including the Well-being of Future Generations (Wales) Act 2015 and the Environment (Wales) Act 2016. It has re-fashioned governance for the environment to develop distinctive institutions, most notably by creating a Future Generations Commissioner for Wales (see Box 1). However, whilst Wales has shown environmental leadership ambition in some areas, in others it has performed less well, most notably in relation to air quality, where the Welsh government has struggled to meet the targets established by EU legislation (See Box 2).

Nevertheless, the Welsh government has committed to on-going environmental ambition after Brexit, declaring that 'We are committed [...] at a minimum, to maintaining current standards in respect of air and water quality, emissions and environmental protection. In particular, we are committed to the principle of using "green growth" as a means of fostering

⁴ Burns, C., Gravey, V., and Jordan, A., 2018. [UK environmental policy post-Brexit: A risk analysis](#).

⁵ [Treaty on the Functioning of the European Union, Article 193](#).

⁶ On climate change, see: Royles, E. and McEwen, N., 2015. [Empowered for action? Capacities and constraints in sub-state government climate action in Scotland and Wales](#). *Environmental Politics* 24 (6): 1034-1054. On waste, see: Cowell, R., Flynn, A. and Hacking, N., 2017. [Assessing the impact of Brexit on the UK waste resource management sector](#). Cardiff University.

economic growth and development, which is socially equitable and ensures that natural resources are sustainably used and managed.⁷

Box 1: Welsh Environmental Leadership

Wales has reformed its system of environmental governance to place well-being and sustainable development at the heart of its approach to policy. There are two legal acts that are central to this innovation.

The Environment (Wales) Act

The Environment (Wales) Act came into force in 2016. It seeks to provide a new approach to environmental policy in Wales that allows for joined-up management of natural resources through the development of a National Natural Resources Policy. It also requires Natural Resources Wales to produce annual reports on the state of natural resources. The Act was a response to on-going policy failure, especially in relation to halting the decline in biodiversity. The emphasis upon integrated policy recognises the incremental and reactive ways that policy had previously developed.

The Well-Being of Future Generations (Wales) Act

The Well-Being of Future Generations (Wales) Act was adopted in 2015 and requires public bodies to work towards seven Well-Being Goals using five ways of working (See Figure 1). There are 46 National Indicators that provide benchmarks to guide action. The Act requires public bodies to pursue sustainable development and created a Future Generations Commissioner, whose role is to act as a guardian for the interests of future generations in Wales.

In addition to these initiatives Wales was a first mover on introducing carrier bag charges and has adopted ambitious climate change and waste targets.

⁷ Welsh Government, 2017. [Securing Wales' future: Transition from the European Union to a new relationship with Europe](#), p. 29.

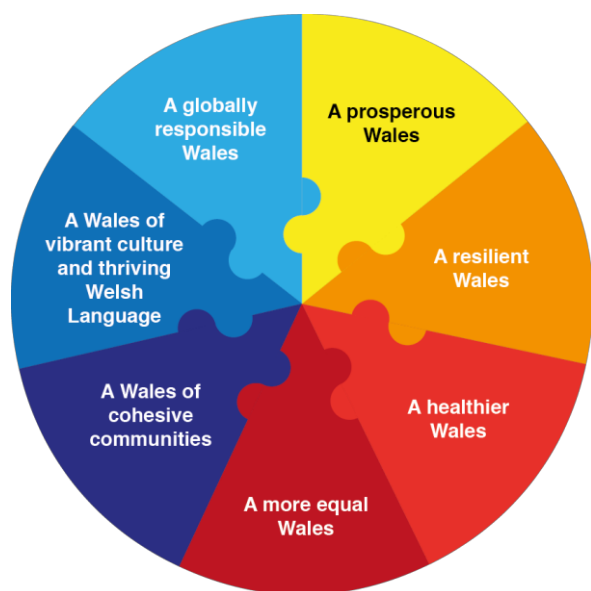


Figure 1: Well-Being Goals of the Well-Being of Future Generations (Wales) Act

Box 2: The Challenge of Air Quality in Wales

Air quality is a devolved issue, but meeting EU targets has been challenging across the UK. This is especially true for Wales, which despite its environmental ambitions has some of the poorest air quality in the UK. Cardiff and Port Talbot both have higher particulate matter levels than Birmingham or Manchester and a road in Caerphilly is the most polluted outside of London.⁸ It is estimated that air pollution contributes to 6% of total deaths a year in Wales.⁹ In 2017, it became apparent that the Welsh government had failed to put in place appropriate measures to reduce air pollution in line with the requirements of the EU Ambient Air Quality Directive. Following legal action taken by Client Earth, the Welsh government agreed to introduce a new air quality plan by the end of July 2018.¹⁰ This deadline has now been missed. The High Court has granted an extension until 30 November 2018 for the Welsh government to introduce its plan. Even if the government brings a forward a plan that meets EU requirements, it is worth noting that those requirements fall short of those recommended by the World Health Organisation (WHO) on particulate matter (PM) 2.5 and 10.

⁸ Abernethy, R., 2018. [Research Briefing: Air Quality](#). National Assembly for Wales, p. 1.

⁹ Abernethy, R., 2018. [Research Briefing: Air Quality](#). National Assembly for Wales, p. 2.

¹⁰ Client Earth, 2018. [Wales concedes but UK Government contests air pollution case](#).

The UK government has laid out environmental policy ambitions in the 25 YEP, but there is insufficient detail on planned targets and monitoring for England and whether and how these might be coordinated with Wales. Wales, like Scotland, originally signalled its opposition to the EU Withdrawal Bill, characterising the UK government's plans as a power grab, and like Scotland adopted a continuity bill (the Law Derived from the European Union (Wales) Bill).¹¹ However, following intergovernmental negotiations and amendments to the EUWA, the National Assembly for Wales has given its consent to the EU Withdrawal Act.

The EUWA contains an explicit requirement for the government to bring forward legislation on environmental principles and lists those principles that should be included (see Box 3). However, because environmental policy is a devolved power, this amendment does not apply to Wales.¹² The Welsh government has committed to non-regression on environmental principles and standards, and to maintaining and continuing to improve upon EU standards. It has also committed to enshrining key environmental principles in legislation.¹³

Box 3: Environmental Principles in the EU Withdrawal Act

The EU Withdrawal Act requires the UK government to bring forward legislation on principles including at a minimum:

- the precautionary principle,
- preventative action principle,
- pollution at source principle,
- the polluter pays principle,
- sustainable development principle,
- environmental protection principle,
- public access to environmental information,
- public participation in environmental decision-making,
- access to justice in relation to environmental matters.

There is no requirement for these principles to be interpreted in line with the EU Treaties.

¹¹ Cabinet Office, 2018. [Written Ministerial Statement: European Union \(Withdrawal\) Bill - Agreement between the UK and Welsh governments.](#)

¹² Lord Callanan, 2018. [European Union \(Withdrawal\) Bill.](#)

¹³ National Assembly for Wales, 2018. [Plenary Record 21/03/2018.](#)

However, there is scope for the UK and Welsh governments to commit to different principles and to interpret them in different ways. For example, Wales is committed to ‘the sustainable management of natural resources’¹⁴ and sustainable development.¹⁵ Whilst the EUWA includes a commitment to a sustainable development principle, it is unclear how this principle will interact with sustainable development principles to which the Welsh government has committed. Therefore, a key challenge for future environmental governance in Wales and the UK is how to mediate and coordinate potentially different environmental ambitions and approaches to framing, interpreting and enforcing environmental legislation.

¹⁴ Welsh Government, 2016. [Environment \(Wales\) Act 2016](#).

¹⁵ Welsh Government, 2015. [The Well-being of Future Generations \(Wales\) Act 2015](#).

3. Challenges to Welsh Environmental Governance and Ambition after Brexit

Our meetings with stakeholders and wider engagement with the policy process have highlighted a range of issues for the future of Welsh and UK environmental governance. There are three overarching challenges shaping policy dynamics for environmental governance.

1. There is a need for common frameworks to operate at UK level, based on shared principles as Wales and England share terrestrial and marine borders that environmental issues do not respect.
2. There is a trust deficit between the Welsh and UK governments, which presents an obstacle to policy coordination and agreeing joint frameworks.¹⁶
3. There is also a suspicion that Defra and Westminster-based politicians fail to understand or fully respect devolved competencies. Officials in Defra seem to forget whether they are ‘wearing’ an English or UK ‘hat’ and often prescribe solutions, which whilst appropriate for England, may not be for other parts of the UK.¹⁷

These three factors have combined to create a difficult policy context within which four key challenges need to be addressed.

¹⁶ House of Commons, Public Administration and Constitutional Affairs Committee, 2018. [Devolution and exiting the UK: Reconciling differences and building strong relationships](#), pp. 20-21.

¹⁷ House of Commons, Public Administration and Constitutional Affairs Committee, 2018. [Devolution and exiting the UK: Reconciling differences and building strong relationships](#), pp. 28-29.

3.1 Policy Co-ordination

Leaving the EU increases the potential demands for intra-UK coordination on environmental policy but raises questions about the appropriateness of existing institutions. Currently, the devolved nations and the UK government meet to discuss and coordinate 'devolved' and 'reserved' powers in the Joint Ministerial Committee (JMC), which was created in 1999 to facilitate co-ordination between the UK government and the devolved governments.¹⁸ The JMC is comprised of a set of committees composed of ministers from the UK and devolved governments. It is designed to provide central co-ordination of the overall relationship between the UK and the devolved nations.

The Joint Nature Conservation Committee (JNCC) brings together representatives from conservation bodies of the UK's four nations.¹⁹ This body provides advice and recommendations, is charged with establishing common standards across the UK for monitoring and researching nature conservation and analyses the resulting information. Its recommendations are then left to be implemented by the competent legislative authorities in each country. The UK-wide Committee on Climate Change operates on a similar basis: it makes recommendations that the Welsh government may implement.

The agencies responsible for helping to implement environmental policy across the UK (the Environment Agency, the Scottish Environmental Protection Agency, Natural Resources Wales and the Northern Ireland Environment Agency)²⁰ have fora for cooperation but the perception of stakeholders is that cooperation is not well developed.

These policy coordination mechanisms were designed to fit a system in which Wales and the other nations of the UK were tied to common standards decided at the EU level. The structures were designed to accommodate distinctive policies and approaches but within a common envelope. Brexit has highlighted some key limitations, especially in the operation of the JMC.

¹⁸ United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee, 2013. [Devolution: Memorandum of understanding and supplementary agreements](#). See also: Thimont Jack, M., Owen, J., Paun, A., and J. Kellam, 2018. [Devolution after Brexit: Managing the environment, agriculture and fisheries](#). Institute for Government.

¹⁹ Joint Nature Conservation Committee, 2018. [About JNCC](#).

²⁰ Northern Ireland does not have an independent environment agency, those functions are carried out by the Department for Agriculture, Environment and Rural Affairs.

JMC meetings are infrequent and irregular.²¹ In addition, they can only be convened when the UK government deems it necessary.²² The JMC on European Negotiations, set up to deal with Brexit, has failed to meet on the planned monthly basis, and did not meet for 8 months between February and October 2017.²³ The lack of regular engagement at the highest level has also contributed to a neglect of devolution issues in the Brexit debate and negotiations.²⁴

The current system of cooperation is bilateral with the devolved administrations dealing mostly with central government, whilst the opportunity for all four UK environmental ministers to meet and work together is rare. Similarly, there is no arrangement for joint working between the parliaments and assemblies of the UK's four nations. This is starting to change with more in-depth working between the four administrations via civil service 'deep dives' to discuss where common frameworks are necessary and what legal form they would take. Fisheries, the environment and agriculture are central to these exercises. At least 30 'deep dive' exercises had been completed by April 2018, addressing areas in which common legislative frameworks are planned.

While the deep dives illustrate greater cooperation on devolved matters, existing arrangements for cooperation beyond the UK are weak, with little engagement of the devolved nations at international negotiations.

These issues are exemplified by recent actions of the UK government in relation to environmental policy. As noted above, the UK government has committed itself to a 'Green Brexit' and pushed ahead with the adoption of the 25 YEP and a governance and principles consultation to address concerns that Brexit could lead to an environmental governance gap and weaker environmental standards.²⁵ However, neither the 25 YEP nor the consultation applied to the devolved nations. The way in which UK-wide environmental policy will be managed and enforced is still to be decided.

These moves by the UK government have caused irritation within the devolved nations. Little notice of the UK government plans was given. Rather than offering genuine opportunities for consultation and co-designed policy, the mode of consultation was more in the style of

²¹ See Institute for Government, n.d. [Devolution and the Joint Ministerial Committee](#).

²² House of Lords, European Union Committee, 2017. [Brexit: devolution](#).

²³ Institute for Government, n.d. [Devolution and the Joint Ministerial Committee](#).

²⁴ Farstad, F., 2017. [Green Gove woos environment sector: but what about devolution?](#) Brexit and Environment Blog.

²⁵ HM Government, 2018. [A green future: Our 25 Year Plan to improve the environment](#); Department for Environment, Food and Rural Affairs, 2018. [Environmental principles and governance after EU Exit](#).

telling the devolved administrations what the UK government's plans were, with little if any opportunity for them to comment.

The JMC has agreed a set of principles (see Box 4) to guide post-Brexit policy.²⁶ It has suggested that 142 policy areas will be allocated into three groups:²⁷

1. Areas where no further action is necessary (covering 49 areas, including 9 related to the environment such as water quality and land use policy);
2. Areas that could require new non-legislative arrangements (covering 82 areas, including 10 related to the environment such as biodiversity and air quality policy);
3. Areas that may require new common legislative frameworks (covering 24 areas, including 19 related to the environment such as chemicals and pesticides policy).

There are also twelve further areas that the UK government believes are reserved but which will still be subject to discussion with the devolved nations, including two areas related to the environment: eco-design and energy labelling, and environmental regulations on international trade in timber.

Box 4: Common Frameworks in the Joint Ministerial Council

Common frameworks will be established where they are necessary in order to:

- enable the functioning of the UK internal market, while acknowledging policy divergence;
- ensure compliance with international obligations;
- ensure the UK can negotiate, enter into and implement new trade agreements and international treaties;
- enable the management of common resources;
- administer and provide access to justice in cases with a cross-border element;
- safeguard the security of the UK.

JMC Conclusions (16 October 2017)²⁸

²⁶ HM Government, 2017. [Joint Ministerial Committee communique: 16 October 2017.](#)

²⁷ HM Government, 2018. [Frameworks analysis: Breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland.](#)

²⁸ HM Government, 2017. [Joint Ministerial Committee communique: 16 October 2017.](#)

The allocation of policies to these groups has raised a set of concerns. First, it is unclear why some policy sectors have been allocated to particular groups. For example, water policy is identified as an area where no further action is necessary despite the transboundary implications of water use and pollution. Second, there also seems to have been little consideration of how to manage the interaction between policies which are covered by legislative frameworks (such as chemicals) and those which are not covered (such as water).²⁹

The Environmental Audit Committee noted that whilst there is no indication that current administrations would seek to weaken regulation, there is also no guarantee that future administrations would not do so.³⁰ Therefore failing to put in place legislative frameworks underpinned by a commitment to high standards leaves the environment vulnerable over the longer term.

In 2017, the Welsh government proposed a constitutional convention to develop a UK Council of Ministers on the grounds that ‘the current intergovernmental machinery will no longer be fit for purpose’ after Brexit.³¹ The First Minister of Wales has stated that he is happy to accept the idea of common frameworks, but has expressed concern about the process by which they are agreed.³²

For example, the April 2018 Inter-governmental Agreement signed between the Welsh and the UK governments sets out a process for creating legislative common frameworks.³³ Building on the civil service led ‘deep dives’, legislation will be drafted by the UK government, after which the devolved administrations will be given 40 days to grant consent. If consent is withheld, regulations can still be agreed if the UK Parliament votes in their favour. The devolved legislatures consequently only have the right to consent to, rather than to amend, proposed common frameworks and are also afforded only forty days to consult with relevant stakeholders. This process thereby limits the scope for legislative and citizen participation and curtails the transparency and accountability of the process.

²⁹ See National Assembly for Wales, Climate Change and Rural Affairs Committee, 2018. [Common frameworks for the environment after Brexit](#); Gravey, V. 2018. [Written evidence](#) provided to the Welsh Assembly Climate Change, Environment and Rural Affairs Committee inquiry into UK common frameworks on agriculture and the environment.

³⁰ House of Commons, Environmental Audit Committee, 2018. [The Government’s 25 Year Plan for the Environment](#).

³¹ Welsh Government, 2017. [Securing Wales’ future: Transition from the European Union to a new relationship with Europe](#), p.8.

³² National Assembly for Wales, External Affairs and Additional Legislation Committee, 2017. [Implications for Wales of Leaving the European Union](#), p.53.

³³ UK Government and Welsh Government, 2018. [Intergovernmental Agreement on the European Union \(Withdrawal\) Bill and the establishment of common frameworks](#).

Conclusion: Environmental policy co-ordination across the nations of the UK will be necessary. Current mechanisms are not fit for purpose: they lack transparency and do not allow for the full involvement of the devolved administrations in decision-making. Decisions on where and how legislation may be needed have been taken without public consultation and, moreover, seem poorly thought through.

3.2 Trade

Brexit raises environmental policy concerns with regard to both internal and international trade.

Internal (intra-UK) trade: The agreement of common frameworks can prevent a ‘race to the bottom’ in environmental standards between the four nations. If the UK and its devolved governments are able to agree a unified position, their combined strength vis-à-vis businesses and potential polluters will make it easier to adopt ambitious standards across all four nations. However, if standards across the UK differ significantly, polluters may ‘dump’ (literally, in the case of waste) in the nation that has the least stringent regulations.

Risks arise from the different market power of the constituent UK nations. The greater size of the English economy and the greater familiarity with it in Whitehall may lead to decisions that fail to take account of the diverging needs of the different nations of the UK.

The devolved administrations may be reluctant to develop policies that differ too much in terms of ambition from those in England, especially if those policies are perceived to impose additional burdens on local industry. For example, after the UK government dropped its policy commitment to ensuring that new homes in England would be carbon neutral by 2016, the Welsh government felt compelled to move its regulations in the same direction, due to pressure from major homebuilders.³⁴

International trade: Negotiations of international trade agreements are reserved to the UK government, but such agreements can significantly impinge upon the devolved nations’ environmental policy objectives and competencies (see Box 5).

To date the operation of existing coordination mechanisms has not facilitated meaningful involvement of the devolved nations in international trade negotiations.

³⁴ National Assembly for Wales, Climate Change, Environment and Rural Affairs Committee, 2018. [Low carbon housing: The challenge](#).

Future trade agreements may lead to competitive deregulatory pressure if products that have been subject to lower standards enter the UK market. The EU and UK have both committed in principle to the inclusion of an environmental non-regression principle in any future trade agreement.³⁵ However, that agreement has yet to be negotiated and these commitments will become moot in the event of a no-deal outcome.

Box 5: International Trade and Genetically Modified Organisms

The issue of Genetically Modified Organisms (GMOs) illustrates the intersection of devolved competences with those matters reserved to the UK government, such as international trade. Wales (along with Scotland and Northern Ireland) has adopted a more restrictive policy on GMOs than England in line with the EU Deliberate Release Directive. This divergence between the devolved administrations and England on the cultivation of GMOs has implications for intra-UK and international trade. For the UK government, ensuring harmonisation and the absence of barriers to trade within the UK internal market is crucial as divergence in standards may restrict such trade.

As the UK government is responsible for negotiating future trade agreements, there is scope for it to reach a deal with pro-GMO states such as Brazil, Argentina and the US that undermines the policy preferences of the devolved nations. Hence the UK government's ability to take decisions on trade can undermine the exercise of devolved competences.³⁶

Conclusion: There is a risk of deregulatory pressures arising from new trade agreements or from differential standards adopted across the UK market. The Welsh government's environmental ambitions may therefore be undercut by:

1. A failure to coordinate trade policies in a way that respects these environmental ambitions;
and/or
2. A post-Brexit trade deal that undercuts domestic standards.

³⁵ For the EU, see: Barnier, M., 2018. [Is Brexit a threat to the future of the EU's environment?](#) Speech given to the European Parliament, 10 April 2018; For the UK, see: HM Government, 2018. [The future relationship between the United Kingdom and the European Union](#), p.38.

³⁶ See Petetin, L., 2018. [GMO cultivation in the UK: Brexit, the devolved administrations and international trade](#). Brexit & Environment Blog.

3.3 The Governance Gap

New institutions will be required for environmental policy development, implementation and enforcement after Brexit. Policy creation has largely been centred on Brussels where the European Commission develops policy in its Directorates General (DG) for the Environment and DG Climate Action. After Brexit, such policy-making power will rest within the UK but is likely to be dispersed across the devolved nations, depending upon agreement about common frameworks and the UK Supreme Court ruling on Scotland's Continuity Bill.³⁷

The UK contributes to and benefits from the European Environment Agency, which gathers comparable cross-national data to inform EU and national policy development and implementation. Whilst the UK government has expressed a preference to participate in some agencies, it has not included the EEA in that list.³⁸ There is consequently on-going uncertainty about whether and how Wales and the UK will gather and access environmental data, and scope for different types of data being used to inform policy development and implementation across the UK. Such divergence may have implications for citizens wishing to access environmental data under the terms of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.³⁹

EU institutions such as the Commission and the Court of Justice of the European Union (CJEU) provide ways to hold member state and devolved governments to account (see Box 2) and to settle environmental disputes. Between 2003 and 2016, the Commission brought 29 cases against the UK on environmental matters, 24 of which resulted in a judgment wholly or partly against the UK government. Notably, these cases represent almost half of all the Court's judgments on UK infringements, thereby illustrating the importance of such legal mechanisms for enforcing environmental policy.⁴⁰

Once the UK leaves the EU it will need to develop its own mechanisms to hold government to account and to resolve problems around the interpretation of common frameworks.⁴¹ Defra's governance and principles consultation suggests a new watchdog but the current proposals

³⁷ See Reid, C., Burns, C., Carter, N., Cowell, R., Eckersley, P., Farstad, F., Gravey, V., Jordan, A and Moore, B. 2018. [Scotland: Challenges and opportunities for post-Brexit environmental governance](#).

³⁸ HM Government, 2018. [The future relationship between the United Kingdom and the European Union](#), pp. 8-10.

³⁹ See United Nations Economic Commission for Europe, n.d. [Public Participation](#).

⁴⁰ Hogarth, R. and Lloyd, L., 2017. [Who's afraid of the ECJ? Charting the UK's relationship with the European Court](#). Institute for Government.

⁴¹ Lee, M., 2017. [The UK needs a new independent body to protect the environment after Brexit](#). Brexit and Environment Blog.

have been widely criticised for being too weak.⁴² They also do not apply to the UK, but rather to England alone and the way in which the body will coordinate with the devolved nations is uncertain. There is scope for the new body to work with equivalent bodies in Wales, but it is uncertain which bodies will assume monitoring and enforcement powers. The Future Generations Commissioner does not currently have the powers to take on this role, and National Resources Wales is not independent from government. As a result, both appear to have been discounted.⁴³ Consequently, the Welsh government's plans in relation to a watchdog are still under development.

There is also currently no plan on future dispute resolution mechanisms across the four nations. Disputes are presently decided via the JMC, but as noted above it is regarded as being unfit for purpose. Moreover, there may be a case for a specialist environmental dispute resolution mechanism to provide sufficient expertise.⁴⁴

In addition, it is unclear whether and to what extent members of the public and civil society organisations will be able to use such bodies to secure the implementation and enforcement of environmental policy in line with international law obligations under the Aarhus Convention.⁴⁵ The UK's current approach to access to justice is poor. In 2017, the UK was found to be in breach of its Aarhus obligations due to the high cost of judicial reviews. There is an opportunity to address these failings in developing an environmental watchdog that is transparent and accountable.

However, it also remains to be decided how any new body would be held to account. There is a strong presumption in favour of parliamentary accountability. The question then arises as to which legislatures should be involved.

If a UK-wide watchdog is developed there is a case for the House of Commons holding the body to account. The Environmental Audit Committee (EAC) has proposed establishing a new Environmental Enforcement and Audit Office that would report to the Parliament and have its budget set by a statutory group of Parliamentarians to ensure its independence. The EAC's proposals are for an England-only body but could be extended to a UK-wide watchdog. However, it would be important to put in place mechanisms to respect the devolved nations'

⁴² House of Commons, Environmental Audit Committee, 2018. [The Government's 25 Year Plan for the Environment](#). Eighth Report of Session 2017-19. HC 803.

⁴³ National Assembly for Wales, Climate Change, Environment and Rural Affairs Committee, 2018. [Environmental governance arrangements and environmental principles post-Brexit](#).

⁴⁴ Thimont Jack, M., Owen, J., Paun, A., and J. Kellam, 2018. [Devolution after Brexit: managing the environment, agriculture and fisheries](#). Institute for Government.

⁴⁵ See United Nations Economic Commission for Europe, n.d. [Public Participation](#).

competence to act in this area. One way to do so would be to have the new watchdog report to the Welsh Assembly government and National Assembly for Wales. A cross-national committee comprising representatives from each of the four legislatures could also be used to review and hold to account either a UK-wide watchdog.

Conclusion: New institutions and coordination will be required for policy development, monitoring and enforcement. Important decisions are required on data collection and coordination of enforcement functions and accountability mechanisms. New governance bodies must be subject to legislative oversight from all relevant parliaments and assemblies.

3.4 Resources

The question of resources is central. The UK formula for allocating resources (the Barnett formula) is based on population share rather than need. As the Welsh government is currently a net beneficiary of EU funding and receives more from the EU than it would under the Barnett formula, there is concern about future funding for Wales. Consequently, the Welsh government has called for a new formula for distributing funds after Brexit based on need rather than population share.⁴⁶ There is certainly a risk of fewer resources being available for environmental policy and on-going uncertainty that compromises the ability of key stakeholders (such as farmers and landowners) to make decisions.

The ‘opportunity costs’ of Brexit—the resources (staff, money and time) that will be necessary to undertake the administrative challenge of carrying it out—are also considerable.⁴⁷ There is a risk that Brexit might occupy so much civil service time and energy in Cardiff and Westminster that neither government will be able to advance ambitious environmental protections. Moreover, new bodies to coordinate policy and ensure comparability of enforcement will also require resourcing. Here it is important to ensure that the resourcing models adopted for the new bodies do not compromise their independence. Finally, as Brexit has tight timeframes, with the government setting a deadline of 29 March 2019 for the UK to leave the EU and the EU suggesting that any transition period should end in December 2020, it may be difficult to develop the necessary administrative and governance capacity in such a short space of time.

⁴⁶ Welsh Government 2018. [Reforming UK funding and fiscal arrangements after Brexit](#).

⁴⁷ National Audit Office, 2017. [Implementing the UK's exit from the European Union: The Department for Environment, Food and Rural Affairs](#).

Conclusion: Future environmental policy will need to be appropriately resourced. Brexit raises the risk that with the loss of pooled capacity at the EU level and a further squeeze on Welsh public finances, environmental policy will be subject to spending cuts and other resource constraints.

4. Future Directions

Brexit offers an opportunity to think carefully and holistically about the future ambition and design of environmental policy in Wales and the UK. Wales has quite recently put in place a suite of legislation that indicates its willingness and ability to think strategically over the long term about how to deliver environmental policy that respects local conditions whilst meeting global environmental challenges. However, the way that Brexit has unfolded has served to obscure the common environmental ambitions that unite the Welsh and UK governments and heightened the risk that the environment will be downgraded on the policy agenda.

We found a range of challenges that could obstruct Welsh environmental policy ambition. We suggested in the introduction that the best environmental policy is one that facilitates transnational action whilst remaining sensitive to local conditions. Environmental policy works best where policy-makers can take account of local conditions and allow local communities to get involved whilst also facilitating cooperation and coordination on transboundary problems. Thinking at a landscape scale requires thinking across political boundaries and borders. Developing well-integrated policies has commercial as well as environmental benefits.

We suggest that policy must be transparent and accountable, allowing for citizen involvement and be based upon effective communication, cooperation and coordination. The current model of UK environmental governance falls short on all counts. The opportunity to address these flaws in developing a post-Brexit environmental settlement has yet to be taken. There is a risk that muddling through the Brexit process could 'lock-in' solutions that are undesirable, and 'lock out' better solutions that seem too difficult to implement.

4.1 Recommendations

We propose the following recommendations to address these challenges:

1. As a matter of priority, the Welsh government and UK government should reach agreement on how to align their respective environmental policy ambitions in ways that respect the environment and facilitate intra-UK commerce. Such an agreement should be genuinely co-designed. Any agreement should be underpinned by a commitment to deliver a high level of environmental protection. Common agreement on principles and their interpretation must also be negotiated.

-
2. Common frameworks must be agreed and there should be a presumption in favour of transparent legislative frameworks underpinned by common standards and principles to avoid gaps in implementation and to create the conditions for successful policy coordination and cooperation.
 3. The Joint Ministerial Council is unfit for purpose and should be reformed to allow parity for the devolved nations. Sufficient notice should be given of policy developments and consultation should be genuinely consultative.
 4. The National Assembly for Wales has proposed a cross-UK environmental watchdog, which would entail pooling of resources across the UK. However, it is important for Welsh stakeholders to feel a sense of ownership of environmental policy and therefore Wales must be properly represented on a UK watchdog.
 5. The new watchdog(s) must be transparent, accountable and provide access to citizens.
 6. A dispute resolution mechanism should be established to manage environmental disputes between Wales and the UK and the other devolved nations. Citizens living in Wales that have suffered negative environmental consequences from policies in one of the other nations of the UK should be able to raise environmental issues with the watchdog in that state and vice versa.
 7. Whatever type of watchdog is adopted, it must be subject to parliamentary scrutiny and accountability. If a UK-wide watchdog is developed, it should be held to account by elected representatives from each of the UK nations so that devolved competences are respected. If more than one watchdog is developed, each legislature should hold each watchdog to account.
 8. Environmental policy must be properly resourced to enable the development of new policies and the implementation and enforcement of existing policies.

References

- Abernethy, R., 2018. Research Briefing: Air Quality. National Assembly for Wales. Available at: <http://www.assembly.wales/Research%20Documents/18-009/18-009-Web-English.pdf>
- Barnier, M., 2018. Is Brexit a threat to the future of the EU's environment? Speech given to the European Parliament, 10 April 2018. Available at: http://europa.eu/rapid/press-release_SPEECH-18-3162_en.htm
- Burns, C., Gravey, V., and Jordan, A., 2018. UK environmental policy post-Brexit: A risk analysis. A report for Friends of the Earth, Brexit and Environment. Available at: <https://www.brexitenvironment.co.uk/wp-content/uploads/2018/04/Environment-and-Brexit-Risk-Analysis-C-Burns-Et-al-2018.pdf>
- Burns, C., Jordan, A. and Gravey, V., 2016. The EU Referendum and the UK environment: The future under a 'hard' and a 'soft' Brexit. Available at: https://www.brexitenvironment.co.uk/wp-content/uploads/dlm_uploads/2017/07/The-Environment-under-Soft-or-Hard-Brexit.pdf
- Cabinet Office, 2018. Written Ministerial Statement: European Union (Withdrawal) Bill - Agreement between the UK and Welsh governments. Available at: <https://www.gov.uk/government/publications/written-ministerial-statement-european-union-withdrawal-bill-agreement-between-the-uk-and-welsh-governments>
- Client Earth, 2018. Wales concedes but UK Government contests air pollution case. Available at: <https://www.clientearth.org/wales-concedes-but-uk-government-contests-air-pollution-case/>
- Climate Change, Environment and Rural Affairs Committee, 2018. Environmental governance arrangements and environmental principles post Brexit, National Assembly for Wales. Available at: <http://www.assembly.wales/laid%20documents/cr-ld11622/cr-ld11622-e.pdf>.
- Cowell, R., Flynn, A. and Hacking, N, 2017. Assessing the impact of Brexit on the UK waste resource management sector. Cardiff University. Available at: https://www.brexitenvironment.co.uk/wp-content/uploads/dlm_uploads/2017/08/Assessing-the-impact-of-Brexit-on-the-UK-waste-resource-management-sector.pdf
- Department for Environment, Food and Rural Affairs, 2018. Health and harmony: The future for food, farming and the environment in a Green Brexit. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/684003/future-farming-environment-consult-document.pdf

Department for Environment, Food and Rural Affairs, 2018. Environmental principles and governance after the United Kingdom leaves the European Union: Consultation on environmental principles and accountability for the environment. Available at: <https://consult.defra.gov.uk/eu/environmental-principles-and-governance/>

Farstad, F., 2017. Green Gove woos environment sector: but what about devolution? Brexit & Environment Blog. Available at: <https://www.brexitenvironment.co.uk/2017/07/24/gove-greenbrexit-devolution/>

HM Government, 2017. Joint Ministerial Committee communique: 16 October 2017. Available at <https://www.gov.uk/government/publications/joint-ministerial-committee-communique-16-october-2017>

HM Government, 2018. A green future: Our 25 year plan to improve the environment. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/693158/25-year-environment-plan.pdf

HM Government, 2018. European Union (Withdrawal) Act. Available at http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpga_20180016_en.pdf

HM Government, 2018. Frameworks analysis: Breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/686991/20180307_FINAL__Frameworks_analysis_for_publication_on_9_March_2018.pdf

HM Government, 2018. The future relationship between the United Kingdom and the European Union. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf

Hogarth, R. and Lloyd, L., 2017. Who's afraid of the ECJ? Charting the UK's relationship with the European Court. Institute for Government. Available at: https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_Brexit_ECJ_v10FINAL%20web.pdf

House of Commons, Environmental Audit Committee, 2018. The Government's 25 Year Plan for the Environment. Eighth Report of Session 2017-19. HC 803. Available at: <https://publications.parliament.uk/pa/cm201719/cmselect/cmenvaud/803/803.pdf>

House of Commons, Public Administration and Constitutional Affairs Committee, 2018. Devolution and exiting the UK: Reconciling differences and building strong relationships. Eighth Report of Session 2017-19. HC 1485. Available at: <https://publications.parliament.uk/pa/cm201719/cmselect/cmpubadm/1485/1485.pdf>

-
- Institute for Government, 2018. Devolution and the Joint Ministerial Committee. Available at: <https://www.instituteforgovernment.org.uk/explainers/brexit-devolution-joint-ministerial-committee>
- Joint Nature Conservation Committee, 2018. About JNCC. Available at: <http://jncc.defra.gov.uk/default.aspx?page=1729>
- Lee, M., 2017. The UK needs a new independent body to protect the environment after Brexit. Brexit & Environment Blog. Available at: <https://www.brexitenvironment.co.uk/2017/11/08/the-uk-needs-a-new-independent-body-to-protect-the-environment-after-brexit/>
- Lord Callanan, 2018. EU Withdrawal Bill - Hansard. Available at: [https://hansard.parliament.uk/Lords/2018-06-18/debates/38C39823-F992-450D-AD1F-1A7A0FC6E706/EuropeanUnion\(Withdrawal\)Bill#contribution-7834F929-D173-4885-8DD8-3C63273A1390](https://hansard.parliament.uk/Lords/2018-06-18/debates/38C39823-F992-450D-AD1F-1A7A0FC6E706/EuropeanUnion(Withdrawal)Bill#contribution-7834F929-D173-4885-8DD8-3C63273A1390)
- National Assembly for Wales, Climate Change and Rural Affairs Committee, 2018. Common frameworks for the environment after Brexit. Available at: <http://www.assembly.wales/laid%20documents/cr-ld11701/cr-ld11701-e.pdf>
- National Assembly for Wales, Climate Change, Environment and Rural Affairs Committee, 2018. Environmental governance arrangements and environmental principles post-Brexit. Available at: <https://www.assembly.wales/laid%20documents/cr-ld11622/cr-ld11622-e.pdf>
- National Assembly for Wales, Climate Change, Environment and Rural Affairs Committee, 2018. Low carbon housing: The challenge. Available at: <https://www.assembly.wales/laid%20documents/cr-ld11711/cr-ld11711-e.pdf>
- National Assembly for Wales, External Affairs and Additional Legislation Committee, 2017. Implications for Wales of leaving the European Union. Available at: <http://www.assembly.wales/laid%20documents/cr-ld10912/cr-ld10912-e.pdf>
- National Assembly for Wales, 2018. Plenary Record 21/03/2018. Available at: <http://record.assembly.wales/Plenary/4915#A10000092>
- National Audit Office, 2017. Implementing the UK's exit from the European Union: The Department for Environment, Food and Rural Affairs. Available at: <https://www.nao.org.uk/report/implementing-the-uks-exit-from-the-european-union-the-department-for-environment-food-rural-affairs/>
- O'Brien, F., 2016. Air quality in Scotland. SPiCE Briefing. Available at: http://www.parliament.scot/ResearchBriefingsAndFactsheets/S5/SB_16-35_Air_Quality_in_Scotland.pdf

-
- Official Journal of the European Union, 2012. Consolidated version of the Treaty on the Functioning of the European Union. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12012E/TXT>
- Paun, A., 2018. Common UK frameworks after Brexit. Scottish Parliament. Available at: <https://digitalpublications.parliament.scot/ResearchBriefings/Report/2018/2/2/Common-UK-Frameworks-after-Brexit>
- Petetin, L., 2018. GMO cultivation in the UK: Brexit, the devolved administrations and international trade. Brexit & Environment Blog. Available at: <https://www.brexitenvironment.co.uk/2018/01/11/gmos-devolution-trade/>
- Reid, C., Burns, C., Carter, N., Cowell, R., Eckersley, P., Farstad, F., Gravey, V., Jordan, A and Moore, B. 2018. Scotland: Challenges and opportunities for post-Brexit environmental governance. Available at: <https://www.brexitenvironment.co.uk/policy-briefs/>
- Royles, E. and McEwen, N., 2015. Empowered for action? Capacities and constraints in sub-state government climate action in Scotland and Wales. *Environmental Politics* 24 (6): 1034-1054. <https://doi.org/10.1080/09644016.2015.1053726>
- Thimont Jack, M., Owen, J., Paun, A., and J. Kellam, 2018. Devolution after Brexit: Managing the environment, agriculture and fisheries. Institute for Government, Available at: <https://www.instituteforgovernment.org.uk/sites/default/files/publications/IFGJ6070-Devolution-After-Brexit-180413-FINAL-WEB.pdf>
- United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee, 2013. Devolution: Memorandum of understanding and supplementary agreements. Available at: <https://beta.gov.scot/publications/devolution-mou/>
- United Nations Economic Commission for Europe, n.d. Public participation. Available at: <https://www.unece.org/env/pp/welcome.html>
- Welsh Government, 2015. Well-being of Future Generations (Wales) Act 2015. Available at: http://www.legislation.gov.uk/anaw/2015/2/pdfs/anaw_20150002_en.pdf
- Welsh Government, 2016. Environment (Wales) Act 2016. Available at: http://www.legislation.gov.uk/anaw/2016/3/pdfs/anaw_20160003_en.pdf
- Welsh Government, 2017. Securing Wales' future: Transition from the European Union to a new relationship with Europe. Available at: https://beta.gov.wales/sites/default/files/2017-01/30683%20Securing%20Wales%C2%B9%20Future_ENGLISH_WEB.pdf
- Welsh Government, 2018. Reforming UK funding and fiscal arrangements after Brexit. Available at: <https://gov.wales/newsroom/finance1/2018/180717-reforming-uk-funding-and-fiscal-arrangements-after-brexit/?lang=en>