

Consultation response on Securing a Sustainable Future: Environmental Principles, Governance and Biodiversity targets for a Greener Wales

This evidence is written by Dr Ludivine Petetin from Cardiff University and the Wales Governance Centre and Dr Viviane Gravey from Queen's University Belfast. Both have expertise in environmental and governance issues and are part of the Brexit & Environment network, which brings together academics analysing how Brexit is affecting the UK and EU environments.

General comments:

- This White Paper is most welcome to fix governance gaps but it is late in the day. This should have been a priority of the Welsh Government back in 2020 following the 2019 Consultation and 2020 Environmental Governance Stakeholder Task Group. Due to the lack of inaction, the current 'interim' system is not adequate and suffers many governance gaps in comparison to what exists in England and Northern Ireland with the OEP and Scotland with the ESS. It is difficult to understand why this matter was not acted upon quicker especially given the importance that plays the Well-being of Future Generations (Wales) Act 2015 and the Environment (Wales) Act 2016 for Welsh governance and the Welsh government.
- We note a concerning silence in the text about the handover/transition process between the IEPAW and the future governance body. This creates a major gap in environmental governance that needs addressing in the future Bill. The legacy, and lessons, of the IEPAW's work should not be put aside by the new governance body.
- In contrast with emerging practice in other parts of the UK on environmental principles, we very much welcome the overarching objective and its emphasis on 'aiming to ensure a high level of environmental protection and improving the quality of the environment in Wales, in particular to contribute to sustainable development'.
- We note that the proposed governance body will have a broad remit and fulfil a number of functions. We are concerned that (i) resources will not be commensurate to those powers (notably in terms of staff numbers) weakening the ability of the Commission to deliver on its missions and thus weakening its credibility and (ii) that potential tensions in delivering on these different functions (combination of advice and enforcement) have not been acknowledged or addressed. This will make it extremely difficult for the new governance body to deliver on high expectations.
- These points are further addressed in a series of three blog posts for Brexit & Environment^{1, 2, 3}

¹ Gravey, V. and Petetin, L. 2024 Late mover advantage? Designing a post-Brexit environmental watchdog for Wales, *Brexit & Environment* <https://www.brexitenvironment.co.uk/2024/04/08/late-mover-advantage/>

² Gravey, V. and Petetin, L. 2024 The long way to a 'principled' Brexit in Wales: from the 2020 Task Group to the 2024 Consultation, *Brexit & Environment* <https://www.brexitenvironment.co.uk/2024/04/11/principled-brexit-in-wales/>

³ Gravey, V. and Petetin, L. 2024 Third time the charm? Comparing the Welsh approach to environmental principles with the rest of the UK *Brexit & Environment* <https://www.brexitenvironment.co.uk/2024/04/11/welsh-principles-2/>

Part A – Environmental Principles

- EP1: To what extent do you agree or disagree with the proposals relating to the preparation of guidance that will explain how the environmental principles are intended to be interpreted?

- A guidance or a policy statement would prove useful to define the principles as well as how to interpret them. However, such guidance should also define what is meant by ‘aiming to ensure a high level of environmental protection and improving the quality of the environment in Wales, in particular to contribute to sustainable development’. All of these new notions need explaining.
- Soft-law instruments (i.e. guidance or policy statement) can be easily changed and adapted to new and unforeseen situations without requiring legislation. This flexibility can be both advantageous and disadvantageous: although guidance documents can be modified rapidly they create uncertainty for those affected by such changes (here the public bodies that will apply such principles).
- It is important that the guidance be based on existing resources (legislation, case law) including scientific evidence but bearing in mind that both minority and majority scientific evidence should play a role especially in cases of scientific uncertainty. This would enable a more general approach to environmental matters that could be more forward looking.

- EP2: The Welsh Government proposes to place a duty on Welsh Ministers to have due regard to the environmental principles and accompanying guidance during the development of their policies and legislation. To what extent do you agree or disagree with this approach.

- We broadly agree with this approach for as long as it is the development of **ALL** (i.e. across all sectors) of their policies and legislation **AT ALL STAGES**, that is to say that this duty is not limited to when Welsh Ministers are drafting environmental (broadly defined) legislation. Having an environmental principles check solely at the drafting stage is likely to lead to engagement with those principles becoming a mere tick-box exercise.
- However, the duty cannot simply be to ‘have due regard to’. This is a weak formulation enabling the objective and principles to be sidestepped.
- One way forward could be to reflect the approach of the Well-being of Future Generations (Wales) Act 2015 whereby actions must be ‘*in accordance with* the sustainable development principle’ (emphasis added) or the likewise mandatory approach in the 2016 Act. The approach in the consultation aligns Wales with practice in the rest of the UK but it goes against existing Welsh practice on well-being which puts a higher duty on Welsh ministers and public authorities more broadly. We suggest building on existing good Welsh practice instead of aligning downwards with the rest of the UK.

- EP3: Do you have any views on whether a separate duty should be placed on Welsh public bodies (other than the Welsh Ministers) to apply the principles and

accompanying guidance? If you consider the duty should apply to Welsh public bodies, please set out in the text box below which Welsh public bodies and why, as well as any views you have on how the duty should apply to those bodies.

- There is no consistency between which Welsh public bodies should be under such duty in the White Paper, the references to a ‘public body’ in section 6 of the Wellbeing of Future Generations (Wales) Act 2015 or the broad definition of ‘public authority’ in section 6(9) of the Environment (Wales) Act 2016. These different definitions could create loopholes and also lead to misunderstanding. Greater uniformity between the acts would be highly beneficial.
 - The obligations should be placed upon all Welsh public authorities and bodies undertaking actions on behalf of Wales (including the Welsh Government, regulatory bodies and the courts) thereby ensuring that the objective and principles underpin all Welsh policy and law at all stages – thereby mirroring the current approach under EU environmental law.
 - Further, many now argue that obligations under the Well-being of Future Generations (Wales) Act 2015 should be extended to apply to private entities and companies when discharging functions relating to the environment. The same could be said about the suggested objective and principles. Considering the climate and biodiversity emergencies we are facing, adopting such a step would be a brave step that is clearly needed to be taken due to urgency the world is facing. We again suggest approach should build on existing Welsh approach (but also learn from Scotland – which does include other public authorities when engaging in strategic environmental assessments) instead of aligning with the lowest common denominator of England/Northern Ireland and Environment Act 2021.
- EP4: Do you have any additional comments relating to the Welsh Government’s intention to embed the environmental principles and overarching objective into Welsh law that are not captured in your answers to the above questions?

Relationships between the principles and existing legislation

- The five principles and the overarching objective suggested to be embedded into Welsh Law positively reflect the principles existing in the EU.
- However, it is difficult to see how this overarching objective and five principles will interact with existing legislation and the principles they include especially with the ‘sustainable management of natural resources’ under the Environment (Wales) Act 2016 and sustainable development and the five ways of working under the Well-being of Future Generations (Wales) Act 2015.
- Consequently, possible tensions between these different Acts and the future Bill must be addressed in the future Bill as there is currently a key gap in the White Paper. This is why a Bill that would have ‘codified’/compiled/brought together/consolidated environmental governance gaps as well as key existing legislation (mentioned above) was preferable. Bringing the White Paper, the Well-being of Future Generations (Wales) Act 2015 and the Environment (Wales) Act 2016 under the same and sole regime would be highly positive to all involved (citizens, environmental NGOs, government, regulatory bodies, courts...). This would have increased certainty and consistency of approaches towards environmental protection and diminished loopholes.

- If the application of the principles is extended to wider public bodies and also private bodies when discharging functions relating to the environment then there could be a clash between existing Welsh law, duties and principles and the proposed principles.

Tensions between the objective(s) and the principles as well as between the principles themselves

- As the overarching objective aims to focus the actions and provide a purpose for the application of the environmental principles, it proves key in order to ensure that Wales always strives for more environmental protection and a race to the top rather than deregulating or regressing on its overall level of environmental protection.
- It is, however, important to note that future environmental legislation establishing specific measures and/or activities may prioritise one principle over another at times. And, therefore, the right balance will have to be found between them. This is a key aspect to mention in the guidance. However, and overall, the principles should not undermine each other.
- Crucially, the fact that the integration principle is not part of the overarching objective (additionally to what is currently proposed) is very problematic and depart from EU environmental law and policy which applies the principle in its 'definition and implementation of the Union's policies and activities'. The integration principle applies across sectors and horizontally to all policy as well as their implementation. Such an approach should be replicated across Wales to provide a more coherent approach towards environmental protection. Once again, the consultation here is suggesting downgrading from existing EU practice and aligning with less ambitious practice adopted in rest of the UK since Brexit.

Gaps in the role played by the principles

- As mentioned above, applying the environmental principles only to the extent that it underpins the development of policies and legislation in Wales is not sufficient and does not reflect the current approach under EU environmental law.
- The obligations deriving from the principles permeate the implementation, application and interpretation of EU environmental law including by the European Court. The White Paper as it stands would completely leave this part out and therefore create a gap in the role played by the principles under EU law. The objective and principles ought to underpin all Welsh policy and law at all stages.

Lack of Aarhus rights

- The three pillars of the Aarhus Convention (Access to Information, Public Participation in Decision-making and Access to Justice) are completely left out of the scope of the White Paper. This is a major gap.
- Incorporating the Aarhus principles that confer rights to individuals (and environmental NGOs) is crucially needed. The UK is a party to the Aarhus Convention. Therefore, these rights exist and can be used by citizens. It is, however difficult to rely on them in practice by referring to international rights. Transposing them more directly in Welsh law is vital to ensure their utilisation. Furthermore, ensuring that the future governance body has the power to guarantee their application in Wales is crucial.

- This is not a Welsh-only issue – it is a UK-wide failing (see for example, discussion of needs for merits-based and not only process-focused reviews under the Aarhus Convention from the acting chair of the ESS in Scottish Parliament in March 2024⁴). But Wales has an opportunity to lead the way in resolving this non-compliance.

Part B Establishing an Environmental Governance Body for Wales

- GB1 - To what extent do you agree or disagree with the proposed purpose and objectives for the new Welsh environmental governance body?

- The lack of reference to adopting a ‘precautionary’ approach by the governance body appears to design a departure from existing policy placing the precautionary principle at its heart. Placing the precautionary principle as a purpose and objective would facilitate its utilisation and practice by the body and ensure continuity with current practice.
- Collaborating and cooperating with other bodies beyond the OEP and the ESS, such as the Well-being of Future Generations Commissioner, JNCC, 4CBG or the UKCCC would also benefit the work of the body.
- Addressing and tackling cross-border and transboundary environmental issues should also be included to ensure consistency across the UK.
- The proposed body appears to try to go further than both the ESS and the OEP in terms of its powers (e.g. monitoring against international commitments which the OEP does not do, issuing compliance notices for non-statutory functions which the ESS does not do, providing advice on policy development like the OEP (something which the ESS does not do)).⁵ While this ambition is positive it raises concerns about capacity and about the relationship between the future body and the Welsh government. There is for example a risk that free-flowing information between the Commission and the Welsh government on policy development may be hampered if Commission is taking enforcement action against Welsh government in similar policy area. Would teams working on advice, monitoring and compliance be kept separate or share data?

- GB2: To what extent do you agree or disagree with the governance body’s proposed strategy and reporting requirements?

- Producing a guidance is positive especially as there is an obligation to review it periodically therefore the guidance both playing a forward and backward role.
- It is crucial that accountability of the body rests with the Senedd. Here, the relationship between the ESS and the Scottish Parliament is important to note and should be drawn upon to ensure legislature is fully integrated in environmental governance architecture. The ESS is formally accountable to the Scottish Parliament, its strategy and annual reports need to be approved by the Scottish Parliament, which holds evidence session with the ESS leadership.

⁴ <https://www.parliament.scot/chamber-and-committees/official-report/search-what-was-said-in-parliament/NZET-05-03-2024?meeting=15741&iob=134322>

⁵ For a more in-depth comparison of the watchdogs, please see Gravey, V. and Petetin, L. 2024 Late mover advantage? Designing a post-Brexit environmental watchdog for Wales, *Brexit & Environment* <https://www.brexitenvironment.co.uk/2024/04/08/late-mover-advantage/>

Improvement plans required in responses to the ESS improvement reports need to be presented by the Scottish Government to the Scottish Parliament for approval.

- GB3 – We propose that the remit of the governance body should apply to the Welsh Ministers and the relevant Welsh public authorities exercising environmental functions Wales listed in Annex 2. To what extent do you agree or disagree with this?
 - Yes, we agree with the fact that the governance body should apply to Welsh Ministers and the relevant Welsh public authorities when discharging functions relating to the environment.

- GB4 Are there any other public authorities, or private bodies exercising functions of a public nature, that you think should be added to (or removed from) the list in Annex 2? Please use the text box below to explain your answer.
 - We adopt the view that the remit of the governance body should also apply to any public bodies, any public authorities as well as any private bodies exercising functions of a public nature when discharging functions relating to the environment. As explained above, we argue that a shared understanding of bodies in scope of this body should be developed alongside the Well-being of Future Generations (Wales) Act 2015 and the Environment (Wales) Act 2016 to avoid loopholes.

- GB5 – To what extent do you agree or disagree with the proposed scope and role for the governance body in relation to monitoring and reporting, including the scrutiny of statutory targets?
 - Yes, we agree with the proposed scope and role. However, this is why as noted above, it is key for the governance body to cooperate and collaborate officially with other organisations such as the UKCCC and JNCC etc (i.e. beyond the OEP and ESS).

- GB6 – To what extent do you agree or disagree with the proposed scope and role of the governance body’s advisory functions?
 - Yes, we agree.

- GB7 – To what extent do you agree or disagree with the suggested approach for managing complaints and representations

- Yes, we agree.
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- GB8: To what extent do you agree or disagree with the proposals to enable the body to investigate?
 - Yes, we broadly agree. However, some justification (even limited) should be given by the body as to why it is decided that some alleged failures are not investigated. Those decisions should also be able to be revisited (difference between decision to not investigate and decision to not investigate *at this stage*) if e.g. numerous similar complaints emerge overtime highlighting a pattern of non-compliance or improper implementation.
 - GB9: To what extent do you agree or disagree with the Welsh Government's proposed process for formally handling non-compliance through compliance notices and court or tribunal procedures?
 - Yes, we agree. In particular, the broad application of enforcement to include functions that are regulatory or not.
 - GB10: To what extent do you agree or disagree with the Welsh Government's proposal to include improvement reports / plans as an enforcement stage to provide space for resolution where systemic issues are evident, and a compliance notice is not considered the optimal mechanism to address the issue.
 - Yes, we agree.
 - GB11: To what extent do you agree or disagree with the proposal for the governance body to, by exception, be able to apply for judicial review and / or intervene in civil proceedings
 - Yes, we tend to agree.
 - GB12: The Welsh Government consider financial penalties would be an ineffective and, in some cases, counterproductive method by which to remedy the non-compliance of Welsh public authorities with environmental law. To what extent do you agree or disagree with this position?
 - We disagree. We are concerned that the loss of the powers to fine government and other bodies for non-compliance represents the loss of a significant lever for driving

enforcement. The power for to impose fines acts as a deterrent on the government and other public bodies should be seriously considered. Fines collected could be utilised for environmental benefits, i.e. fund projects that would enhance environmental protection.

GB13 – The Welsh Government proposes that the governance body should set out how it intends to co-operate with the organisations specified, including how they will avoid duplication and overlap when exercising their functions? To what extent do you agree or disagree with this approach?

- Yes, we tend to agree.

- GB14 – Our preferred model for the governance body is a ‘Commission’, but consider alternative models, such as an arms-length body, could provide similar benefits. To what extent do you agree or disagree with this approach?
 - Yes, we agree that a Commission would be the most beneficial for Wales and environmental protection. It would provide wider expertise for as long as it is adequately resourced and independent from Welsh Ministers. This is not currently the case: the proposed Commission would have only 12 staff members compared to ESS 24 (and OEP 74) even though its remit is much broader than that of ESS.

- GB15 – To what extent do you agree or disagree with the Welsh Government’s approach in respect of appointing members and allocating resources to the governance body?
 - Yes, we tend to agree. As noted above, the Commission should be adequately resourced and supported so as to be autonomous. Further, there is little content on the process of appointment of the Commissioners. In particular, appointments should be ultimately decided by the Senedd after proposal from the Welsh Government.

- GB16 – Are there any other views you would like to provide in relation to our proposals to set up a governance body?
 - The new governance body should be overall accountable to the Senedd.

Part C: Targets for the Protection and Restoration of Biodiversity

General comments

- We welcome the continued and consistent approach of the Welsh Government to look at international frameworks and legislation and their derived international obligations to guide and implement its environmental policies.
- However, when integrating international instruments into national law, this should be consistent across the board to in particular including the Aarhus Convention – international convention which is not mentioned in the White Paper.
- For example, point 62 refers to ‘Citizens of Wales have a right to know about the quality of their environment and whether the actions to deliver the statutory targets are making a real difference’. This is a clear reference to the Aarhus right to environmental information and yet without mentioning it. As noted above, this constitutes a major gap in the document.
- We tend to agree on the content of Part C of the White Paper. However, we question its inclusion in the White Paper. It feels out of place with the rest of the content.
- Further, the emphasis on biodiversity, although very much needed, without also addressing climate change issues feels disproportionate. Both should be included or neither.
- An opposite approach can be found in the proposed Sustainable Farming Scheme where the almost entire content of the document puts emphasis on climate change and afforestation with little on biodiversity.
- Greater links between the White Paper and the Sustainable Farming Scheme should be made, especially since the White Paper, via the 2023 State of Nature Report, mentions that farming activities constitute ‘the most significant factor driving species population change in the UK’ (page 46).
- Despite the White Paper and the proposed Sustainable Farming Scheme being developed at similar times, a siloed approach between policies/legislation/other regulatory bodies (as well as Welsh Government department) and the lack of policy coherence between the documents are flagrant. Both documents should address both biodiversity and climate crises.