

Cynulliad Cenedlaethol Cymru | National Assembly for Wales

Y Pwyllgor Newid Hinsawdd, Amgylchedd a Materion Gwledig | Climate Change, Environment and Rural Affairs Committee

Ymchwiliad i lywodraethu ac egwyddorion amgylcheddol ar ôl Brexit | Inquiry into environmental principles and governance post-Brexit

PG05

Ymateb gan : World Wide Fund for Nature

Evidence from : World Wide Fund for Nature

Thank you for the opportunity to provide written evidence ahead of my appearance in front of the Committee in June. For the purposes of this evidence I have limited my comments to the areas specified in your invitation.

WWF Cymru recognises that leaving the European Union will create an environmental principles and governance gap. To prevent this, the minimum necessary is for domestic legislation to be brought forward which replicates EU environmental principles and builds a new and equivalent governance structure. WWF Cymru's view is that the Welsh and other governments of the UK should not limit their ambition to the minimum necessary. Instead it is our ambition that this should be used as an opportunity to build on what we have and create a stronger and more effective environmental principles and governance structure which is bespoke to our needs and is able to protect and restore nature for future generations.

## Summary

### ***Principles***

- All EU environmental principles should be clearly defined in Welsh law. We do not agree with the Welsh Government's assessment that two of the four core environmental principles are sufficiently present in existing Welsh law.
- These principles must be legally enforceable; overarching in scope and be should be accompanied by an overarching objective of achieving a high level of environmental protection, towards which their application can be assessed.
- There are several additional European principles which currently support the core environmental principles. These also need to be considered and incorporated into Welsh law.
- The SMNR duty should be extended to all public bodies operating in Wales, including reserved bodies with functions falling within devolved competence and public body/private sector coalitions. But to do so effectively the duty and/or principles will need to be amended.
- Procedural rights for the public to environmental information, participation and access to justice should also be enshrined into the law.

### ***Governance***

- The EU environmental governance structures have proven to be to the benefit of the Welsh environment and Welsh citizens for decades.
- It is vital that their replacement continue to be as powerful and give effect to citizens' rights to access justice by challenging governments – free of charge and liability.
- Successor bodies (watchdog) adopting the EC's functions must retain the power to require corrective action to put right any environmental damage.

- Any new body must have the resources; remit; expertise; and independence to deliver its duties effectively. A new body should be created to do this as no current body fits these criteria.

### ***UK-wide Approach***

- A joint UK wide body is advantageous. However, it must respect the devolution settlement and existing Welsh law.
- If unachievable, there must be a new inter-governmental co-ordination and dispute resolution function between the nations of the UK.
- Part of this approach could be to define UK wide principles in relation to an overarching objective, but then afford nations the flexibility to seek to obtain that objective and operationalise those principles, in a way which is bespoke to their needs.

## **Detailed Response**

### **Principles**

WWF Cymru is in broad agreement with the Welsh Government's analysis insofar that two of the four core environmental principles (Rectification at Source and Polluter-Pays) are not currently included in Welsh legislation. However, we disagree that existing Welsh legislation provides equivalence for the principles of Precaution and Prevention. Our reasoning for this is based on how the principles function within the European Union, contrasted with the scope and effect of the sections of the Well-being of Future Generations Act and Environment (Wales) Act (the Acts) that the consultations suggests contain Prevention and Precaution.

When the Acts were being developed, WWF Cymru argued for the inclusion of clearly defined environmental principles. However, at the time we were informed that to do so would be duplication and that the Acts needed to provide additionality to what we had within the EU. This additionality resulted in the 'operationalisation' of Prevention and Precaution within the scope of the Acts. It is therefore surprising that the contents of those Acts alone are now suggested to be sufficient to ensure non-regression from EU position.

We remain concerned that the Acts will not remain fit for purpose without an overarching framework, as currently provided at EU level.

Our main concerns are:

#### **1. Scope**

As the Committee stated in its report last year "The EU environmental principles are intended to shape the development of EU law and policy to ensure high environmental standards and are used in the interpretation of EU law".

Within the Treaty of the Functioning of the European Union, Article 11 states that "Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development". The Government consultation seems to suggest that the approach in our existing Acts provides equivalence. The principles are operationalised in part in both WFG and Environment Acts. We do not believe that the current approaches in either of these Acts applies the principles to all policies, laws and activities. We do not consider the scope of the Ways of Working in the WFG Act, to match this as their effect is restricted to the setting of Well-being Objectives to achieve broad Well-being Goals, rather than requiring integration of environmental protection across the definition and implementation of all policies and activities.

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

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

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

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

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

## **2. Issues with existing approach to core principles**

### 2a Precautionary principle

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

We are doubtful that the reference to *ecosystems* is sufficiently broad to cover all aspects of the environment given that the environment is not defined within Welsh legislation – which instead talks in terms of Natural Resources. 2B. As a partial solution to these issues, the Consultation proposes extending the SMNR Duty and the applications of the SMNR principles to more Welsh public bodies. Subject to the comments detailed above, WWF Cymru support this proposal and argue that it offers a much-needed opportunity to revisit SMNR based on what is now known about the practicalities of its implementation. One immediate observation is how difficult it has been for Welsh Government and NRW officials to understand its requirements; what successful implementation looks like; and how to demonstrate it. This is largely due to the complex drafting of the Act and the very specific way it was ‘operationalised’ within its very limited scope of application to NRW and Welsh Ministers in specific circumstances.

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

### 2c Other EU principles

Within the EU, while these core environmental principles are stand alone and overarching in meaning, they are not applied in isolation and several non-environmental principles have developed along-side them which are relevant to their application. These include:

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

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

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

### 2d Procedural rights

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

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

### Governance

The environmental governance structure of the European Union has proven to be to the benefit of Welsh environment and Welsh citizens for decades. It has reduced the environmental damage caused by human activity and has provided a strong and effective avenue for citizens to access justice; correct damage and punish those responsible. A loss in the strength and effectiveness of any aspect of this structure would constitute a regression from the perspective of citizens and their ability to discharge their rights. This is unacceptable to WWF Cymru.

The consultation broadly identifies the gaps. However, it understates the strength of the EU system with regards to how it:

- can require remedial action to correct environmental damage;
- protects citizens from financial liability. This means that they can make complaints without the fear that they will be subject to future action by those they complain against, or would face costs should the complaint not proceed, or be ruled against;

- functions to extensively monitor and collect data. While we do have some national data collection and analysis it is not as expansive, nor does it proactively monitor compliance with objectives and regulations in the same manner.

Wales currently lacks an independent champion for environmental law which ensures that Welsh nature is resilient for future generations. Instead we are reliant on the oversight, advice and enforcement powers of the EC. Given the vital role the environment plays as the foundation of social, cultural and economic well-being this is a significant gap which needs to be filled.

The simplest way of building this role into existing structures is to make any new body responsible for advising on; investigating; and enforcing compliance with environmental law (to include all law covering the matters discussed above in the context of the SMNR duty as well as the overarching objective and principles) and require existing bodies to report to it on these matters; any additional matters the new body deem necessary; and for others to abide by its guidance and decisions.

In undertaking this role, we agree with the consultation and applaud Welsh Government's honesty, that a body should be transparent; accountable to the National Assembly for Wales; independently audited; independent of Government with regard to appointments; and for it also be independent of Government with regard to funding. Throughout this process we have heard the Welsh Government refer to existing bodies as being in a position to take on this role – in whole or in part. WWF Cymru strongly disagree with this proposal. We argue that there is no body currently operational in Wales which has the resources; remit; expertise; and independence to do this role. Changing an existing body to do this would be as complex as establishing a new one and risks fundamentally changing/losing the purpose that existing body currently has. We also note that the constitution of several existing bodies (including the Office of the Future Generations Commissioner) fail the independence standard provided by the consultation.

WWF Cymru argue that a new body should have a series of informal and formal enforcement powers akin to those available within the EU. These should include the issuing of advisory notices, binding notices, interim measures and stop notices and initiating legal proceedings for failure to comply.

A key point in the effectiveness of the current structures is the knowledge that the enforcement structures are strong and carry with them a 'stick' (financial, practical and reputational) which is sufficient to discourage a lack of effective implementation so that cases do not arise very frequently. This does not currently exist in Wales given the weak environmental enforcement structures and lack of remedy and sanction for non-compliance in our existing Acts. This is a key opportunity to strengthen existing protection as well as replacing EC functions.

A key improvement which could be made to the status-quo would be to improve the transparency and speed of the informal methods. Under the current system at EU level, informal methods can go on for several years without a public statement on progress. We would recommend a publicly accessible log of the details of all informal processes underway, and frequent updates on work underway in relation to them. These processes need to be responsive to the scale and severity of the case at hand, with swift action being taken to stop any damaging action while a longer investigation can be conducted.

### **UK-wide Approach**

The environment does not respect borders with the decisions of one nation easily affecting another. This is the reason why Member States chose to empower the European Union to act on the environment, and why leaving the EU creates such a significant gap in environmental law and governance. The same is true of the UK and therefore there are clear advantages to a UK wide approach to environmental governance and principles.

However, any approach must respect the devolution settlement and be co-developed and co-owned by the nations of the UK that are part of it. The proposals made by DEFRA, as currently drafted, do not fulfil this requirement. Nor are they sufficient to prevent regression from EU standards. Were

this to change there is potential for Wales to participate, but only in a way which does not diminish the environmental ambition contained within our existing legislation.

If this is not possible, and a Wales only body is created, there will still need to be a degree of UK wide co-ordination. This must discuss, develop and deliver common standards and coordinate action, particularly on matters with trans- boundary impacts, it is also necessary for the effective scrutiny of international agreements and commitments. This will also require there to be an inter-governmental dispute resolution process. We make this point in recognition that such disputes will not be limited to the environment and therefore argue that this would have to exist within the wider reorientation of the functioning of the UK which will have to occur post-Brexit.

One approach to this would be to agree to define UK wide (or those nations willing to participate) principles in relation to an overarching objective, but then afford nations the flexibility to seek to obtain that objective and operationalise those principles, in a way which is bespoke to their needs. This could afford nations a degree of 'dynamic alignment' which ensures coherence while delivering a shared outcome.

Thank you for the opportunity to give evidence. I look forward to meeting the Committee members in person on July 26<sup>th</sup>.