

# Environmental governance in the UK

## Research Briefing

November 2023



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# **Environmental governance in the UK**

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November 2023

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This briefing is an update of our July 2021 publication - Environmental governance following Brexit.



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## Introduction

Following the outcome of the EU referendum, there was **widespread concern** across the environment sector about gaps in environmental governance arising from the UK's departure from the EU.

This system of EU environmental governance includes monitoring and reporting on environmental law implementation by Member States, receiving citizens' complaints, and taking enforcement action. This includes the ability to levy fines on Member States that are found to be in breach of EU law.

The European Commission and the Court of Justice of the EU (CJEU) played a role in governing the implementation of EU derived environmental laws across the UK and in resolving cross-border environmental disputes between the UK and other Member States.

Out of the EU, the individual UK countries have been developing separate domestic environmental governance arrangements. The **Office for Environmental Protection** (OEP) has been established for England and Northern Ireland and **Environmental Standards Scotland** (ESS) for Scotland (Box 1). Wales is yet to establish an environmental governance body but has an **Interim Environmental Protection Assessor for Wales** (IEPAW). The IEPAW has been tasked with assessing the functioning of environmental law, however environmental stakeholders argue this role is far from filling the governance gap. The Welsh Government **has committed** to introduce legislation this Senedd term to establish a governance body.

Welsh environmental groups have been calling for action to address the 'governance gap,' fearing it could lead to environmental harm with limited ability for redress. **Wales Environment Link argues** Wales now has "the weakest environmental governance structures in western Europe".

This briefing explores the system of environmental governance the UK has left, and actions across the UK to set up domestic arrangements.

## Box 1. Summary: Developments across the UK (at November 2023)

### Wales:

- In 2018, the previous **Welsh Government committed to** “take the first proper legislative opportunity to enshrine the environmental principles into law and close the governance gap”. However, no legislation has been brought forward to date. A **consultation was carried out in 2019** outlining the Welsh Government’s proposals. Since then, a **Stakeholder Task Group has provided further recommendations** to which the **previous Welsh Government responded in November 2020**.
- Establishment of an environmental governance body is a **Programme for Government** (2021-26) commitment. The Welsh Government’s **2023-24 Legislative Programme** doesn’t include a Bill for this purpose. Instead the First Minister committed to bring forward legislation “this Senedd term” and a White Paper **is anticipated** in January 2024 on the establishment of a body as well as nature targets. In the meantime an Interim Environmental Protection Assessor for Wales was **appointed in February 2021**, and she continues her role in assessing the functioning of environmental law.

### England and Northern Ireland:

- Powers to **establish an Office for Environmental Protection (OEP)** are included in the **Environment Act 2021**. **The OEP** was legally established on 17 November 2021. Prior to this, an interim OEP was set up in preparation for the legal powers. The OEP mainly applies to England and Northern Ireland. It has jurisdiction in Wales in relation to non-devolved environmental law only. The 2021 Act also lists **environment principles** and places a duty on the Secretary of State to prepare a policy statement on those principles for England.

### Scotland:

- Powers to establish **Environmental Standards Scotland** (ESS) are included in the **UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021**. ESS officially launched on 1 October 2021, and was established over a period of nine months. An interim body preceded the statutory ESS. The Act also lists environmental principles to which the Scottish Ministers must have due regard when making policies.

## In a nutshell

### **1. What is the EU's system of environmental governance?**

EU institutions monitor Member States' implementation of EU environmental law. They receive citizens' complaints and can take enforcement action against Member States that are found to be in breach of EU environmental law.

The core EU environmental principles of the Treaty of the Functioning of the EU (TFEU) are applied during the development and interpretation of EU law to ensure high environmental standards flow through the EU.

### **2. What is the issue?**

The EU system of environmental governance, including relevant principles, no longer apply in the UK following its withdrawal from the EU.

Following EU-exit, environmental stakeholders feared this 'environmental governance gap' could lead to environmental harm due to limited redress in instances where the UK governments were not properly implementing legislation.

Domestic statutory environmental governance bodies have been established for England and Northern Ireland, and Scotland. However in Wales, legislation is yet to be brought forward to establish such a body.

### **3. What are stakeholders calling for?**

Environmental stakeholders are calling for Welsh primary legislation to be brought forward as a priority to establish an environmental governance body. They argue it should be independent from government, have a simple and inexpensive mechanism for citizens to raise complaints and robust monitoring and enforcement functions. Essentially it would hold governments and public bodies to account on their implementation of environmental law.

There are calls for the EU's core environmental principles to be listed on the face of the Welsh Bill, with an overarching objective to secure a high level of environmental protection.



#### **4. What progress has been made?**

The previous Welsh Government issued a consultation in 2019. A Stakeholder Task Group was subsequently established to provide further recommendations.

No replacement system was set up before the end of the Brexit transition period, so the Welsh Government established interim arrangements (an Interim Environmental Protection Assessor for Wales). Stakeholders have said these fall short of addressing the environmental governance gap.

The Welsh Government has said it will publish a White Paper for a Bill in January 2024.

## Environmental governance mechanisms

This section provides a background to EU environmental governance and principles, the regime from which the UK departed in 2020. It also explores existing domestic functions in Wales in order to determine gaps that have arisen as a result of the UK's withdrawal from the EU.

Since the 1970s, EU Member States' **environmental governance** arrangements have gradually been replaced by EU law and mechanisms. Successive EU treaties have contained new commitments intended to further the EU's aim of creating a common environmental policy. Its **current aims**, set out in the Treaty on the Functioning of the European Union are:

- preserving, protecting and improving the quality of the environment;
- protecting human health;
- ensuring the prudent and rational use of natural resources; and
- promoting measures internationally to combat regional or worldwide problems, including combatting climate change.

The EU's institutions have an **oversight role**, ensuring Member State compliance with EU environmental law. These functions include monitoring and reporting on environmental law implementation, receiving citizens' complaints, and taking enforcement action, such as infringement proceedings.

The EU also carries out different types of reviews of environmental policy and legislation such as:

- a rolling review process to ensure that environmental legislation is fit for purpose (known as **REFIT or the 'Regulatory Fitness and Performance' programme**); and
- the 2017 and 2019 **Environmental Implementation Review**, which detailed the main challenges and opportunities for implementation of environmental legislation for Member States.

The Welsh Government carried out a **public consultation in 2019** seeking views on:

- gaps in environmental governance and principles in Wales arising from the UK's withdrawal from the EU; and
- how best to provide a governance framework that aligns with the **Well-being of Future Generations (Wales) Act 2015** and **Environment (Wales) Act 2016**.

The Fifth Senedd's Climate Change Environment and Rural Affairs (CCERA) Committee explored these matters over two inquiries, held **in 2018** and **in 2019**.

During the CCERA Committee's inquiries the majority of stakeholders advocated for Welsh primary legislation to establish a replacement domestic environmental governance body. They called for the body to be independent from government, have a simple and inexpensive mechanism for citizens to raise complaints and robust monitoring and enforcement functions. Stakeholders also advocated for the EU's core environmental principles to be explicitly listed on the face of the Bill.

## **Monitoring and reporting function**

The European Commission monitors the implementation of EU environmental law. It uses national indicators and implementation reports to do this. For example, every six years Member States are required to report on the conservation status of the habitats and species identified within the **Habitats Directive** in order to evidence implementation of the Directive. European Commission reporting on progress provides data and a basis for holding Member State governments to account in terms of implementation of environmental legislation.

There are domestic monitoring and reporting requirements in Wales under the Well-being of Future Generations (Wales) Act 2015 and the Environment (Wales) Act 2016. These include, for example, national indicators (authored by the Welsh Ministers), the well-being objectives and statements (by Welsh public bodies), well-being of Wales annual report (by Welsh Ministers) and State of Natural Resources Report (SoNaRR) (by Natural Resources Wales). A more exhaustive list is provided on page 25-26 of the **Welsh Government's 2019 consultation**.

**The CCERA Committee concluded** in 2019 that the monitoring and reporting requirements under existing Welsh law are designed for a different purpose than that of the European Commission. It stated that while these complement the EU requirements, "they do not provide an adequate substitute". The Committee argued that unless robust and appropriate reporting requirements are put in place following EU exit, effective oversight and scrutiny of the implementation of

environmental law in Wales could be limited.

In terms of data collection the Committee also concluded that there are extensive benefits associated with the UK's membership of the **European Environment Agency (EEA)**. The UK is no longer a member of the EEA. The Committee also had concerns about capacity and expertise within Wales, and across the UK, to replicate the technical expertise of the EU institutions.

## Enforcement function

Where a Member State has not complied with EU law, the European Commission can take enforcement action. This process can lead to the matter being referred **to the CJEU**. Only a small number of cases are heard by the CJEU since recourse to the courts should be a final method of enforcement. Cases can be taken to the CJEU in a number of ways. The Welsh Government **outlined these** in 2019:

- Referral by a Member States' national courts on the interpretation of EU law;
- By the European Commission taking a case against an EU state regarding any breach of its obligations to the EU;
- By an EU state taking another Member State to court; or
- The court can perform a judicial review of EU law. This means it has the power to review EU Regulations and Directives and make sure they comply with EU Treaties and general principles of law.

Where a Member State is found to be in breach, the **CJEU may require** it to take measures necessary to comply with the judgment, including putting an immediate end to its infringement. It may also impose fines if the Member State has not complied with its initial judgment, the amount of which is determined on the basis of a proposal from the Commission.

For example, in 2016, **the CJEU ruled** that the UK had failed to limit emissions from Aberthaw power station, located in the Vale of Glamorgan, and ordered the UK to pay the associated legal costs. The breach came to light following the Commission's enquiries as part of its monitoring of large combustion plants. The coal-fired station, which closed in 2020, was **found to be emitting** illegal amounts of nitrogen oxides between 2008-2011.

The CJEU can also rule on cross-border transboundary environmental disputes between Member States, such as in 2006 when it ruled on the **MOX Plant dispute** between the UK and Ireland. The case concerned marine pollution in the Irish Sea by means of radioactive discharge from the plant, located at the UK's Sellafield

nuclear site.

The Court can also take action against an EU institution, body, office or agency for annulment of a measure that is contrary to EU law or for their failure to act.

**Judicial review** is currently the key mechanism in Wales for redress against public bodies and is available to the public. Courts may review the lawfulness of a public body's actions. The main concern in such cases is not whether the conclusion reached by a public body is right, only whether the correct procedure was followed. The following remedies are available:

- mandatory orders require the body under review to do something;
- prohibitory orders restrain or prevent the body from doing something; and
- quashing orders set aside the decision of a body on the basis that it is invalid.

There are several **tribunals** in the justice system of the UK in a two-tiered tribunal structure; a First-tier Tribunal and an Upper Tribunal. Both are split into Chambers. Each Chamber comprises similar jurisdictions or bring together similar types of experts to hear appeals. The First-tier Tribunal hears appeals from citizens against decisions made by government departments or agencies. The Upper Tribunal primarily, but not exclusively, reviews and decides appeals arising from the First-tier Tribunal.

**In evidence to the CCERA Committee in 2019**, stakeholders reported weaknesses within domestic enforcement structures and lack of remedy and sanction for non-compliance with legislation. There was support among stakeholders for an informal enforcement mechanism for any new environmental governance body to enable issues to be resolved via co-operation. However, they asserted that a robust, formal mechanism, including enforcement proceedings and credible sanctions for continued non-compliance, was essential.

**The Committee heard** strong support among stakeholders for cases investigated by a new governance body to be referred to an appropriate judicial forum for review. They highlighted the weakness of judicial review and argued it was not an appropriate or effective replacement for the infraction procedures available to the CJEU. A number of stakeholders called for the establishment of a bespoke environmental court or tribunal with technical experts from across a range of environmental policy areas.

**The majority of stakeholders** asserted that financial penalties were an essential enforcement tool, and that the threat of infraction fines was key to the success

of the EU system. Some suggested that revenue from fines could be used for environmental purposes. Some acknowledged the practical challenges of replicating a fining system within the domestic context. The Committee recommended the Welsh Government should explore how a fining system for continued non-compliance with environmental law could operate in Wales.

## Access for citizens

EU citizens may **contact the European Commission** in instances of suspected non-compliance with EU legislation. The European Commission has discretion to act upon the information received, which can lead to infringement proceedings before the CJEU (as described above). The **Welsh Government's 2019 consultation** states that this is “via a free and simple efficient service”.

Currently, in Wales at a domestic level:

- The Public Services Ombudsman can receive complaints from citizens about the delivery of functions by public bodies.
- Individuals may also raise issues with the Future Generations Commissioner.
- Citizens can introduce petitions into the Senedd.
- Public bodies are required to have established complaints procedures including commitments to fully investigate and respond to complaints about their performance.

**The CCERA Committee heard** strong support among stakeholders for any new governance body to have a complaints function to fill the gap arising from the loss of the EU citizens' complaints system. Stakeholders highlighted the limitations of existing domestic mechanisms as a means of access to justice on environmental matters. There was broad consensus that any new complaints mechanism should be simple to access, cost free, and liability-free, in line with the EU system.

The UK's withdrawal from the EU does not affect its international obligations in this area, including those contained in the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the “**Aarhus Convention**”), to which the UK is a party in its own right. The **Convention provides** several rights to individuals and organisations with regard to the environment, such as the right of citizens:

- to receive environmental information that is held by public authorities;
- to participate in preparing plans, programmes, policies, and legislation that may affect the environment; and

- to have access to review procedures when their rights with respect to access to information or public participation have been violated.

## Application of environmental governance

The EU system of environmental governance applies to EU Member State governments in terms of liability and accountability.

The Welsh Government proposed in its **2019 consultation** that the remit of a new domestic body could extend to:

- The Welsh Ministers;
- Natural Resources Wales;
- Welsh local authorities; and
- Ministers of the Crown (e.g. consistent with their responsibilities under the Environment (Wales) Act 2016).

**The CCERA Committee heard** evidence from several stakeholders that all public bodies should fall under the scope of any domestic environmental governance body in terms of accountability (and that this should mirror the bodies that will apply the environmental principles). An alternative view was that the primary role of the new body should be to only hold the Welsh Government to account for non-compliance with EU derived environmental law.

The CCERA Committee concluded that the scope of the new governance body should extend to all Welsh public bodies who would be required to apply the environmental principles. The Committee said the Welsh Government's starting point should be the public bodies listed in the Well-being of Future Generations (Wales) Act 2015.

## Environmental principles

**EU environment policy** is grounded in its environmental principles which aim to ensure high environmental standards.

**Article 191(2) of the Treaty on the Functioning of the European Union (TFEU)** lists the four core EU environmental principles as:

- The prevention principle;
- The principle that environmental damage should as a priority be rectified at source;

- The polluter pays principle; and
- The precautionary principle.

The European Commission and the CJEU apply these principles in the development and interpretation of EU legislation. Rather than applying directly to Member States, the EU environmental principles instead flow through the EU's policies and laws.

Whilst the principles are undefined in the TFEU, the European Commission has **issued guidance** on the application of the precautionary principle. The principles are also defined elsewhere, including in international law and case law. Post-EU withdrawal, EU law and the EU Treaties (including the TFEU) no longer apply in the UK (although some EU environmental legislation continues to apply in Northern Ireland by virtue of the Withdrawal Agreement's **Ireland-Northern Ireland Protocol**).

Therefore the relevant Articles of the TFEU, including the principles, no longer apply to the UK. However, the UK has converted EU environmental legislation into domestic law via the **EU (Withdrawal) Act 2018** (but not the treaties). This legislation is now referred to as 'retained EU law' and was originally developed in the context of the EU environmental principles whilst the UK was a Member State.

The EU environmental principles therefore apply indirectly through retained EU law, but the principles themselves have not been directly carried over into domestic law from the TFEU.

The EU principles could also take effect where they have been referenced in **retained EU case law**.

## **Retained EU Law (Revocation and Reform) Act 2023**

The **Retained EU Law (Revocation and Reform) Act 2023** ("the REUL Act") makes significant changes to how retained EU law operates. Among other things, the Act:

- revokes some REUL so that it expires on 31 December 2023;
- revokes EU-derived rights on 31 December 2023;
- renames remaining REUL "assimilated law" from 1 January 2024;
- grants UK and Welsh Ministers powers to amend, repeal and replace REUL and assimilated law more easily;
- grants Ministers powers to recreate the effect of the supremacy of retained EU law to a limited extent in relation to specific instruments;



- provides domestic courts with greater discretion to depart from REUL case law; and
- repeals the ‘Business Impact Target’ as part of other regulatory reforms.

The Senedd **voted to withhold consent** to the Act twice, in March and June 2023.

During the Bill’s passage through the UK Parliament, the Interim Environmental Protection Assessor for Wales (see below) **published a report** on the Bill’s potential impact of on environmental law in Wales. The report conveyed the “serious concerns” from stakeholders that legislation could be “discarded” without proper assessment or stakeholder consultation. The report was **welcomed by the Welsh Government**.

## International obligations

The extent to which the UK countries are able to set their future environmental governance arrangements is limited by international obligations.

In the absence of the EU’s system of environmental governance, international environmental law has become the UK’s main external source of environmental legislation. For example, the UK is a party to many large multilateral environmental agreements, such as the **UN’s Paris Agreement** and the **COP15 global biodiversity framework**.

In addition, the UK has entered into bilateral agreements with other states which include environmental obligations, such as the UK-EU **Trade and Cooperation Agreement (TCA)**. The TCA commits the UK and EU to respect certain environmental principles and refers to multiple international instruments. It also commits the UK and EU’s supervisory bodies to meet regularly and to cooperate on the monitoring and enforcement of environment and climate law as it relates to environmental non-regression.

The Welsh Government and Senedd are responsible for implementing **international obligations in devolved areas** of competence and Wales’ devolution settlement requires adherence to international obligations in many ways. For example, Senedd legislation must be compatible with international obligations (section 114(1)(d) of the **Government of Wales Act 2006**) and the Secretary of State has powers to intervene to ensure compliance (section 82 of the Government of Wales Act 2006). Furthermore, the Welsh Government’s **Ministerial Code** places a duty on the Welsh Ministers to comply with the law, which explicitly includes international law and treaty obligations.

**Common frameworks** may offer routes for the Welsh Government to influence the UK Government's position in international matters, including obligations entered into. For example, the **Hazardous Substances (Planning) framework** commits the UK Government to consulting the devolved governments before ratifying new international agreements. However, **in other areas** the governments have acknowledged disagreement over how far the devolved governments should be involved in influencing international negotiations.

## Actions to address the governance gap in Wales

An Environmental Governance Stakeholder Task Group ('the Task Group') was established following the Welsh Government's 2019 consultation. This section outlines its key recommendations and the Welsh Government's responses. It also sets out interim measures – the Interim Environmental Protection Assessor for Wales.

### Legislative mechanism

In 2020 **the Task Group recommended** the introduction of primary legislation to address the gaps in environmental governance and principles. It recommended a Welsh response should address the gaps that would arise at the end of the Brexit transition period (1 January 2021). Although the previous Welsh Government **expressed its intention** to legislate to 'close the governance gap', legislation was not brought forward.

### Environmental governance body

The Task Group recommended a Welsh 'commission for the environment', independent from the Welsh Government, to oversee the implementation of environmental law in Wales. It recommended it should be provided with certainty of finance and be audited by the Auditor General. It recommended the commission should produce an Annual Report to the Senedd.

The Task Group recommended that the commission should have permanent staffing but with the ability to draw upon an Expert Panel where needed. It stated that the commission should be provided with appropriate functions to receive and respond to citizens' complaints, and to carry out inquiries where systemic issues are identified through investigations and scrutiny. It also recommended that the commission have powers to escalate matters where necessary to stop or prevent environmental damage. The Task Group said the commission should be able to address issues in an appropriate manner; from advising public bodies in Wales through to enforcement and employing mechanisms of environmental review before the Upper Tribunal (see 'enforcement function' section above). It highlighted the commission should work cooperatively with other bodies.

A major focus of the Task Group's discussions were on the sanctions necessary to drive a matter to a binding resolution and to robustly ensure compliance with environmental legislation. The majority of the group agreed that in practice public bodies comply with court determinations. Therefore it felt that it ought to be sufficient to extend the ordinary remedies attached to judicial review without the need for fines, which it said would be handed to the Treasury.

The Task Group's report states that remedies for judicial review include the award of damages in appropriate cases as well as orders that would quash decisions or mandate actions. The Upper Tribunal would have ordinary powers of contempt of court where a decision was not respected, so that enforcement could be backed by financial penalties. Some members of the Task Group did not agree with this approach, and expressed concern about powers available to the Upper Tribunal.

It was accepted by the Task Group as a whole that the sanctions proposed in its report are not at the "same level" as those previously available under the EU regime.

The Welsh Government **accepted these recommendations**, subject to budget consideration.

## Environmental principles

The Task Group recommended that the four EU environmental principles (rectification at source, polluter-pays, prevention and precaution) should be explicitly provided for in Welsh legislation. It emphasised that these principles should support an overarching objective which would include the connections between environmental policy and other policy areas (integration). In terms of applying the principles it recommended these should be imposed as a duty on the Welsh Ministers in the development of policy and legislation.

It recommended the existing **sustainable management of natural resources** (SMNR) duty, which applies to Natural Resources Wales, should be extended to a wider group of public bodies, including the Welsh Ministers. It said further work is required to determine the definition of public bodies. It suggested using the definition provided in the Well-being of Future Generations (Wales) Act 2015, of bodies which discharge functions relating to the environment.

The Task Group highlighted that the **Aarhus Convention rights** (access to information, public participation and access to justice) should be articulated in any forthcoming legislation for environmental governance, alongside the principles and the new governance framework.

The Welsh Government accepted these recommendations subject to further exploratory work on the application of the SMNR principle.

More detail on the Task Group's discussions [can be found in its March 2020 report](#).

## The Welsh Government's options appraisal

The Welsh Government carried out an [options appraisal](#), which was published in November 2020 following consideration of the Task Group's recommendations and the 2019 consultation.

The options included:

- do nothing;
- use of an existing body/bodies;
- establish a new environmental governance body for Wales or;
- use the UK Government's Office for Environmental Protection (OEP - detailed below).

The Welsh Government concluded that establishing a new environmental governance body for Wales was the preferred option. It said it was supported by the majority of respondents to the consultation and formed the basis of the recommendations from the Task Group.

The options appraisal considered a number of models including the Task Group's favoured 'commission' model, but also a 'commissioner' model, a 'tribunal' and a 'Welsh Government Sponsored Body'. The then Minister for Environment, Energy and Rural Affairs, Lesley Griffiths MS, considered the commission or commissioner model to be the most appropriate approach as it could "undertake the required range of functions with the necessary degree of independence". She went on to say that delivery will be subject to availability of a legislative slot to take forward the necessary primary legislation and budget identification.

## Transitional arrangements

Interim measures have been adopted, ahead of the establishment of an environmental governance body and principles.

At the end of 2020, the Welsh Government set out to [recruit an Interim Environmental Protection Assessor](#). The role of interim assessor (as originally advertised) included receiving and logging complaints during the post-transition

period; redirecting complaints to other bodies where necessary and escalating complaints deemed serious or urgent.

However, on 31 December 2020, the Welsh Government **published new arrangements** for an interim assessor. This guidance suggested that the role had changed from the original responsibilities. The focus has moved from receiving and escalating complaints regarding breaches of environmental law, and instead to the “functioning of environmental law”.

To bring a challenge in relation to compliance with environmental law the Welsh Government therefore advised citizens to pursue existing means of domestic redress (e.g. judicial review).

On 24 February 2021, the **Welsh Government announced** the appointment of the Interim Environmental Protection Assessor for Wales (IEPAW) for two years, with the possibility of extension (the role has been extended by the Welsh Government for an extra year to 2024). The IEPAW has been receiving submissions from stakeholders and the public where there are perceived issues on the functioning of environmental law. Her role is to produce reports to the Welsh Government on these issues. She has **published one report** on the Retained EU Law (Revocation and Reform) Bill (detailed above).

The environment sector **is concerned** that the interim arrangements do not fill the environmental governance gap. The sector has called for a Welsh Bill to establish a fully functioning governance body as a matter of priority. Wales Environment Link (WEL) **concluded**:

It is clear that the interim arrangements do not constitute a route to environmental justice nor do they provide a substitute for the oversight and enforcement role required to replace that provided by EU institutions, as recommended by the Task Group and accepted by the Minister.

The IEPAW has attended **two sessions** of the Sixth Senedd’s Climate Change, Environment and Infrastructure (CCEI) Committee (in 2022 and 2023). The Committee had concerns about the effectiveness and resourcing of the interim measures. Following the 2022 session, the Welsh Government carried out a resource review and committed to provide extra resource for the interim measures. However, following its second session, the Committee felt this extra resource hadn’t been made available in a timely manner to support the IEPAW to produce reports to the Welsh Ministers. The Committee was also concerned about a lack of impact monitoring. In terms of longer term arrangements **it concluded**:

It is now seven years since the EU referendum when the environmental sector first raised concerns about an environmental governance gap and five years since the Welsh Government committed to legislate to address that gap. The absence of a Bill in year three of the Legislative Programme means the new body is likely to be at least two years away. It will be an unforgivable failure of this Welsh Government if the new body is not fully operational before the end of its term in office.

In terms of environmental principles prior to any Welsh Government legislation, the **previous Welsh Government committed** to continue to apply the four EU environmental principles.

## Developments across the UK

The UK countries have been developing separate replacement environmental governance arrangements. The Office for Environmental Protection (OEP) has been established for England and Northern Ireland and Environmental Standards Scotland (ESS) in Scotland.

The CCEI Committee **held an evidence session** with representatives from the OEP and ESS in June 2023 to gain insight into the establishment and activities of the permanent environmental governance arrangements elsewhere in the UK. The aim was to learn lessons ahead of establishment of a Welsh environmental governance body, and to identify gaps in Wales in the absence of such a body.

The **Committee recommended** the Welsh Government should engage the OEP and ESS to understand the lessons learned from the establishment of their respective bodies.

### The Office for Environmental Protection

#### Establishment

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Powers to **establish an Office for Environmental Protection (OEP)** are included in the Environment Act 2021.

The OEP mainly applies to England and Northern Ireland and only has jurisdiction in Wales in relation to non-devolved environmental law. The Northern Ireland Assembly was not sitting at the time of the Environment Bill's drafting. As such, Department of Agriculture, Environment and Rural Affairs (DAERA) officials developed a range of Northern Ireland provisions for the Environment Bill with DEFRA. The Northern Ireland Executive **consulted on these matters in 2020-21**.

**The UK Government** had suggested the OEP could operate across the UK. However, **the previous Welsh Government said** that the proposed governance model wasn't a workable approach for Wales. It argued that it was incompatible with the devolution settlement and Wales's existing legislation.

Given the Environment Act 2021 was not enacted, nor the OEP established by the end of the Brexit transition period, DEFRA initially set up transitional arrangements



for England. **These comprised a system** (launched early 2021) for registering complaints against public bodies suspected of failing to comply with environmental law. An Interim Environmental Governance Secretariat within DEFRA operated on a temporary basis to conduct initial assessments of any complaints. This was under the guidance of both the **newly appointed Office for Environmental Protection Chair-designate, Dame Glenys Stacey**, and the other Board members “to ensure an effective transition to the permanent body”.

An **interim OEP** was subsequently established and staff previously seconded from DEFRA were employed directly by the OEP. Before being put on a statutory basis, the OEP was able to sift and collate complaints but not address them. The OEP was legally established on 17 November 2021, following the passing of the Environment Act 2021. Once it became a **legal entity** it began to prepare its strategic approach. It was then granted its full legal powers by UK Parliament on 24 January 2022 (for England) and 28 February 2022 (for Northern Ireland).

Once fully operational, the OEP was able to review all complaints made to the interim body and its predecessor, the Interim Environmental Governance Secretariat.

**The OEP** can hold the following organisations to account:

- government departments;
- government ministers;
- regulators;
- local authorities; and
- some private bodies, such as water companies, but only in respect of their public powers and duties.

It does this by:

- scrutinising Environmental Improvement Plans and targets;
- scrutinising environmental law;
- advising government on environmental law; and
- enforcing against failures to comply with environmental law.

## The OEP's work

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Key pieces of work undertaken by the OEP include:

- **identifying possible failures** by DEFRA, the Environment Agency and Ofwat to comply with environmental law in relation to the regulation of combined sewer overflows;
- scrutiny of **UK Government's plans and environmental targets** for improving nature, particularly deliverability and progress against the 25 year environment plan;
- influencing legislation, including providing **evidence to the Levelling Up and Regeneration Bill Committee**, and evidence to the **Retained EU Law (Revocation & Reform) Bill 2022 (REUL Bill) Committee**;
- responding to consultations including on **environmental targets, biodiversity net gain** and the **joint fisheries statement**; and
- recording and responding to **629 separate enquiries, and 84 complaints** (as of 31 March 2023).

## Environment Standards Scotland

### Establishment

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The UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 includes powers to establish the environmental governance body '**Environmental Standards Scotland**' (ESS).

**ESS officially launched** on 1 October 2021, taking nine months to establish. Its purpose is to scrutinise public bodies to ensure compliance with environmental law, and to monitor the effectiveness of environmental law. It's able to take representations from the public and stakeholders and determine which to pursue.

ESS covers all public authorities, including the Scottish Government and its agencies, as well organisations carrying out functions on behalf of public authorities.

ESS is independent of the Scottish Government, and accountable to the Scottish Parliament.

The ESS can **investigate representations concerning**:

- whether a public authority is failing (or has failed) to comply with environmental law; and

- the effectiveness of environmental law or of how it is (or has been) implemented or applied.

## ESS's work

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**Representations received** are screened, and if admissible are initially **considered as pre-investigation enquiries**, which can either be moved to a full investigation, resolved with the appropriate public authority, or closed.

The ESS also undertakes **monitoring and analytical work**. Analytical priorities are **issues identified as potential concerns**, but where further analysis is required to understand the cause(s) and how policy and regulatory decisions may have an impact. Analytical work can lead to investigations, further analysis or monitoring.

ESS has **completed an investigation** into the Scottish Government's plans and approach to ensuring future compliance with legal limits on nitrogen dioxide levels. A **further investigation** into the systems in place to support local authorities in the delivery of climate change targets is ongoing.

## Environmental principles

The Environment Act 2021 introduced a duty on the UK Secretary of State to prepare a **policy statement** on environmental principles, with the objective of contributing to environmental protection and sustainable development. This policy statement applies to England only. Ministers of the Crown must have due regard to the policy statement when developing policy. The five environmental principles listed in the Act are:

- the principle that environmental protection should be integrated into the making of policies;
- the principle of preventative action to avert environmental damage;
- the precautionary principle, so far as relating to the environment;
- the principle that environmental damage should as a priority be rectified at source; and
- the polluter pays principle.

This list is mostly derived from the core EU principles (described above), with the addition of the integration principle.

For Scotland, the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 includes the same five principles. Under the Act the Scottish Ministers

must have **due regard to the five guiding principles in policy development**. In addition a “responsible authority” must have due regard to the five principles in doing anything in respect of the duty under section 1 of the **Environmental Assessment (Scotland) Act 2005** (requirement for environmental assessment).

## Key sources

Climate Change, Environment and Infrastructure Committee: **Report on operation of interim environmental protection measures 2022-23** (2023)

Climate Change, Environment and Infrastructure Committee: **Report on operation of the interim environmental protection measures** (2022)

Climate Change, Environment and Rural Affairs Committee: **Environmental principles and governance post-Brexit** (2019)

Climate Change, Environment and Rural Affairs Committee: **Environmental governance arrangements and environmental principles post-Brexit** (2018)

Environmental Governance Stakeholder Task Group: **Report from the Environmental Governance Stakeholder Group and Welsh Government response** (2020)

Welsh Government: **Environmental principles and governance in Wales post European Union exit** (2019)