



Brexit and Environmental Law

Wales, Brexit and Environmental Law

The UK Environmental Law Association is the foremost body of environmental lawyers in the UK. UKELA aims to promote better law for the environment and to improve understanding and awareness of environmental law. UKELA is composed of 1,400 academics, barristers, solicitors, consultants, and judges involved in the practice, study and formulation of environmental law across England, Scotland, Wales and Northern Ireland.

UKELA remained neutral on the Brexit Referendum. In order to ensure regulatory stability and continued environmental protection UKELA considers it imperative that the UK's current environmental legislation is preserved pending proper review, and full and open consultation on options for change. UKELA's full position on Brexit can be found at www.ukela.org/ukelaposition.

UKELA's Brexit Task Force was established in September 2016 to advise on all matters relating to and arising from the UK's decision to leave the European Union insofar as this impacts environmental law, practice and enforcement in the UK. The Task Force has been examining the legal and technical implications of separating our domestic environmental laws from the European Union and the means by which a smooth transition can be achieved. With the assistance of UKELA's specialist working parties the Task Force aims to inform the debate on the effect of withdrawal from the EU, and draw attention to potential problems which may arise.

The UKELA Brexit Briefing Papers have been produced under the guidance and approval of UKELA's Brexit Task Force chaired by Andrew Bryce and Professor Richard Macrory, and with input from relevant UKELA Working Parties and individuals. They do not necessarily and are not intended to represent the views and opinions of all UKELA members.

This report is one of a series to be published by UKELA on the implications of Brexit for environmental law.

Other reports already available include:

- Brexit and Environmental Law: Exit from the Euratom Treaty and its Environmental Implications
- Brexit and Environmental Law: Enforcement and Political Accountability Issues
- Brexit and Environmental Law: Brexit, Henry VIII Clauses and Environmental Law
- Brexit and Environmental Law: The UK and International Environmental Law after Brexit

Forthcoming reports include:

- Brexit and Environmental Law: Environmental Standard Setting Outside the EU
- Brexit and Environmental Law: the UK and European Environmental Bodies

UKELA supports the Welsh Language and its contribution to the cultural well-being of Wales. However, as a small charity, UKELA regrets that it does not have the funds to translate this report.

First published in Great Britain in 2017 by:
UK Environmental Law Association (UKELA)
One Glass Wharf, Bristol, BS2 0ZX

www.ukela.org

© UK Environmental Law Association

ISBN: 978-1-9997986-4-2

All rights reserved. Without limiting the rights under copyright reserved above, no part of this publication may be reproduced, stored or introduced into a retrieval system, or transmitted, in any form or by any means (electronic, mechanical, photocopying, recording or otherwise), without the prior written permission of both the copyright owner and the publisher of this book.

Table of Contents

- Executive summary..... 3**
- Background5**
 - The Political, Social and Economic Context.....5
 - The Welsh Environment.....5
 - Wales, the Environment and Brexit6
- The Challenges of Developing Environmental Law in Wales Post-Brexit.9**
 - Common Frameworks and Devolved Powers9
 - Dealing with Complexity in Welsh Law.....10
 - Addressing the Divides Between Devolved and Non-Devolved Powers.....11
 - Scrutiny of Welsh Law.....11
- Appendix 1: Further Background Information13**
 - The Wales Act 2017 and Environmental Protection13
 - General Reservations13
 - Specific reservations13
 - Executive Powers14
- Appendix 2: Powers of the National Assembly for Wales in Specific Policy Areas15**
 - Marine, Fisheries and Harbours15
 - Biodiversity, Habitat and Species Protection.....15
 - Water15
 - Climate Change16
- Appendix 3: The Devolution of Tax Raising powers.....17**
- Endnotes19**

Executive summary

This report gives a Welsh perspective on the issues arising from Brexit. The intention is not to provide a detailed analysis of the implications for environmental law as it applies to Wales, nor to rehearse the arguments with respect to devolution and Brexit relevant to all devolved governments. Instead this report focuses on the challenges faced in developing environment law in Wales post-Brexit.

Brexit presents an opportunity to see greater divergence in approaches to environmental protection across the UK. This presents a threat to the development of a coherent framework for environmental protection;¹ but also an opportunity to develop new and innovative approaches. This is particularly significant given the importance of local and participative approaches to environmental law and the desire for flexibility and experimentation in tackling environmental problems.

The main concern post-Brexit is how to create common UK frameworks for environmental protection in a devolved context and the process of scrutiny for any new legislation in Wales. The future of Welsh environmental law will also be impacted by the current complexities of the law applying to Wales and the divides between devolved and non-devolved powers. These concerns are not directly related to Brexit, but Brexit provides an important catalyst for contemplation of these wider concerns.

The report begins by providing some background in terms of the political, social and environmental context in Wales, the Welsh environment and the approach to Brexit in Wales. It then outlines the challenges of developing environmental law in Wales post-Brexit.

The key messages are:

- It will be important to maintain common frameworks for action on environmental protection across the UK. New institutional mechanisms involving all four nations will be necessary to underpin the work on developing these frameworks. There must also be room for devolved approaches in meeting, or indeed exceeding, common environmental standards. The National Assembly for Wales (NAW) should not be restricted by the arrangements for the devolution of powers from developing such approaches.
- The Welsh Government has recently demonstrated significant energy and enthusiasm in developing innovative approaches to environmental protection in Wales. This has resulted in new legal frameworks for sustainable natural resource management and the well-being of future generations. These frameworks, and crucially the principles underpinning them, will be important in providing strategic direction and stability for the future development of Welsh environmental law.
- The current complexity of the law applicable to Wales and relationship between devolved and non-devolved powers must also be considered in developing environmental law in the future. Any ambition to create a Welsh Environment Code should not stand in the way of pressing needs for incremental change.
- The procedures for scrutiny of future Welsh environmental law should be carefully considered. There should be consistency in the approach to legislation made further to the European Union (Withdrawal) Bill and other laws made by the Assembly. This will require NAW to have control of the procedures to be adopted. Legislation introducing significant changes to environmental protection should be subject to on-going review by the relevant Assembly Committee.

Brexit and Environmental Law: Wales, Brexit and Environmental Law

Background

The Political, Social and Economic Context

- 1 Devolution in Wales has been a dynamic process and the Wales Act 2017 will create another important step in this process.² The Act creates a 'reserved powers' model that should provide the National Assembly for Wales (NAW) with greater powers, but has been subject to significant criticism.³ Crucially, Wales will maintain a shared jurisdiction with England.
- 2 Wales unlike the other devolved nations voted in favour of Brexit: 52.5% voters in Wales chose to leave the European Union (EU), compared with 47.5% supporting Remain.⁴ Yet, Wales also has good reason to be concerned about withdrawal from the Single Market given that 66.9% of exports go to the EU as compared to 49.1% for the rest of the UK and Wales is a net beneficiary of EU membership, currently receiving about £680million in EU funding each year.⁵ There are also important differences in the employment sectors in Wales that mean the impacts of Brexit will vary from those in the other nations of the UK. For example, more people in Wales are employed in the public sector and manufacturing and less in the finance industry and the agriculture forestry and fishing are more significant here.⁶
- 3 Labour and Plaid Cymru issued a position statement on Brexit (the position statement) which is particularly important given their status in Welsh politics.⁷ This paper makes it clear that in their view continued access to the Single Market is essential:

"We believe that full and unfettered access to the Single Market for goods, services and capital – including our key agricultural and food products – is vital for the forward interests of Wales and the UK as a whole and we urge the UK Government to adopt this as the top priority for negotiation with the EU."⁸

- 4 This is potentially at odds with the UK Government's commitment to a 'hard Brexit'.⁹
- 5 The Welsh Government has shared the concerns of other devolved nations about their involvement in the Brexit negotiations, or lack of it; the effect of the European Union (Withdrawal) Bill; and the development of inter-governmental machinery in the UK post-Brexit.¹⁰
- 6 The Assembly has set up an External Affairs and Additional Legislation Committee whose role includes considering the arrangements for Brexit. This has issued a report on the Implications for Wales of leaving the EU;¹¹ and the Great Repeal Bill and its Implications for Wales.¹²

The Welsh Environment

- 7 The social, political, economic and cultural history of Wales is clearly entwined with its natural environment. The economy of Wales has traditionally been built on the mining of its natural resources, but despite the demise of this industry the environment continues to provide a significant resource for water and energy production and as a carbon sink.¹³ It also provides economic benefits, and opportunities for recreation and improving public health.¹⁴
- 8 The designated landscapes of Wales are particularly important in these respects. Wales has three National Parks and five Areas of Outstanding Natural Beauty which together cover 24% of the land in Wales.¹⁵ These landscapes provide the backdrop to Wales's social history, including art and literary traditions. They also bind the Welsh environment to the country's native language which continues to grow from strength to strength.¹⁶ Wales is rich in biodiversity and has more than 1000 Sites of Scientific Interest many of which sit within these protected landscapes.¹⁷

- 9 Environmental protection and rural affairs have been devolved areas since the inception of NAW.¹⁸ Wales has developed specific policies on issues such as forestry and waste and a general approach grounded in the notions of the ecological footprint and ‘sustainable development’.¹⁹ When NAW was granted primary legislative powers, in 2011, it began development on a Natural Environment Framework. The first step was to create a new environmental agency from the amalgamation of the Environment Agency Wales, the Countryside Council for Wales and the Forestry Commission. Natural Resources Wales (NRW) came into operation on 1 April 2013. Subsequently, NAW introduced a trilogy of legislation relevant to environmental protection: Planning (Wales) Act 2015, the Well-Being of Future Generations (Wales) Act 2015 and the Environment (Wales) Act 2016.²⁰
- 10 The Well-Being of Future Generations (Wales) Act 2015 creates a new framework for the working of public bodies focused on ‘Well-being’, whilst the Environment (Wales) Act 2016 focuses the operation of NRW on Sustainable Natural Resource Management. These frameworks will be significant in the future development of environmental law and policy in Wales. For example, the Welsh Government is now intending to align the legislation on the designated landscapes in Wales with these frameworks.²¹

Wales, the Environment and Brexit

- 11 Labour and Plaid Cymru are committed to maintaining current standards in respect of air and water quality, emissions and environmental protection, as a minimum;²² and have made a commitment to the principle of green growth’. This includes: moving towards a more resource efficiency, circular economy; supporting the sustainable management and growth of Wales’ natural resources based sectors – farming, forestry, fisheries, tourism and renewable energy; and developing high value markets for new and innovative products and services based around sustainable management.²³
- 12 Since the latest elections in March 2016, environmental protection has been within the remit of the Assembly’s Climate Change Environment and Rural Affairs Committee. As part of the preparations for Brexit, this Committee has issued a report on the Future of Land Management in Wales;²⁴ and is currently conducting an inquiry into Marine Protected Areas in Wales²⁵ and Forestry and Woodland Policy.²⁶
- 13 Sustainable land management post-Brexit is a key concern in Wales. Perhaps the most significant issue, however, is agriculture. Brexit, as everywhere in the UK, is a major concern for farmers. 88% of land in Wales is agricultural land and much of this is made up of small farms with a particular focus on livestock. At present 90% of Welsh food and drink exports go to the rest of the EU.²⁷ Welsh Government also has control of the application of its quota of CAP funding and developed its own agri-environmental schemes, most recently Glastir.
- 14 NAW’s Climate Change Environment and Rural Affairs Committee issued a report in 2017 which came to the following broad conclusions:
- Tariff and quota free access to the Single Market is a priority for agriculture in Wales.
 - The Welsh government should be a key partner in negotiations in this respect – and it should be emphasised that support for agriculture underpins the viability of rural communities and the culture and language of Wales.
 - The Welsh government should aim to increase public procurement of Welsh produce.
- 15 The report also noted that replacement funding for CAP is essential. It suggested that in future agricultural funding should be based on the delivery of outcomes that:
- are more aligned to sustainable outcomes whilst producing high quality food;²⁸
 - contribute to the climate change target set out in the Environment (Wales) Act 2016 and WBFA 2015;²⁹ and
 - reward improvements in providing access to the countryside.³⁰
- 16 Agricultural funding will also be key to the protection of biodiversity and, in particular, the delivery of the Welsh Government’s Nature Recovery plan. The position paper is also supportive of maintaining the EU Birds and Habitats Directives and adopting a precautionary approach to the management and enforcement of SACs.³¹

17 The marine environment and fishing are also a key concern in Wales. Most aspects of fishing are devolved to Wales including the regulation of aquaculture. 90% of the Welsh fleet are under 10 metre fishing vessels and 3% of the total UK fishing quota is in Welsh areas of interest.³² Continued powers of management over fisheries is a key concern in the position statement as well as access to major European markets.²⁶ In its current inquiry into Marine Protected Areas in Wales the Climate Change, Environment and Rural Affairs Committee is asking questions around the strategic direction of the protection of the marine environment; especially the potential effects of Brexit on Marine Protected Areas (MPAs) and the future alignment with Area Statements under the Environment (Wales) Act 2016.³³

The Challenges of Developing Environmental Law in Wales Post-Brexit

18 The main concern post-Brexit is how to create common UK frameworks for environmental protection in a devolved context and the process of scrutiny for further legislation in Wales. The future of Welsh environmental law will also be impacted by the current complexities of the law applying to Wales and divides between devolved and non-devolved powers. These concerns are not directly related to Brexit, but this provides an important catalyst for contemplation of these wider concerns.

Common Frameworks and Devolved Powers

19 The UK Government has stated that it wishes to maintain common standards and frameworks for the domestic market “empowering the UK as an open, trading nation to strike the best trade deals around the world and protect the common resources of our island”.³⁴ There is clearly however, some tension between these aims and it is important that current environmental standards are not lost.

20 EU law provides central standards and frameworks for action in meeting environmental protection aims. The European Union (Withdrawal) Bill, as originally drafted, will bring these powers back to the UK Government before further consideration is given as to how these should operate within the devolved context. The Welsh and Scottish Governments have been united in their condemnation of this approach which is, in their view, a move to centralise power. On the other hand, it is undoubtedly the case that in the context of environmental protection there will need to be some central standard setting and common frameworks for action on a UK-wide basis that should, indeed, be cognisant of EU and international approaches.

21 Much of the current legislation on the implementation of EU environmental law in Wales is shared with England, such as:

- Environmental Information Regulations 2004/3391;
- Climate Change Act 2008;
- Conservation of Habitats and Species Regulations 2010/490;
- Pollution Prevention and Control Act 1999;
- Waste (England and Wales) Regulations 2011;
- Environmental Permitting (England and Wales) Regulations 2016/1154; and
- Water Environment (Water Framework Directive) (England and Wales) Regulations 2017/407.

22 This approach to EU environmental law can be explained by the incremental nature of devolution in Wales, the shared jurisdiction and transboundary issues. Notable exceptions to this are the legislation on Environmental Assessment and Air Quality Standards and which have been implemented on a Wales only basis:

- Environmental Assessment of Plans and Programmes (Wales) Regulations 2004/1656; The Town and Country Planning (Environmental Impact Assessment) (Wales) Regulations 2016; and the Environmental Impact Assessment (Agriculture) (Wales) Regulations 2017/565; and
- Air Quality Standards (Wales) Regulations 2010/1433.

23 This can be explained by the close association between Environmental Assessment and land use planning.

24 In future, it will be crucial that we have institutional mechanisms that include the devolved nations in developing UK-wide environmental standards and common frameworks for action. It is also essential to provide effective mechanisms for monitoring and reporting on progress and holding all governments to account for their actions.³⁵ Crucially, notwithstanding the necessity for common environmental standards and frameworks for action across the UK, Wales should have powers to tailor its approach to account for the particular circumstances of the country, as evidenced in the Background to this report.

25 The Welsh environment is, arguably, particularly important to economic, social and cultural development in Wales and sustainable development has been a key consideration for NAW since its inception.³⁶ There has been a clear appetite for developing new and innovative approaches to environmental policy and law throughout its history, as evidenced by the example of Waste outlined below. Most recently, this has resulted in the trilogy of new legislation outlined above. Sub-national states can provide good 'laboratories' for innovative practice and devolved nations may learn from each other. This may in fact drive up environmental standards rather than creating a 'race to the bottom'. The 5p carrier bag charge, outlined below, is one example of this, although the clear financial incentive in that instance will not always be evident.

26 The new legal frameworks for 'Well-being' and 'Sustainable Natural Resource Management', provide a positive basis for strategic thinking around the challenges that will be presented in the future development of Welsh law. They also have the potential to create stability in what will undoubtedly prove to be a period of uncertainty. It is notable, that these legal frameworks are based on a series of essential principles which will be significant in this regard. However, these principles differ somewhat from traditional EU environmental principles. Thus, existing debates around 'common standards' should also extend to 'common principles'.

Dealing with Complexity in Welsh Law

27 Responding to the challenges of Brexit in Wales will be complicated by the complex legal landscape. 'Welsh law' now includes:

- UK primary legislation;
- Wales only UK provisions of primary legislation;
- UK secondary legislation;
- Welsh secondary legislation;
- National Assembly for Wales measures; and
- Welsh primary legislation.³⁷

28 Waste provides a useful example of this issue given that it has been a priority policy area for NAW since its early days.³⁸ The main aspects of the system are governed by UK primary and secondary legislation such as:

- Waste and Emissions Trading Act 2003;
- Waste (England and Wales) Regulations 2011; and
- Producer Responsibility Obligations (Packaging Waste) 2007/871.

29 The Waste and Emissions Trading Act 2003 includes key 'Wales only' provisions not only on creating a Wales Waste Strategy, but around local authority waste management strategies.³⁹ Waste is also an area in which there is an important example of the use of Assembly Measures. In 2010, the Welsh government introduced both a new strategy for Waste and the Waste (Wales) Measure 2010.⁴⁰ The latter was responsible, for example, for the 5p carrier bag charge which was a key policy initiative that has since been followed in Scotland and England.⁴¹ In the recent Environment (Wales) Act 2016 the Assembly reconsidered its position on the carrier bag charge, including issues of enforcement and the use of civil sanctions; as well as regulatory provisions on food waste to sewers and incineration of waste.⁴² There are few examples of Welsh secondary legislation in waste law;⁴³ but divergence is also, of course, created by 'England only' provisions. One example of this is the Household Waste (Fixed Penalty and Penalty Charge) Regulations 2015/969. Finally, the importance of tax raising powers in this field is demonstrated by the Landfill Tax Disposals Tax (Wales) Act 2017 (for details see Appendix 3).

30 It is the ambition of Welsh Government to pursue a major programme of codification of Welsh law following Brexit;⁴⁴ and there is a clear implication that we could see a Welsh Environment Code emerging. Whilst this is an important ambition the enormity of this task should not stand in the way of more incremental change.

Addressing the Divides Between Devolved and Non-Devolved Powers

- 31 The recent controversy over the balance of power between Wales and Westminster in the development of the Wales Act 2017 is indicative of the complexities of Welsh devolution. The Welsh Government has highlighted the problems that exist in trying to make clear distinctions between reserved and devolved powers. In environmental protection, this is particularly relevant to the reservations with respect to energy. This has already caused considerable controversy with regard to fracking and planning for wind energy.
- 32 The Welsh Government is keen to establish an energy policy with an emphasis on local energy, reducing demand and increasing efficiency. This includes a target of reducing carbon emissions by at least 80% by 2050 and meeting all of its energy needs from renewable sources.⁴⁵ Whilst, the essential benefits from co-operation in energy supply are clear, the Assembly's ambitions may be thwarted by reservations on energy; and also energy efficiency and transport (see Appendix 1). Agriculture is another area that is devolved to Wales, but involves clear cross overs with reserved powers on import and export which are subject to specific reservation in the Wales Act 2017 (see Appendix 1).

Scrutiny of Welsh Law

- 33 Brexit presents the opportunity to develop different approaches to environmental protection in Wales, but it is important that proper scrutiny of any new legislation is undertaken, albeit that it is introduced on a primary or secondary legislative basis. There should also be consistency in the approach to legislation made further to the European Union (Withdrawal) Bill and other laws made by the Assembly. This will require NAW to have control of the procedures to be adopted. Legislation introducing new and innovative approaches to environmental protection are generally to be welcomed, but should be subject to on-going review by the relevant Assembly Committee.⁴⁶

Appendix 1: Further Background Information

The Wales Act 2017 and Environmental Protection

General Reservations

- 1 Generally reserved matters cover foreign affairs including trade matters; but there are also specific reservations around industrial development; the protection of trade and economic interests; and, import and export control.⁴⁷
- 2 Crime is a reserved matter and careful consideration must be given to the effect on the shared jurisdiction with respect to criminal law.⁴⁸ This also extends to anti-social behaviour legislation which has increasingly been used to address problems in the local environment.⁴⁹ The reservations regarding criminal law might be thought to create potential problems where the Assembly wishes to introduce new offences in pursuit of its environmental policies. However, the Act only prohibits this in listed areas such as, treason and offences against the person.⁵⁰ Therefore, it is possible to create new offences with respect to a devolved area such as environmental protection. The Act also prohibits any modification of the private law.⁵¹
- 3 In a shared jurisdiction, all justice issues including matters related to the legal profession, legal services and claims management, legal aid services and arbitration are also reserved.⁵² However, the UK Government has set up a non-statutory committee on Justice in Wales. It also states that the law that applies in Wales creates a distinct body of Welsh law and puts the devolved Welsh Tribunals on a statutory footing.⁵³
- 4 There are general reservations on import and export but these do not extend to the prohibition and regulation of movement into and out of Wales of food, plants, animals and related things for the purposes of—(a) protecting human, animal or plant health, animal welfare or the environment, or (b) observing or implementing obligations under the Common Agricultural Policy.⁵⁴ There is also an exception for the prohibition and regulation of movement into and out of Wales of animal feeding stuffs, fertilisers or pesticides for the purposes of protecting human, animal or plant health or the environment.⁵⁵

Specific reservations

Transport

- 5 Transport is an essential issue with regard to environmental protection and this is also a reserved matter, but with some important exceptions from an environmental perspective:
 - The subject-matter of Part 6 of the Traffic Management Act 2004 (civil enforcement of traffic contraventions);
 - Regulation relating to trunk road charging schemes; and
 - Regulation of the carriage of animals in motor vehicles or trailers for the purposes of protecting human, animal or plant health, animal welfare or the environment.
- 6 There are also specific reservations for rail transport although not including financial assistance not relating to the carriage of goods;⁵⁶ and the regulation of the carriage of animals on vessels for the purposes of protecting human, animal or plant health, animal welfare or the environment.⁵⁷ Air transport is specifically reserved with the exception of financial assistance to providers, or proposed providers, of air transport services or airport facilities or services and strategies by the Welsh Ministers or local or other public authorities about provision of air services.⁵⁸
- 7 The specific reservations also include consumer protection law and product standards safety and liability. However, there is an exception with regard to food (food products and food contact materials).⁵⁹ This could be important to the development of future approaches to the packaging of waste where there may be a conflict between environmental and consumer needs, for example, between environmental pressure to reduce packaging and the needs of consumers. Other relevant reservations include Hunting;⁶⁰ and public access to information (including environmental information) other than that held by a Welsh institution.⁶¹

Energy

- 8 Most aspects of energy have been specifically reserved (including energy conservation) with the following exceptions:⁶²
- 9 Oil and gas exceptions:
 - The granting and regulation of licences to search and bore for and get petroleum that, at the time of the grant of the licence, is within the Welsh onshore area, except for any consideration payable for such licences.
 - Access to land for the purpose of searching or boring for or getting petroleum under such a licence.
 - Marine licensing and the regulation of works that may obstruct or endanger navigation, so far as relating to searching or boring for or getting petroleum under such a licence.
- 10 The exception of land restoration with regard to coal mining. (The fact that coal is a reserved matter is, of course, particularly contentious in Wales given its extensive coal seams, history of deep mining and continuing problems of water contamination from this; and the destructive nature of open cast coal mining).
- 11 Heat and cooling networks, but not the regulation of them; Schemes providing incentives to generate or produce, or to facilitate the generation or production of, heat or cooling from sources of energy other than fossil fuel or nuclear fuel.
- 12 The encouragement of energy efficiency otherwise than by prohibition or regulation.

Executive Powers

- 13 Welsh Ministers will exercise powers in devolved areas and those ancillary to their functions that exist outside their competence. Currently, where those obligations relate to observing and implementing obligations under EU law they must be carried out concurrently with the UK Minister.⁶³ An important issue will be the extent to which this applies to powers returned to Westminster and not devolved to Wales.
- 14 Schedule 4 sets out those powers that are currently exercised concurrently by Welsh and UK ministers at present and those that require the approval or consent of the Treasury or the Minister for the Civil Service to be exercisable by the Welsh Ministers. There are many provisions that relate to agriculture, fisheries and other aspects of land use planning and environmental protection that require such consent.⁶⁴
- 15 Specific executive powers have however, been granted over the development of fracking.⁶⁵ Provision has also been made to allow Welsh Ministers to provide development consent for all onshore wind farms (in line with England); and off-shore wind farms, of less than 350MW.⁶⁶ Associated development of overhead lines for generating stations is also included.⁶⁷ The Wales Act 2017 also specifically transfers powers over functions in relation to excepted energy buildings and renewable energy incentive schemes.⁶⁸

Appendix 2: Powers of the National Assembly for Wales in Specific Policy Areas

Marine, Fisheries and Harbours

- 1 The Welsh Government began work on a Wales Marine Plan in 2015 but a final version has yet to be published.⁶⁹ In the draft plan the vision for the marine environment is as follows:

“By 2036, Welsh seas are clean, healthy, safe, productive and biologically diverse:

- *Through an ecosystem based approach, our seas are healthy and resilient and support a sustainable and thriving economy.*
- *Through access to and enjoyment of the marine environment, health and wellbeing are improving. Blue growth is creating more jobs and wealth; and, is helping coastal communities become more resilient, prosperous and equitable with a vibrant culture.*
- *The Welsh marine area is making a strong contribution to energy security and climate change emissions targets through the responsible deployment of low carbon technologies.*⁷⁰

- 2 The Wales Act 2017 specifically devolves powers over marine licensing in the Welsh offshore region (in addition to existing controls over the in-shore region) excluding any activity under the Merchant Shipping Act 1995 Part 6.⁷¹ Welsh Ministers may also create marine conservation zones in the offshore region with the consent of the UK Minister.⁷² The position paper recognised that Brexit presents particular problems for funding for marine science and monitoring, as this requires large capital assets.⁷³
- 3 The Wales Act 2017 also transfers powers to the Welsh Ministers over Welsh fishing boats beyond the seaward limits of the Welsh zone with respect to certain functions related to fishing.⁷⁴ In addition it will devolve executive functions in relation to Welsh ports and harbours including development consent for the construction or alteration of harbour facilities except in respect of reserved port trusts.⁷⁵ Only the Port of Milford Haven falls within the definition of a reserved port trust in Wales.⁷⁶

Biodiversity, Habitat and Species Protection

- 4 The Welsh Government has traditionally been slow to respond to the challenges of biodiversity protection and the Environment (Wales) Act 2016 fell short of creating targets in this respect.⁷⁷ Although 12% of land in Wales is designated as an SSSI not all of these are in a favourable condition.⁷⁸ The Nature Recovery Plan for Wales, published in 2015. Part 3 provides a Nature Recovery Framework identifying the roles and responsibilities of the key players for delivery of action for biodiversity in Wales, as well as how they will fit into the delivery framework for the Well-being of Future Generations Act and the Environment (Wales) Act.⁷⁹ This will be essential to biodiversity protection.
- 5 In addition, the future of the Environmental Impact Assessment (Agriculture) (Wales) Regulations 2017/565 will be very significant to the protection of biodiversity. These have broader impacts on the protection of biodiversity on Welsh farmland. Anecdotally, an increase in the amount of challenges to the regulations has already been noticed since the Brexit vote. It is apparent that many farmers see the Regulations as unwelcome bureaucracy. A better approach, in future, might be to focus on any projects which disturb semi-natural land.
- 6 In summary, Brexit is an opportunity to restate the importance of biodiversity and the maintenance of small but key sites and to ensure that all landowners are treated equally.
- 7 Finally, issues to note with respect to the reservation of powers over nature conservation are that the reservation on import and export control extends to CITES regulation, but the reservation with regard to private law does not include intellectual property rights relating to plant varieties or seeds.⁸⁰

Water

8 Water was a controversial issue during the passage of the Wales Act 2017 and key amendments were made in the House of Lords in this respect. Wales has full control of the appointment of water and sewerage undertakers and the regulation of licencing in this respect where the relevant area is wholly or mainly in Wales;⁸¹ as well as functions under the Water Industry Act 1991 on reporting.⁸² However, the Wales Act 2017 includes provision for the Welsh Ministers and SS to enter into an agreement – a Water Protocol – for the purpose of ensuring that the actions or inaction of the Welsh Ministers, or public bodies exercising functions in Wales, do not have a serious adverse impact on water resources in England, water supply in England or the quality of water in England; and the means of resolving matters of disagreement.⁸³ This protocol will be laid before both Houses of Parliament and NAW and will be binding on the parties.⁸⁴ There is also a reciprocal cross-border duty on all parties when exercising functions relating to water resources, water supply or water quality to have regard to the interests of consumers in the other country.⁸⁵

Climate Change

9 The common framework for action on climate change is provided by the Climate Change Act 2008. This creates essential targets and includes provision for the Welsh Government to report to NAW on the actions they are taking to tackle climate change.⁸⁶ The Welsh Government's Climate Change Strategy, was published in October 2010 and outlined a commitment to a reduction of 40% in greenhouse gases in all sectors by 2020 from 1990 levels and a target to reduce greenhouse gas emissions in Wales by 3% each year from 2011, relative to a baseline of average emissions over 2006-2010.

10 The Environment (Wales) Act 2016 placed the UK target on greenhouse gas emissions for 2050 in Welsh law (of at least 80% lower than the baseline); and made provision for the creation of interim targets for 2020, 2030 and 2040 by the end of 2018. It also placed a duty on the Welsh Ministers to set five yearly carbon budgets, which provide limits on the total amount of emissions that can be emitted in Wales and to report on progress in meeting these.

11 The position statement, calls upon the UK government to create climate policies to reduce emission where policies previously agreed through the EU no longer apply. This statement suggests that these should be at least as challenging as the EU's commitments to tackle climate change which must continue to be met.⁸⁷ It also stated that the intent of the EU trading system (covering emissions from electricity generation and heavy industry and provide a common carbon price for participants) should be preserved.⁸⁸

Appendix 3: The Devolution of Tax Raising powers

- 1 The Wales Act 2014 amended the Government of Wales Act 2006 to confer power on NAW to raise taxes in two key areas – land transactions (stamp duty) and disposals to landfill. See further Land Transaction Tax and Anti-Avoidance of Devolved Taxes (Wales) Bill 2017 and the Landfill Tax Disposals Tax (Wales) Bill 2017 currently in its 3rd stage. Both are set to come into force in April 2018. The importance of the Landfill Tax Disposals Tax (Wales) Act 2017 to environmental protection is clear, but it has also been suggested that the land transaction tax could be linked to energy efficiency measures in homes.⁸⁹
- 2 The Wales Act 2014 also provided powers for a referendum to be held on whether to allow National Assembly for Wales to vary the rates at which Welsh tax payers pay UK income tax (not to create a new income tax). This would allow the National Assembly to reduce the basic, higher and additional rates of income tax for Welsh tax payers by up to 10%, or to increase them without limit. The requirement for a referendum on this was removed by the Wales Act 2017.⁹⁰ There was also provision for some new borrowing powers in the 2014 Act the limit of which was raised from £500m to £1 billion by the Wales Act 2017.⁹¹

Endnotes

- 1 As noted by Lee R. Always Keep a Hold of Nurse: British Environmental Law and Exit from the European Union JEL (2017) 29(1) 155, at 164
- 2 The majority of its provisions come into force in 2018.
- 3 See for example 'Wales Act carries seeds of own destruction, says Rawlings', BBC News, 5 March 2017.
- 4 'EU referendum: Welsh voters back Brexit', BBC News, 24 June 2016.
- 5 *Securing Wales' Future: Transition from the European Union to a new relationship with Europe* (Welsh Government, 2017) page 7
- 6 Statistics for Wales, Workplace employment by industry in Wales 2001 to 2015, SB 48/2016 (Welsh Government, October 2016). In 2015 agriculture forestry and fishing made up 3% of workplace employment in Wales as compared to 1% in England; public sector 30% compared to 25%; 12% production compared to 9%; and finance 17% compared to 27%.
- 7 i.e. Labour leads a minority Government and Plaid are their nearest significant political ally
- 8 *Securing Wales' Future* (Welsh Government, 2017), page 6
- 9 Department for Exiting the European Union, 'The United Kingdom's Exit from and New Relationship with the European Union', Cm 9417, 2 February 2017
- 10 On intergovernmental machinery see further *Securing Wales' Future* (Welsh Government, 2017), page 8 and *Brexit and Devolution: Securing Wales' Future* (Welsh Government, 2017)
- 11 External Affairs and Additional Legislation Committee, *Implications for Wales of leaving the European Union* (National Assembly for Wales, 2017)
- 12 External Affairs and Additional Legislation Committee, *The Great Repeal Bill White Paper: Implications for Wales* (National Assembly for Wales, June 2017)
- 13 *UK National Ecosystem Assessment Technical Report* (UNEP-WCMC, Cambridge 2011), 'Status and Changes in Ecosystems and their Services to Society – Wales'. For example, page 981: Wales records some of the highest rainfall levels in the UK
- 14 *ibid*, page 891: Overall the environment is relatively more important to the Welsh economy than it is to the other UK nations
- 15 See further National Parks Wales and Visit Wales, 'Welsh AONBs'
- 16 See for example the paintings of Richard Wilson and poetry of RS Thomas. The links with the Welsh language are evident in the art and literature that emerges from the Eisteddfod movement in Wales.
- 17 Natural Resources Wales, 'Sites of special scientific interest (SSSIs)'
- 18 *Securing Wales' Future* (Welsh Government, 2017), page 27
- 19 See further Victoria Jenkins, 'Welsh devolution and the protection of the environment: the story so far and the future challenges' *Elaw* (Issue 96, September/October 2016), pages 23-24.
- 20 For further details on these legislative frameworks see further Williams & Jenkins, 'The Planning (Wales) Act 2015: a Case Study in Evidence-Based Planning Reform under Devolution', *Journal of Planning and Environmental Law*, 2016(7), pages 637-652; Williams & Jenkins, 'The Planning (Wales) Act 2015: Part 2 Lessons in Law Making under Devolution', *Journal of Planning Law* 2016(9), pages 860-875; Williams & Jenkins, 'The Planning (Wales) Act 2015: Part 3 Further Developments', *Journal of Planning Law*, 2017(7), pages 669-681; Haydn Davies, 'The Well-being of Future Generations (Wales) Act 2015 - A Step Change in the Legal Protection of the Interests of Future Generations?', *Journal of Environmental Law*, 2017(29)(1), pages 165-175; and 'Environment (Wales) Act 2016 – Snapshot', *Lexis Nexis* (forthcoming)
- 21 *Future Landscapes: Delivering for Wales: The Review of Areas of Outstanding Natural Beauty and National Parks* (Welsh Government, May 2017)
- 22 *Securing Wales' Future* (Welsh Government, 2017), page 27
- 23 *ibid*
- 24 Climate Change Environment and Rural Affairs Committee, 'The Future of Land Management in Wales' (National Assembly for Wales, March 2017)
- 25 National Assembly for Wales, 'Consultation: Inquiry into the management of marine protected areas in Wales' (closed 10 February 2017)
- 26 National Assembly for Wales, 'Consultation: Forestry and woodland policy in Wales' (closed 7 April 2017)
- 27 External Affairs and Additional Legislation Committee, *Implications for Wales of leaving the European Union* (National Assembly for Wales, 2017), page 11
- 28 Climate Change Environment and Rural Affairs Committee, 'The Future of Land Management in Wales' (National Assembly for Wales, March 2017), recommendation 16.
- 29 *ibid*, recommendation 18.
- 30 *ibid*, recommendation 24.
- 31 *Securing Wales' Future* (Welsh Government, 2017), page 25
- 32 *ibid*, page 28

- 33 Evidence of Wales Environment Link Marine Group, Climate Change, Environment and Rural Affairs Committee Inquiry into the management of marine protected areas in Wales (MPAW06). In their evidence to the inquiry, they note that most MPAs are designated as Special Areas of Conservation (SACs), but that unlike terrestrial SACs these are not always underpinned by domestic protection as Sites of Special Scientific Interest (SSSIs). They provide evidence that these sites are at considerable risk and they also note that “cross-border collaboration around the UK for the establishment of an ecologically coherent network of MPAs remains critical” (response to question 8). Also of note are Wales Environment Link’s concerns around the loss of access to an evolving knowledge base and guidance in monitoring and enforcement processes, as developed under the Marine Strategy Framework Directive, as well as financial support for wider marine management e.g. the eventual loss of European Marine Fisheries Fund (EMFF).
- 34 Government Response to the House of Lords Energy and Environment Sub-Committee report on Brexit the Environment and Climate Change (12th Report Session 2016-2017 HL paper 109), 16 April 2017
- 35 See further UKELA, *Brexit and Environment Law: Enforcement and Political Accountability Issues* (July 2017)
- 36 For an explanation of this approach see Victoria Jenkins, ‘Welsh devolution and the protection of the environment: the story so far and the future challenges’ *Elaw* (Issue 96, September/October 2016), pages 23-24.
- 37 The problems that this position creates have been noted and discussed by the Law Commission in its recent. Law Commission, *The Form and Accessibility of the Law Applicable in Wales*, No. 366 (2016) HC 469–I
- 38 See further on the early days of the Assembly: Victoria Jenkins, ‘Environmental Law in Wales’, *Journal of Environmental Law* (2005) 17(2), pages 207-227
- 39 Waste and Emissions Trading Act 2003 section 19, relates to the Wales Waste Strategy published as *Wise About Waste* (Welsh Government, 2003); sections 29 and 30 relate to local authority strategies and reporting arrangements to the Welsh Government
- 40 *Towards Zero Waste: The Overarching Waste Strategy Document for Wales* (Welsh Assembly Government, 2010), version updates 12 July 2017
- 41 This inserted a new s45AA to the Environmental Protection Act 1990 just one small indication of the complexity being created in the legislative landscape by devolution in Wales
- 42 Environment (Wales) Act 2016
- 43 An exception is the Farm Waste Grant (Nitrate Vulnerable Zones) (Wales) Scheme 2004/1606. This followed the development of a distinctive approach on nitrate zones in Wales. See further, Victoria Jenkins, ‘Environmental Law in Wales’, *Journal of Environmental Law* (2005) 17(2), pages 207-227
- 44 As noted by Robert Lee, ‘Always Keep a Hold of Nurse: British Environmental Law and Exit from the European Union’, *Journal of Environmental Law* (2017), Volume 29, Issue 1, pages 155-164, at 164
- 45 Environment and Sustainability Committee, *A Smarter Energy Future for Wales* (National Assembly for Wales, March 2016)
- 46 This was a key recommendation of stakeholders at the end of the last Assembly. See Environment and Sustainability Committee, *Fourth Assembly Legacy Report* (National Assembly for Wales, March 2016)
- 47 Government of Wales Act 2006, Schedule 7A Section C5
- 48 Government of Wales Act 2006, Schedule 7A Section B5
- 49 Government of Wales Act 2006, Schedule 7A Section B6; see further, Victoria Jenkins, ‘The Legal Response to Safeguarding Local Environmental Quality’, *Legal Studies*, 35(4), pages 648-674.
- 50 e.g. general modifications to the central tenets of criminal law such as criminal responsibility and capacity and the meaning of intention and recklessness
- 51 Government of Wales Act 2006, Schedule 7B Paragraph 3, but does include the compulsory acquisition of property and is with the exception of law of property does not include intellectual property rights relating to plant varieties or seeds
- 52 Government of Wales Act 2006, Schedule 7A Head L
- 53 Wales Act 2017, Section 1 and Part 3. On the Standing committee for justice in Wales, see further: Wales Governance Centre, *Justice in Wales: Principles, Progress and Next Steps* (Cardiff University, September 2016)
- 54 Government of Wales Act 2006, Schedule 7A Section C5. This is an example of a provision that will be out of date almost as soon as the Wales Act 2017 comes into force
- 55 Government of Wales Act 2006, Schedule 7A Section C5
- 56 Government of Wales Act 2006, Schedule 7A Section E2
- 57 Government of Wales Act 2006, Schedule 7A Section E3
- 58 Government of Wales Act 2006, Schedule 7A Section E4
- 59 Government of Wales Act 2006, Schedule 7A Sections C6 and C7
- 60 Government of Wales Act 2006, Schedule 7A Section B19
- 61 Government of Wales Act 2006, Schedule 7A Section L
- 62 Government of Wales Act 2006, Schedule 7A Section 2006 D
- 63 Government of Wales Act 2006, section 58A

- 64 Government of Wales Act 2006, Schedule 3A Paragraphs 4 and 5. Paragraph 5 states that functions of the Secretary of State under section 272 of the Transport Act 2000 (financial assistance for inland waterway and sea freight) so far as they relate to (a) the carriage of goods by an inland waterway that is partly in Wales, or (b) the carriage of goods by sea where the carriage concerned is wholly or partly by sea adjacent to Wales (within the meaning of that section), are exercisable concurrently or jointly with the Welsh Ministers. Paragraph 4 states that the following functions are exercisable jointly with the Welsh Ministers: Schedule 3A Paragraph 4, Marine Strategy Regulations 2010 (S.I. 2010/1627) Functions of the Secretary of State under regulation 19 (directions to, and assistance from, public authorities) and regulation 20 (guidance); Schedule 3A Paragraph 4, Crime and Disorder Act 1998, section 6 - strategies for combatting crime and disorder or reoffending in areas in Wales which are very relevant to the protection of the local environment; and, Marine and Coastal Access Act 2009, sections 45, 46 and 47 (preparation, review and amendment of marine policy statement) in relation to a marine policy statement prepared by the Secretary of State and the Welsh Ministers acting jointly and Schedule 5 (preparation or amendment of marine policy statement)
- 65 Wales Act 2017, sections 23 to 25
- 66 Wales Act 2017, sections 39 to 41
- 67 Wales Act 2017, section 42. However, associated consent for schemes over 350 MW which will be determined by the Secretary of State, will now also be granted by the Secretary of State rather than by the local planning authority
- 68 Wales Act 2017, sections 54 to 55
- 69 Welsh Government, *The Welsh National Marine Plan: initial draft* (November 2015)
- 70 *ibid*, page 3
- 71 Wales Act 2017, section 46
- 72 Wales Act 2017, section 47
- 73 *Securing Wales' Future* (Welsh Government, 2017),
- 74 Wales Act 2017, section 53. These are: (a) functions of a Minister of the Crown or the Marine Management Organisation under the Sea Fish (Conservation) Act 1967; (b) functions of a Minister of the Crown under the Sea Fisheries Act 1968; (c) functions of a Minister of the Crown under Parts 2 to 4 of the Fisheries Act 1981; and (d) functions of a Minister of the Crown or the Marine Management Organisation under the Sea Fisheries (Wildlife Conservation) Act 1992
- 75 Wales Act 2017, sections 29-33
- 76 A reserved trust port is defined by reference to turnover in accordance with section 11 of the Ports Act 1990 (s32). Provision is also made in respect of cross-border harbours and pilotage functions Wales Act 2017, sections 34-38
- 77 See discussion by stakeholders in the passage of the Environment (Wales) Act 2016 as outlined in the Stage 1 Committee report. National Assembly Environment and Sustainability Committee, Environment (Wales) Bill Stage 1 Committee Report (National Assembly for Wales, October 2015)
- 78 For details see Natural Resources Wales, *State of Natural Resources Report* (NRW, 2016)
- 79 Nature Recovery Plan for Wales Consultation (closed 3 December 2014)
- 80 Government of Wales Act 2006, Schedule 7B paragraph 3 - but does include the compulsory acquisition of property
- 81 Government of Wales Act 2006, Schedule 7A section C15
- 82 Water Industry Act 1991, section 192B
- 83 Wales Act 2017, section 50
- 84 *ibid*
- 85 Wales Act 2017, section 51. In addition the UK government is given powers to issue an Order in Council to make provision modifying (by reference to geographical extent or otherwise) a previously conferred or transferred water related function; or provide for such a function to be exercisable either concurrently or jointly with a Minister of the Crown or the Welsh Ministers; or only with the agreement of, or after consultation with, a Minister of the Crown or the Welsh Ministers. Section 49 Wales Act 2017. "water-related function" means a function exercisable in relation to water supply, water quality, water resources management, control of pollution of water resources, sewerage, rivers and other watercourses, land drainage, flood risk management or coastal protection." As a result of these changes, the powers of intervention by the UK Government with respect to water issues under sections 114 and 152 Government of Wales Act 2006 have been repealed.
- 86 Climate Change Act 2008, section 80
- 87 *Securing Wales' Future* (Welsh Government, 2017)
- 88 *Securing Wales' Future* (Welsh Government, 2017)
- 89 Environment and Sustainability Committee, *A Smarter Energy Future for Wales* (National Assembly for Wales, March 2016)
- 90 Wales Act 2017, section 17
- 91 Wales Act 2017, section 18



UKELA is grateful to the Economic and Social Research Council for their assistance in publishing these reports.

Dr Victoria Jenkins is a Senior Lecturer at the College of Law and Criminology, Swansea University. During her career, she has published widely on environmental law in leading academic journals. Much of her work has focused on legal approaches to sustainable development, but she also has a keen interest in the impact of devolution on environmental protection in Wales.

Victoria is also co-convenor for UKELA's Wales Working Party. This group acted as an important stakeholder in the development of new environmental legislation in Wales and organised several events for its members outlining these key developments. Victoria has personally provided significant comment on Welsh environmental law for UKELA, LexisNexis and the Journal of Planning Law.

Brexit and Environmental Law: Wales, Brexit and Environmental Law

Dr Victoria Jenkins

This report highlights the challenges in developing environment law in Wales after Brexit. EU law has provided central standards and frameworks for action in meeting environmental protection aims. After Brexit, it will be important to maintain common frameworks for action on environmental protection across the UK. This report argues that new institutional mechanisms involving all four nations in the UK will be necessary to underpin the work on developing these frameworks. There must also be room for devolved approaches in meeting, or indeed exceeding, common environmental standards.

The Welsh Government has recently demonstrated significant energy and enthusiasm in developing innovative approaches to environmental protection in Wales. This has resulted in new legal frameworks for sustainable natural resource management and the well-being of future generations. These frameworks, and crucially the principles underpinning them, will be important in providing strategic direction and stability for the future development of Welsh environmental law.

The current complexity of the law applicable to Wales and the relationship between devolved and non-devolved powers must also be considered in developing environmental law in the future. Any ambition to create a Welsh Environment Code should not stand in the way of pressing needs for incremental change.

The procedures for scrutiny of future Welsh environmental law should be carefully considered. There should be consistency in the approach to scrutinising legislation made further to the European Union (Withdrawal) Bill and other laws made by the Assembly. This will require NAW to have control of the procedures to be adopted. Legislation introducing significant changes to environmental protection should be subject to on-going review by the relevant Assembly Committee

October 2017

The UK Environmental Law Association (UKELA) is the foremost body of environmental lawyers in the UK. UKELA aims to promote better law for the environment and to improve understanding and awareness of environmental law.

UKELA remained neutral on the Brexit Referendum. UKELA's Brexit Task Force was established in September 2016 to advise on all matters relating to and arising from the UK's decision to leave the European Union insofar as this impacts environmental law, practice and enforcement in the UK.

The Task Force has been examining the legal and technical implications of separating our domestic environmental laws from the European Union and the means by which a smooth transition can be achieved. The Task Force aims to inform the debate on the effect that withdrawal from the EU will have, and to draw attention to potential opportunities and problems which may arise.

This report is printed on sustainably sourced paper.

Registered charity number: 299498 (Registered in England and Wales)
Company listed by guarantee: 2133283 (Registered in England and Wales)



ISBN 978-1-9997986-4-2



9 781999 798642 >