POLICY PAPER:
THE FUTURE OF ENVIRONMENTAL GOVERNANCE IN NORTHERN IRELAND

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This Policy Paper should be cited as:

Ciara Brennan, Mary Dobbs, Viviane Gravey and Attracta Uí Bhroin, *Policy Paper: The Future of Environmental Governance in Northern Ireland* (July, 2018)
https://www.brexitenvironment.co.uk/download/4083/

The research which informed this policy paper was partly funded by the ESRC UK in a Changing Europe programme as part of the Brexit & Environment project: brexitenvironment.co.uk

An extensive draft was prepared for a workshop on the Future of Environmental Governance in NI, organised by Dr. Mary Dobbs and Dr. Viviane Gravey in association with Nature Matters NI. The workshop was funded by Queen's University Belfast and a report is available here. Feedback from the workshop fed into this paper where appropriate and our thanks to all participants for their engagement.

This paper is presented in a personal capacity and does not represent the views of the ELIG, IEN, Queen's or Newcastle Universities or the ESRC UK in a Changing Europe. If you have any queries, please contact the author with primary responsibility for the relevant section:

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1. INTRODUCTION

This Policy Paper is a response to the deficit in leadership on the future of environmental governance in Northern Ireland at this politically turbulent time. The aim here is not to dwell on past failures in Northern Ireland – this has been comprehensively dealt with elsewhere[1] – but instead to focus on the specific challenges posed by Brexit and avenues through which these might be addressed.

The influence of the UK's membership of the European Union (together with that of the Republic of Ireland, with which it shares a border) on NI environmental governance has been profound.[2] Now Brexit raises the very real possibility of major environmental governance gaps across the UK. Whereas the Welsh[3] and Scottish[4] governments are publishing plans to prepare for Brexit and both the Assembly for Wales[5] and the Scottish Parliament[6] are conducting inquiries on how to best address Brexit challenges and seize opportunities, there are no equivalent public discussions in Northern Ireland. While Northern Ireland's Department of Agriculture, Environment and Rural Affairs (DAERA) has invested considerable efforts for instance with stakeholder groups, NI is lacking an operational Executive to develop NI policy or push for either its own solutions or tailored versions of English proposals. Consequently, there is a significant risk that those governance gaps will remain or that the Department of Environment, Food and Rural Affairs (DEFRA)'s proposals for England on 'Environmental Governance and Principles Post Brexit'[7] will become "common by default"[8] and be superimposed on Northern Ireland. As this paper will discuss, this scenario would be very problematic as Northern Ireland is faced with a range of distinctive environmental governance challenges that are different to those experienced to other parts of the UK.

Suitable policy and legislative frameworks must be developed for Northern Ireland as soon as possible – without waiting for the Brexit negotiations to be resolved. It is also essential to consider how the development of approaches across England, Scotland and Wales will impact the UK as a whole and in particular Northern Ireland. Therefore, public engagement by those within England, the rest of the UK, the ROI and other nearby countries with DEFRA's governance proposal is crucial.

In light of this need, and using DEFRA's proposals (in conjunction with the EU Withdrawal Act[9] and the White Paper on the future relationship between the UK and the EU)[10] as a springboard, this paper reflects on 4 key issues highlighted by Brexit for environmental governance in Northern Ireland (and more generally): common frameworks; principles; compliance and accountability; and cross-border/all-island issues. Although not addressed in the DEFRA proposal, the authors assert that common frameworks as well as issues associated with the UK's future relationship with the ROI are fundamental to any consideration of the future of environmental governance in Northern Ireland.

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[1] Ciara Brennan, Ray Purdy and Peter Hjerp 'Political, economic and environmental crisis in Northern Ireland: the true cost of environmental governance failures and opportunities for reform' (2017) NILQ 68(2).
[2] Charlotte Burns, Andrew Jordan and Viviane Gravey, 'The EU Referendum and the UK Environment: The Future Under a "Hard" and a "Soft" Brexit' (London: UK in a Changing Europe, 2016), 1–16 <https://www.brexitenvironment.co.uk/policy-briefs/> accessed 30 July 2018.
[3] https://gov.wales/newsroom/environmentandcountryside/2018/180710-new-proposals-to-support-welsh-farmers-unveiled/?lang=en accessed 30 July 2018.
[4] https://www.gov.scot/Publications/2018/06/2221/6 accessed 30 July 2018.
[5] http://www.assembly.wales/laid%20documents/cr-ld11622/cr-ld11622-e.pdf accessed 30 July 2018.
[6] http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/107913.aspx accessed 30 July 2018.
[7] https://consult.defra.gov.uk/eu/environmental-principles-and-governance/ accessed 30 July 2018.
[8] Viviane Gravey and Mary Dobbs, 'Written Evidence from Dr Viviane Gravey and Dr Mary Dobbs - Northern Ireland Affairs Committee Inquiry on Brexit & Agriculture' (London: House of Commons, 2018), 13 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/northern-ireland-affairs-committee/brexit-and-northern-ireland-agriculture/written/81579.pdf> accessed 30 July 2018.
[9] http://www.legislation.gov.uk/ukpga/2018/16/enacted accessed 30 July 2018.
[10] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf accessed 30 July 2018.

2. COMMON FRAMEWORKS

Environmental policy is one area that is both devolved and Europeanised – this means that common EU-wide policies are implemented sometimes jointly, sometimes separately across the UK.[11] Within the EU, it is also an area of shared competence, leaving considerable powers in the hands of the devolved regions. EU environmental policy has developed rapidly since the 1970s, to cover a wide range of areas from water and air pollution, to nature protection, product and process standards, waste management and climate change. Brexit creates the unique situation of having to repatriate over 400 pieces of EU environmental legislation[12] in the UK.

Over the last twenty years all four jurisdictions have developed their own approaches to implementing EU environmental law and more generally to the governance of the environment. Thus for example, the "strong deregulatory tone in England is not shared elsewhere".[13] The Welsh government has set out novel legislation (such as the Well-Being of Future Generations (Wales) Act 2015 and ambitious policies) as the first UK nation to impose a fee on the use of single-use plastic bags for example. [14] Scotland has been particularly ambitious on the development of renewable energy. As for Northern Ireland, the experience in this jurisdiction has revealed how differentiation within the UK can also lead to reduced ambitions – with no Climate Change Act or independent Environmental Agency. [15]

Hence, as the UK is preparing for Brexit, the *status quo* is one of differentiation – differentiated implementation of common EU frameworks. This raises a number of questions: will UK frameworks replace EU frameworks in some/all cases? Which policy areas will be concerned? How will they be agreed? How will they be governed and enforced? How much differentiation will be allowed?

2.1 Recent developments in formulating Common Frameworks

These questions are not yet answered, with continued profound disagreement between, in particular, the UK and Scottish government. Three key developments in the last year have started sketching what the common frameworks could look like.

- **The Joint Ministerial Committee (EU Negotiations) meeting in October 2017** set out guidelines on what a framework could entail. This included "common goals, minimum or maximum standards, harmonisation, limits on action, or mutual recognition". It considered the various legal formats a framework could take, "implemented by legislation, by executive action, by memorandums of understanding, or by other means". Finally, it considered the scope, i.e."a common UK, or GB, approach"). Frameworks would be established to fulfil the following objectives, to:
    - enable the functioning of the UK internal market, while acknowledging policy divergence;
    - ensure compliance with international obligations;
    - ensure the UK can negotiate, enter into and implement new trade agreements and international treaties;
    - enable the management of common resources;
    - administer and provide access to justice in cases with a cross-border element;

[11] Colin T Reid, 'Brexit and the Devolution Dynamics', *Environmental Law Review*, 19.1 (2017), 3–5 <http://dx.doi.org/10.1177/1461452917693337> accessed 30 July 2018.
[12] Tom Delreux and Sander Happaerts, 'The Evolution of EU Environmental Policy', in *Environmental Policy and Politics in the European Union* (London: Macmillan, 2016), 12–40.
[13] Reid (n 11), 4.
[14] UKELA, 'Brexit and Environmental Law : Wales, Brexit and Environmental' (Bristol: UKELA, 2017), 20–24 https://www.ukela.org/content/doclib/322.pdf accessed 30 July 2018.
[15] Brennan et al (n 1).

- safeguard the security of the UK. [16]

- **The Framework Assessment published by the Cabinet Office in March 2018** set out 155 areas where EU and devolved competences overlapped. It argued that only 24 areas may require legislative frameworks, 82 would require non-legislative frameworks and finally identified 49 areas where no further actions would be required at all.[17] Critically, while all agricultural policy issues are deemed to require legislative frameworks, environmental policy is split across all three categories:
  - *No frameworks:* Flood risk, water quality, water resources, forestry, land use
  - *Non-legislative frameworks:* Air quality, biodiversity, waste management
  - *Legislative frameworks*: chemicals & pesticides, waste packaging and product regulations
- **The bilateral agreement between the Welsh and UK Government on the EU Withdrawal Bill in April 2018** [18] set out how common frameworks would be agreed under the (then) EU Withdrawal bill. Draft legislative frameworks are expected for some/all of the 24 areas and will be drafted by the UK government before being sent to devolved administrations and legislatures.
  - Devolved administrations are expected to "not unreasonably withhold an accompanying recommendation to their respective legislature(s) to provide consent."
  - Furthermore, "If the consent of a devolved legislature is not provided within 40 days of the draft regulations being sent to the relevant devolved administration, the UK Minister may decide either not to proceed with the regulations or to ask the UK Parliament to approve the regulations. If a UK Minister decides to proceed with the regulations, the Minister must provide a written statement to the UK Parliament indicating the reasons why, in the Minister's view, the devolved legislature did not provide consent."

2.2 Five issues with the proposed approach to common frameworks

What these three developments tell us is, first, that Brexit is likely to lead to a sharp reduction in cooperation to tackle environmental challenges – from 155 common legislative frameworks shared across the EU we are likely to end up with only 24 common legislative UK frameworks.

Second, the rationales underpinning these frameworks at EU level appear not to have been considered in creating the UK list, and neither has the October 2017 objective to "enable the management of common resources". Hence, environmental issues with clear transboundary nature – water, air pollution, biodiversity protection – have not been deemed to require a legislative framework, resting instead on the political goodwill of governments or even on their non-coordinated actions. This marks a profound departure from EU environmental law and how it developed over time, as legally binding Directives on Water Quality (see for example Directives 75/440/EEC, 76/160/EEC), the protection of Birds (Directive 79/409/EEC) and Air Quality (see for example Directive 80/779/EEC) were among the first pieces of EU-wide environmental legislation agreed.

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[16] Joint Ministerial Committee (EU Negotiations), 'Communique 16 October 2017' (London: HM Government, 2017) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/652285/Joint_Ministerial_Committee_communique.pdf> accessed 30 July 2018.

[17] HM Government, 'Frameworks analysis: breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland' (London: HM Government, 2018), 1–21 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/686991/20180307_FINAL__Frameworks_analysis_for_publication_on_9_March_2018.pdf> accessed 30 July 2018.

[18] HM Government and Welsh Government, 'Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks' (London: HM Government, 2018), 6, at 4 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/702623/2018-04-24_UKG-DA_IGA_and_Memorandum.pdf> accessed 30 July 2018.

What can justify these allocations? Legal frameworks appear to be limited to areas directly linked to trade – product standards, waste management, chemicals, agricultural support etc. On all other areas, the UK Government has shown high flexibility – trying to obtain devolved support for its approach by limiting the number of common frameworks to the bare trade-required minimum. [19]

Third, the proposed process to agree these frameworks – currently only agreed by two out of four governments in the UK – leaves very little room for devolved parliamentary scrutiny (40 days in total, and limited to the power to grant or withhold consent, not amend) and even less for civil society participation, yet these frameworks would last up to 5 years [20] and shape future environmental, agricultural and fisheries management. As things stand, there is a clear risk that 'taking back control' of environmental policy after Brexit will mean reducing oversight and control over the executive.

Fourth, while the bilateral agreement sketches out a way forward for legislative frameworks, how the bulk of common frameworks (non-legislative) would be agreed remains even less clear. Will the Joint Ministerial Committee deliver this work? If so, it would make it very difficult for stakeholders to participate in environmental policy-making - the JMC is a black box with no clear agenda, no minutes, no voting. While EU environmental policy is often criticised as taking a long time to be agreed, the transparent decision-making process means a variety of stakeholders get to weigh in – something which must not be lost after Brexit. Beyond decision-making, there are also serious questions about how these frameworks might be enforced and what remedies might be available, issues which will be addressed later in this report.

Last but not least, the current Northern Irish limbo, with neither an Executive nor Direct Rule is making it impossible to agree truly shared, joined-up architecture for devising and updating frameworks. This cuts across both the institutional dimension – how should frameworks be agreed, who should be drafting them, and how they should be enforced – as well as the content of these frameworks, in particular their scope. Thus, the JMC October 2017 discussions as well as the March 2018 framework assessment discuss the possibility for differentiated scope, on the one hand that common frameworks could be 'common UK or common GB', on the other hand that frameworks would be compatible with the GFA and existing N/S cooperation on the island of Ireland. Hence multiple scenarios could be imagined:

- NI continuing N/S cooperation in an area where there are no common frameworks, such as continued N/S cooperation on water management while the current plans call for no common UK frameworks on that issue.
- NI pursuing its own policy or N/S cooperation in an area where the UK develops a 'common GB framework' – for example on animal health or invasive species.
- NI being part of both a N/S framework and a common UK framework.

This last option would be rendered possible by the very flexibility of the content of frameworks. Hence, as agreed at the JMC meeting in October 2017, a common framework can entail "common goals, minimum or maximum standards, harmonisation, limits on action, or mutual recognition, depending on the policy area and the objectives being pursued".[21] This means NI could share minimum standards with GB while having mutual recognition with Ireland or vice-versa.

2.3 Potential ways forward

The lack of agreement on common frameworks currently undermines discussions for future environmental governance. Decision-making relating to the environment cannot be agreed if there is no

[19] Viviane Gravey, 'Oral Evidence to Welsh Assembly Climate Change, Environment and Rural Affairs Committee Inquiry into UK Common Frameworks' (Cardiff: Assembly for Wales, 2018) <http://record.assembly.wales/Committee/4882> accessed 30 July 2018.
[20] HM Government and Welsh Government, (n18).
[21] Joint Ministerial Committee (EU Negotiations), (n16) 2.

agreement about how competencies can be shared. This means that solving the common frameworks conundrum is central to future environmental governance discussions. Some potential solutions include:

1. **Development of a common environmental baseline** This would ensure that all future divergence can only be 'upwards', with extant EU law providing a shared minimum level across the UK (and, critically for NI, across the Irish border). This would be in line with the TFEU article 193 – the environmental guarantee principle. This would still allow for different ways to deliver ambition and different levels of ambition to co-exist within the UK.[22] This would further give greater credibility to UK commitments to environmental non-regression in its negotiations with the EU.
2. The frameworks should be established based on **what is needed to achieve environmental aims** – for Northern Ireland this may mean common UK frameworks, common N/S frameworks or a combination of both.
3. Beyond the environment, **common frameworks need to be seen as not solely a matter for policy but a governance matter**. Good environmental governance principles – such as proportionality, subsidiarity, participation and access to information and justice (see section 3 below) – need to be front and centre in how these frameworks are agreed, enforced, evaluated and revised.

[22] Viviane Gravey, 'Evidence Submitted to the Welsh Assembly Climate Change, Environment and Rural Affairs Committee Inquiry into UK Common Frameworks on Agriculture and the Environment' (Cardiff: Assembly for Wales, 2018), 1–6 <http://senedd.assembly.wales/documents/s75638/UK 01 Dr Viviane Gravey - Queens University Belfast.pdf> accessed 30 July 2018.

3. ENVIRONMENTAL PRINCIPLES

Environmental principles are fundamental to environmental law in developing standards and procedures. The 1992 Rio Declaration is a prime example of the wide range of principles that exists without being exhaustive. The content of those principles also varies across jurisdictions, regimes and documents. The 4 UK jurisdictions and the UK as a whole should reflect carefully on which principles should be adopted or maintained post Brexit and on the details or content of these principles.

Within the EU, the environmental principles apply at all stages, including policy and rule formation, implementation and enforcement. On the face of the Treaty for the Functioning of the EU, they apply to EU institutions, but effectively they apply across the board.[23] They are crucial in contributing to purposive interpretation and the development of law before the courts. Again, the question is raised as to what role environmental principles should play post Brexit within the UK.

Further, principles are only part of the story when it comes to the underpinnings of environmental governance. Directly relevant to the principles are objectives, which provide the underlying values of the system/regime and thereby weight to the principles when there is a potential conflict with alternative objectives. There is also the potential application of procedural and substantive human and nature rights. Finally, the creation of corresponding binding duties provides the necessary force. Thus, it is necessary for the UK and devolved administrations to consider what other precepts to include alongside the principles and whether effectively to create an Environmental Charter.

The following discussion considers DEFRA's proposal in light of these three points.

3.1 The Principles

Annex A of DEFRA's consultation document outlines a number of potential principles to be adopted by England on a domestic level, with scope to amend that list now or in the future. These encompass the core principles that typically come to mind when considering environmental law, but if the UK is taking environmental protection seriously then these should not be optional or with the potential to be removed – they are fundamental to environmental governance and should be guaranteed. This is reflected in Section 16(2) of the EU Withdrawal Act, which names these principles alongside 3 others as the minimum to be included.

As noted in the DEFRA consultation documents, a wide range of further environmental principles exist. There are also numerous principles that may not be considered as 'environmental', but nonetheless are central to environmental governance, e.g. transparency, accountability, the Aarhus principles, rule of law, legal certainty, proportionality etc. Some of these principles will become of greater importance following Brexit due to the external elements, e.g. those found in the Espoo Convention relating to cross-border issues, the principle of customary international law of avoiding transboundary harm (Trail Smelter principle),[24] or indeed adapting the Aarhus principles to expressly cover cross-border issues.

Similarly, principles relevant to the allocation of decision-making powers would be valuable in light of the debates over devolution and common frameworks. Although subsidiarity is associated with EU law, it holds broader resonance conceptually;[25] it essentially calls for decision-making to be made at the lowest level feasible for reasons of democracy and the importance of local knowledge, experience and interests, but recognises that issues over effectiveness, expertise and externalities might call for some or all of the decision-making powers to be made at the higher levels instead. In some instances it may be suitable for UK wide standards or approaches to be taken, whilst allowing for regional or local

[23] Alan Doyle and Tom Carney, 'Precaution and Prevention: Giving Effect to Article 130r Without Direct Effect', (1999) 8 *Eur. Envtl. L. Rev.* 44.
[24] Established in *Trail Smelter Arbitral Decision,* 35 American Journal of International Law 684 (1941), at 716-7.
[25] Mary Dobbs, 'Attaining Subsidiarity-Based Multilevel Governance of Genetically Modified Cultivation?' (2016) 28:2 *Journal of Environmental Law* 245-273.

flexibility and improvements – as outlined above. Subsidiarity thereby would be a principle to guide the existence, nature and detail of common frameworks across the UK.

The UK/the 4 jurisdictions should survey all relevant principles and consider which to introduce and/or maintain. The UK/the 4 jurisdictions should adopt the principles outlined in the first 4 rows of Table 1 below at a bare minimum. It should also be established that these are non-exhaustive.

Stronger, more detailed versions should be chosen over weak, passive and excessively narrow versions, e.g. the precautionary principle should impose obligations to take actions, references to human health should be retained in relation to the principles of precaution or prevention, and the polluter pays principle could become the transgressor principle. Concerns may arise over conflicting principles preventing decision-making, stymying the economy or creating countervailing risks, but strong versions typically do not necessitate specific outcomes – they provide guidance based on societal values and objectives and are part of a balancing exercise.

Table 1: 5 families of principles to consider

Type	List of principles	Comments
Core (traditional) environmental principles	• Prevention • Precaution • Polluter pays • Rectification at source • Environmental integration	• All 5 are included in DEFRA consultation document and EU Withdrawal Act. • These should be amended as relevant to refer to human health as per EU versions. • Wording is unnecessarily narrow at times, e.g. regarding rectification at source. • Wording is unnecessarily weak at times, e.g. regarding precaution – should impose obligations and be forceful. • Wording should bear in mind evolution of principles and versions available internationally – alternatives exist and may be preferable.
Aarhus principles	• Access to environmental information, • Public participation in environmental decision-making • (Wide) access to justice in relation to environmental matters	• Included in the EU Withdrawal Act, but not within the DEFRA consultation document. • Obligations will continue under Aarhus Convention and they are implemented to an extent within the UK, but these would be strengthened by their inclusion in the proposed legislation also (and required by EU Withdrawal Act). • Potentially should be included also in a separate Aarhus Act, implementing the Convention as a whole.[26] • Fundamental to promoting effective participation in, deliberative governance of and enforcement of environmental law.
Cross-border cooperation principles	• International cooperation and collaboration • Avoiding transboundary harm	• Omitted. International law obligations will continue to apply, but typically weaker in effects & effective enforcement mechanisms. • Relevant to all regions (e.g. air pollution, fisheries, plant diseases) but especially for NI (border with ROI) as environment is permeable. • Should be included and also operate in conjunction with Aarhus principles to facilitate engagement by those outside UK. Look to Espoo Convention in particular – engagement should be at all levels.
General governance principles	• Proportionality • Subsidiarity (broad version, rather than simple EU version) • Effective deterrence • Good governance principles, e.g. transparency, accountability, efficiency, effectiveness, and equality.	• Omitted. Proportionality (as do those of good governance) applies generally, but useful to restate/emphasise in context – helps balance approaches/objectives. • Subsidiarity and proportionality would complement devolution arrangements – helping to guide whether UK, regions, local bodies or individuals should regulate an issue. Does the context & effectiveness require the UK to develop some common approaches/elements? • Effective deterrence simply recognises that environmental harms are not always taken seriously and that there is a need to have an appropriate sanctioning system to deter such behaviour/environmental offence. • The remaining principles are examples of good governance and should apply normally, but incorporation would ensure their application. Reference could be made to good governance as a whole if a compromise were needed to avoid cluttering the document.
Other principles to be considered	• E.g. the role of science/other sources, state of the art, alternatives/substitutes, net environmental gain, best overall environmental outcome	• Omitted. Rio Declaration, French Charte de l'Environnement, international documents, literature more generally should be considered. • Potential to identify what sources of knowledge are valued/ensure an excessively restrictive approach is not adopted. • Valuing state of the art information/technology can raise standards (proportionality will protect against unrealistic expectations). • Alternatives/substitutes included sometimes as a principle – enables consideration of broader context and alternatives in decision-making, e.g. over authorisations.

[26] Carol Day, 'Brexit and Aarhus: Key challenges for environmental governance', presentation at 3rd ELIG Environmental Law Seminar, King's Inns, Dublin, 14th July 2018.

3.2 Nature and Role of Environmental Principles

Legal principles, in contrast with rules and policies, are simultaneously binding but flexible without requiring specific outcomes – they provide direction and guidance.[27] However, adopting and maintaining the principles risks being mere fluff, unless done in such a manner as to respect their nature and facilitate an effective role.[28]

Currently, principles applicable in the UK due to EU membership play considerable roles across all areas of environmental concern, although their implementation is by no means perfect.[29] They provide significant flexibility and help address legislative gaps in relation to environmental standards, decisions and governance, thereby complementing existing rules. However, the proposal raises numerous concerns in this regard – in relation to the initial legal status of the principles, the role they are designated, their value and their scope.

3.2.1 Where will these principles will be situated and what about their legal status?

In contrast with the Secretary of State Michael Gove's comments to the Environmental Audit Committee in July,[30] environmental principles can and currently do form part of both EU and UK law. However, for a principle to operate effectively, it must be incorporated within the legal hierarchy, i.e. within legislation, constitutional documents or jurisprudence. Thus, within the EU, relevant environmental and supporting principles are found in Article 191 TFEU, Article 11 TFEU, Article 3 TEU, Article 5 TEU, legislation such as that implementing the Aarhus Convention, a range of other secondary legislation and soft law. They are also found in CJEU judgments and the precautionary principle has even been suggested as a general principle of EU law.[31] This establishes these principles as binding legal principles within the EU and the UK currently.

The proposal provides two alternatives: within the legislation and detail then to be found in a policy statement, or with their existence noted in the legislation and the list and detail to be found in the statement. Such discretion is not present within the EU Withdrawal Act (EUWA). At the very least (as now required by the EUWA) these principles should be situated in primary legislation (preferably in legislation applicable to all regions), which provides greater strength and protection to the principles as cementing them within the upper layers of the hierarchy of law. If the legislation merely refers to principles and then the policy statement expounds on these, it is too easy for these to be amended, deleted or otherwise undermined. Only naming them in the policy statement also signifies that they are of limited value.

Further, even if the principles are named within the legislation and all detail is left to the policy statement, the principles risk being watered down through weak descriptions. For instance, obligations or references to human health could be removed (if included initially), which would significantly weaken the principles. Consequently, some detail on the concepts and central requirements should also be found within the legislation and then the policy statement can be used to develop these further or provide guidance on their implementation.

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[27] Ronald Dworkin, 'The Model of Rules' (1967) 35 *The University of Chicago Law Review* 14.
[28] Mary Dobbs, 'Flexible Rationality: Legitimising the Precautionary Principle?', Presentation at the UK IVR Conference, Sheffield, November 2017.
[29] E.g. arguably the CJEU went too far in its purposive approach in expanding the definition of waste in *Case C-1/03: Van de Walle,* [2006] ECR I-1145 to include accidentally contaminated land. In contrast, Doyle noted that costs, timing issues and lack of clarity remain considerable barriers to effective implementation of the Aarhus principles, even if the applicable procedures are considered sufficient by the relevant courts: Doyle, A. (2018) Anarchical Fallacies: the Duty of the Citizen, a Complete System of Judicial Protection, Equality before the Law, Access to Justice, and the Aarhus Convention. Presentation at 3rd ELIG Environmental Law Seminar, King's Inns, Dublin, 14th July 2018.
[30] https://www.parliamentlive.tv/Event/Index/4df40b59-f1d4-4fe8-aa61-49f66c072fab accessed 30 July 2018.
[31] Case C-132/03 *Ministero della Salute v Coordinamento delle Associazioni per la Difesa dell'Ambiente e dei Diritti degli Utenti e dei Consumatori (Codacons)* [2005] ECR I-416, [35].

3.2.2 What will be their role?

Their proposed role is limited in a significant manner, as it is to be only relevant to Ministerial functions.

Although not perfect, the principles currently play significant roles. They are relevant at all stages of environmental regulation, going beyond policy formation, e.g. through teleological/purposive interpretations of the legislation. For instance, Article 6(3) of the Habitats Directive has been interpreted in light of the precautionary principle to require an appropriate assessment unless it is established beyond reasonable doubt that there will be no significant effects posed.[32] This enables the legislation to be read more flexibly, strengthening environmental protection and facilitating evolution of the law to an extent. This purposive approach is currently mandatory in the UK in relation to EU environmental law,[33] due to the CJEU judgments.[34] A similar approach can be seen in relation to the Aarhus principles,[35] whilst proportionality is seen throughout the CJEU's jurisprudence and nationally. Subsidiarity can also complement in determining where the powers should lie/who should be making the decisions, as seen regarding the allocation of powers regarding GM crops[36]

If the role of the principles is not to be severely undermined within the UK, then these principles need to be included within the proposed legislation and addressed to all parties involved in environmental regulation – whether in determining policy/law, implementing it or enforcing it. Whilst essential that they apply to Ministers and ministerial functions, they cannot be restricted to this. This will help ensure the daily use of the principles, provide them with an appropriate legal basis and protect them from legal challenge, thereby furthering effective environmental protection.

3.2.3 What value will they have?

Applying at all stages and being of a binding nature, principles (and objectives) can help form the legal basis for policies or decisions, help identify who should make the decisions, help determine decisions and be used before courts of justice in litigation. Thus, they can be seen referred to in preambles or explanatory memorandums, as well as enabling the teleological/purposive approaches outlined above. However, even if the principles are incorporated within the legislation, the wording applied may make them devoid of any real value. The legislation needs to impose veritable obligations to abide by the principles.

The proposed phrasing is that the Ministers are 'to have regard to' these principles. Whilst 'have regard to' is a common phrase to apply in the context of policies, approaches and similar 'material considerations', it is very easy for a Minister (or other parties) to indicate that the consideration was borne in mind and move swiftly on to make a decision or create a policy or law that appears to fly in the face of that same consideration. The phrasing should be adapted to impose an obligation to base environmental policy, law and decision-making on the relevant principles. This will also have a knock-on effect of strengthening obligations to provide reasons where it is not clear that the eventual decision was based on the relevant principles.

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[32] Case C-127/02 *Landelijke Vereniging totBehoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2005] ECR I-7405 (Waddenzee), para 44. This effectively reversed the burden of proof at this stage.

[33] *Champion, R (on the application of) v North Norfolk District Council & Anor [*2015] UKSC 52 (22 July 2015).

[34] C-6/04 *Commission v UK* [2005] ECR I-09017.

[35] E.g. Case 664/15 *Protect Natur-, Arten- und Landschaftschutz Umweltorganisation,* ECLI:EU:C:2017:987; C-263/08, *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd*, [2009] I-09967; C-240/09 *Lesoochranárske zoskupenie v Ministerstvo životného prostredia Slovenskej republiky,* ECLI:EU:C:2011:125; and C-243/15 *Lesoochranárske zoskupenie VLK v Obvodný úrad Trenčín*, ECLI:EU:C:2016:838.

[36] Dobbs, (n25); Annagret Engel & Ludivine Petetin, 'International obligations and devolved powers – ploughing through competences and GM crops' (2018) 20:1 *Environmental Law Review* 16-31.

3.2.4 What will be their scope?

It is worth noting once more briefly that the DEFRA document relates strictly to England for the meantime. The UK is signed up to international agreements that oblige it as a whole to comply with most of these principles in some form or other – an obligation that extends past Brexit. It also has indicated that it aims for a 'green Brexit' and has proposed a non-regression principle. Each of the jurisdictions within the UK is bound similarly and has indicated their intention in different fora to support high levels of protection of the environment following Brexit (except, notably NI). An agreed common framework across the whole of the UK that outlines and commits to at least the abovementioned principles (and objectives below) in a fashion that is binding across the UK would help support the environment and also reflect the principles of subsidiarity and proportionality.
As the eventual document (preferably mainly to be present in an Act of Parliament) should apply across the UK, but might at least apply in Northern Ireland due to the current lack of a functioning Assembly and addresses environmental concerns, it is essential that the devolved administrations and their populations be actively engaged in the creation and adoption of such a framework.

3.3 Complementary Content

Principles incorporated within legislation should be complemented by various objectives for instance regarding a high level of protection of the environment, sustainable development, non-regression and environmental improvement. These will provide weight and guidance for the principles, thereby prioritising the environment and helping determine the balance between principles. Sustainable development could be aided by reference to the UN Sustainable Development Goals. An objective of environmental improvement would reflect a forward-looking approach and also help to address the long term environmental damage incurred. Protection could have human health included also.

Although not traditionally a core environmental principle, non-regression has come to the fore in discussions on Brexit. It has now been included in para 118 of the White Paper, as a proposed commitment for both the EU and the UK. Currently environmental protection is not perfect, but the aim would be to avoid further degradation as a bare minimum and it would operate as a backstop for the environment. We have seen this concept in the area of nature conservation and water quality. Whilst this is in the context of 'open and fair competition' in the White Paper and environmental standards have the potential to be a central part of trade negotiations, the UK should be very cautious not to risk a race to the bottom or undermining the environment for the sake of short-term gains or expediency.

Rights (human and nature) should also be included within any such legislation. e.g. rights to a clean and healthy environment, but also related to due process and access to justice thereby strengthening governance further. For instance, those in Article 47 of the EU Fundamental Charter of Human Rights regarding a right to an effective remedy and fair trial could be applied in the context of environmental issues. Nature rights could encompass rights not to be harmed or killed, right to welfare, right to standing and might be achieved in part through recognising animal sentience.

Corresponding duties are essential to the effectiveness of any principles, rights or objectives. This is recognised to an extent in the proposal and EUWA through imposing a limited duty on the Minister(s). However, this should be extended and strengthened if the other precepts are to have any force. In that case, duties should be imposed on public authorities and all individuals. Therefore, all actors must owe a duty at least to strive to achieve the objectives and then abide by the principles and respect the rights therein when developing, implementing or enforcing any relevant law/policy.

Table 2: Environmental Objectives, Rights and Duties

Type	Examples	Comments
Environmental objectives	• Sustainable development • High level of protection • Non-regression • Improvement of the environment	• Sustainable development is included in DEFRA consultation document and EU Withdrawal Act. Reference to the Sustainable Development Goals would help give it substance and clarity. • High level of protection is reflected in DEFRA consultation document to a limited extent and more obviously in the 25-year plan. This should be expressly adopted in the proposed legislation. • Reference to human health could (and should) be included in referring to the high level of protection. • Reference could (and should) be included to improvement alongside protection (being more proactive). • Non-regression would offer a backstop for the environment – currently suggested for both EU and UK in White Paper, this should be included in domestic legislation irrespective of any agreement. • Environmental improvement should be included as an objective – this would be more ambitious but is also needed to combat centuries of environmental degradation.
Rights	• Nature rights, including recognising animal sentience, animal welfare, standing before tribunals etc; • Human rights to clean and healthy environment, etc • Right of future generations, beyond simply sustainable development • Rights regarding due process, fair trial and effective justice – link to Aarhus and good governance principles.	• Omitted. Rio Declaration, French Charte de l'Environnement, EU Charter of Fundamental Rights, international documents, literature more generally should be considered. • Consideration of rights for animals and rights to clean and healthy environment would strengthen protection. • Facilitate public participation, standing before the courts and substantive claims depending on the rights. • Various authors and even AG Sharpston in Protect Natur have raised the possibility of standing for nature, whilst acknowledging that it is not provided for by the law yet.
Duties	Examples: • Duty to strive to achieve the relevant environmental objectives; • Duty to undertake tasks in light of all relevant environmental principles/found all actions on such principles' • Duty to respect all relevant rights; • (duties should refer and correspond to the principles, rights and objectives incorporated within the legislation.	• These duties should correspond in some fashion to the principles, rights and objectives included in any resulting legislation. • Proposal refers to a form of obligation on the Minister(s). Use of the phrase 'have regard to' – consequently very limited in force and scope; • No duties owed by any agencies or other public authorities (broadly understood), which is essential; • No duties owed by any individuals/companies; • Duties help give force, weight and teeth to environmental law. The French Environmental Charter has some initial duties that could be considered and built upon.

3.4 Conclusions on principles et al

Environmental principles can play numerous essential roles in environmental governance. In order to ensure effective environmental protection, a broad range of non-exhaustive principles should be adopted here, encompassing those traditionally considered as the core environmental principles, governance principles, Aarhus principles, Espoo principles and principles addressing cross-border issues at a minimum. These should be incorporated with sufficient detail and in such a fashion as to impose proactive obligations on all concerned to avail of these principles, whilst still maintaining some flexibility. They should neither be restricted to Ministers, nor weakened through their formulation – instead all environmental law and policy in the UK should be based upon the above principles and objectives and a duty must be imposed upon all public authorities (broadly understood) to use these in their activities. They should be further strengthened through inclusion of appropriate objectives, rights and further duties.

4. COMPLIANCE & ACCOUNTABILITY

4.1 EU Compliance and Accountability Mechanisms

Central to the EU legal system are the enforcement mechanisms which ensure compliance with EU obligations and which hold member states to account where obligations have been breached. Although these mechanisms have been characterised as slow-moving and imperfect in nature and levels of success,[37] they have played a crucial role in ensuring that EU environmental rules are taken seriously by member states. The three key accountability functions that the EU has fulfilled to date have been characterised as 'the big sticks of Commission-plus-Court of Justice enforcement mechanisms and fines, but also a more subtle architecture of transparency and political accountability, as well as a series of EU legal principles that render judicial review before domestic courts more effective'.[38]

Dependent on the nature of the final Brexit deal, these functions may be lost in part, or in their entirety.[39] Future environmental governance in the UK will therefore require principles, processes and structures to replicate or replace these important fail-safes, and to ensure environmental decision-making is accountable and environmental rules are effectively enforced. The problematic history of environmental governance in Northern Ireland demonstrates not only the power and influence of the EU's enforcement architecture, but also some of its core weaknesses. There are important lessons that can be learned from this experience in terms of:

- Informing the design of any future environmental governance structures for Northern Ireland and the UK as a whole, regardless of the extent to which EU enforcement mechanisms continue to play a role in protecting the environment post-Brexit;
- Informing the design of any new all-island environmental governance mechanisms which may emerge; and
- Informing the reform of enforcement and accountability mechanisms at EU-level.

4.2 Environmental Governance in Northern Ireland

Much of the criticism of environmental governance in Northern Ireland has been directed towards issues associated with ensuring compliance with environmental law and a perceived lack of accountability relating to environmental decision-making.[40] Declining environmental quality and scandals involving environmental criminality[41] have led to a sense that the rule of environmental law has not been effectively enforced and that the structural arrangements for delivering this core regulatory function are not fit for purpose.[42] Key issues relate to:

- The fact that the Northern Ireland Environment Agency remains within a central government department, leading to substantial accountability gaps and a risk of political interference in regulatory decision-making;

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[37] M. Hedemann-Robinson, Enforcement of European Union Environmental Law (Routledge: London, 2015); Robert Lee, 'Always Keep a Hold of Nurse: British Environmental Law and Exit from the European Union' (2017) 29 *Journal of Environmental Law* 155.

[38] Maria Lee, 'Accountability for Environmental Standards after Brexit' (2017) *Environmental Law Review* 19(2) 89-92.

[39] UKELA, Brexit and Environmental Law Enforcement and Political Accountability Issues (2018) <https://www.ukela.org/content/doclib/317.pdf> accessed 20 July 2018.

[40] Brennan et al (n1).

[41] Ciara Brennan, 'The Enforcement of Waste Regulation in Northern Ireland: Deterrence, Dumping and the Dynamics of Devolution' (2016) *Journal of Environmental Law* (28)3, 471-496.

[42] Richard Macrory, *Transparency and Trust: Reshaping Environmental Governance in Northern Ireland* (2004) UCL Press, London and Tom Burke, Gordon Bell, and Sharon Turner, Foundations for the Future: The Review of Environmental Governance (2007) <http://www.ukela.org/content/doclib/135.pdf> accessed 20 July 2018.

- The highly-criticised performance of the NIEA in ensuring proper implementation of environmental law;
- Problems with prosecution of breaches of environmental law by both the NIEA and the Public Prosecution Service (PPS);
- The fact that sentences imposed in environmental prosecutions in most cases do not provide a deterrent to non-compliance with environmental law.

While the devolved government in NI has seemed impervious to the background political pressure exerted via EU membership to deliver effective environmental protection, the accountability and enforcement mechanisms designed to ensure EU environmental law is transposed and EU standards are implemented throughout member states have played an important coercive role.[43] Importantly, the European Commission can instigate infraction proceedings for not only failure to transpose Directives, but in situations where they have not been implemented incorrectly or applied properly in practice. The CJEU then has the power to impose substantial fines, and also daily fines until compliance has been achieved by the member state(s) in question.[44] Central to the EU's influence in relation to environmental governance in Northern Ireland has been the fact that since the Northern Ireland Act 1998 the devolved government rather than Westminster is liable for the potentially crippling cost of any financial sanctions imposed for breaches of its EU law obligations.[45]

4.3 The Spectre of Infraction Fines

Although the threat of these sanctions has proven crucial exerting pressure on the NI government, its legislators, and regulators to transpose and attempt to implement EU environmental rules, success in many cases has been limited. [46] The extent to which NI has breached its EU environmental obligations was revealed prior to the collapse of the devolved government, when the Committee for Agriculture, Environment And Rural Affairs were informed of on-going infraction cases being brought by the European Commission in respect of breaches of the Water Framework Directive, Waste Framework Directive, Habitats Directive, Strategic Environmental Assessment Directive, Environmental Impact Assessment Directive and Urban Waste Water Treatment Directive.[47] In addition, there have also been concerns raised in the Northern Ireland Assembly about Northern Ireland potentially being in breach of the Nitrates Directive, Safe Storage of Metallic Mercury Wastes Directive, Birds Directive, and Marine Strategy Framework Directive.[48]

The level of non-compliance even in the face of potentially severe economic consequences is telling. If the general political pressure to meet environmental standards coupled with the threat of formal EU infraction proceedings has not been sufficient to coerce the devolved government in NI into compliance with large swathes of EU environmental law, then several core questions must be considered in any discussion of future governance arrangements:

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[43] Brian Jack, 'Environmental Law in Northern Ireland' in Stephen McKay and Michael Murray, *Planning Law and Practice in Northern Ireland* (Routledge, 2017), 154-155.
[44] E.g. in Case C-196/13 Commission v Italy, Italy was fined €40 million for failing to tackle the dumping of illegal waste. The court also said it would impose further penalties of €42.8 million for every six months Italy failed to clean up their legacy of hundreds of waste dumps.
[45] Office of the Deputy Prime Minister, Memorandum of Understanding and Supplementary Agreements: Between the United Kingdom Government Scottish Ministers and the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee (Cm 5420, 2001) para B4.25.
[46] Sharon Turner, 'Transforming Environmental Governance in Northern Ireland: Part One: The Process of Policy Renewal' (2006a) 18 JEL 55.
[47] Official Report: Minutes of Evidence Committee for Agriculture, Environment and Rural Affairs, meeting on Thursday, 16 June 2016, <http://aims.niassembly.gov.uk/officialreport/minutesofevidencereport.aspx?AgendaId=18395&eveID=10674> accessed 20 July 2018.
[48] Brennan et al (n 1), 141.

- Have deficiencies in the EU enforcement processes rendered them ineffective in practice? Are they, for example, too slow to present a meaningful deterrent? Is this experience replicated elsewhere and should these processes and structures be reformed at an EU level?[49]
- Is the NI devolved government willing or indeed able to take the implementation and enforcement of environmental law seriously, or will it perpetually be de-prioritised in favour of constitutional/political questions, economic imperatives and security concerns?[50] If so then…
- Would a UK-wide approach to ensuring effective enforcement of environmental law enhance the quality of environmental protection in NI, or does governing the environment in NI (or indeed any of the devolved jurisdictions) pose distinct challenges (such as the impact of a land border in NI) which would render UK-wide environmental enforcement and accountability structures inappropriate?[51]
- How will Brexit affect cross-border cooperation in relation to environmental governance, especially given the explicit provision for cross-border environmental governance enshrined in Strand 2 of the Good Friday Agreement?[52] Would (as will be considered later in this paper) an all-island approach to enforcement and accountability aspects of environmental governance protect the environment both north and south of the border to a greater degree?[53]
- Must the enhancement of environmental accountability and enforcement mechanisms in Northern Ireland wait until Brexit is resolved?

4.4 Filling the Accountability Gap

Questions about how to fill the compliance and accountability gap that will emerge across all parts of the UK post-Brexit are currently being considered by the UK government, the Scottish and Welsh devolved governments, NGOs and academics.[54] However, the present document represents the only contribution to the debate so far that deals explicitly with Northern Ireland. Continued uncertainty regarding the nature of the UK's exit deal currently means that many of these discussions are necessarily speculative in nature, however proposals and suggestions which have emerged to date have centred around two core ideas:

(i) Creation of an 'Independent Environmental Watchdog'

In November 2017, Michael Gove (UK Secretary of State for the Environment, Food and Rural Affairs) committed to establishing an independent watchdog in response to concerns that Brexit would lead to the lowering of environmental standards and 'bonfire of anti-pollution protections'.[55] The proposal was met with cautious optimism by NGOs, who had previously viewed Gove's appointment as Secretary of State as akin to placing a 'fox in charge of hen house'.[56] The Commitment to establishing the new watchdog was then enshrined in the European Union (Withdrawal) Act which received Royal Assent in June 2018. This means that the UK's Secretary of State for Environment, Food and Rural Affairs is now under an obligation to publish draft legislation to make provision for the establishment of a public authority with functions for taking proportionate enforcement action (including legal proceedings if

[49] Ludwig Krämer, Enforcement of Environmental Law (2016) Edward Elgar.
[50] Sharon Turner and Ciara Brennan, 'Modernising Environmental Regulation in Northern Ireland: A Case Study in Devolved Decision Making' (2012) 63 NILQ 509.
[51] Brennan et al (n1),
[52] Good Friday (Belfast) Agreement 1998, Strand 2 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf> accessed 20 July 2018.
[53] Brennan et al (n1), 146.
[54] E.g. UKELA (n 39).
[55] https://www.independent.co.uk/news/uk/politics/michael-gove-environment-secretary-green-brexit-andrew-marr-show-european-union-a8050626.html
[56] Matthew Taylor, Michael Gove as environment secretary is 'fox in charge of hen house' (The Independent, 12 June 2017) <https://www.theguardian.com/politics/2017/jun/12/michael-gove-entirely-unfit-to-be-environment-secretary-says-greens> accessed 20 July 2018.

necessary) where the authority considers that a minister of the Crown is not complying with that environmental law.

The May 2018 consultation document, as well as Gove's subsequent assurances to NGOs and other bodies, have billed this new watchdog as central to the mission of delivering a 'Green Brexit', and with that in mind the Government intends that the central roles of the new watchdog will be to:

- Provide independent scrutiny/advice relating to environmental law and policy;
- Respond to complaints surrounding the delivery/implementation of environmental law; and
- Hold Government publicly accountable where its implementation of environmental law has failed, exercising enforcement powers where necessary.

Ultimately, the Government explicitly intends that this authority will replace the functions of the European Commission and European Court of Justice. However, initial optimism amongst NGOs was punctured when details of the government's plans were published in the consultation document in May 2018, and the plans have since been the subject of significant criticism. Key problems include:

- *Limited to an Advisory Role:* The consultation document makes it clear that the government intend the bulk of the new watchdog's role will be advisory in nature – which falls far short of the promises to replace the EU enforcement mechanisms with a body 'with real bite' in Gove's own words.[57]
- *Insufficient enforcement powers:* One of the most important criticisms of the proposals relates to the fact that the body will suffer from a serious lack of formal enforcement powers (specifically the lack of specific provision for fines[58]) and that the proposed new environmental watchdog will not have the power to take the government to court. Again, this falls far short of the current EU powers, particularly the ability of the European Commission to take legal action against non-compliant member states before the European Court of Justice.[59] In Northern Ireland, there is a need for careful consideration of the nature of sanctions (or threat of sanctions) which have worked. For example, the link between single farm payments and the need to comply with environmental law under the current EU agri-environment mechanisms could provide a model for connecting grants and incentives to positive implementation of environmental law, as well as facilitating reductions in these in cases of non-compliance. While this approach has worked on a regulatory level, more exploration of its potential at a governance level could be undertaken. Enforcement powers should also extend to enhancing the accountability of individual decision-makers where relevant and appropriate.
- *Scope*: Despite UK Government assurances to the contrary, it also remains unclear how the current proposals might apply to the devolved governments.[60] The duty on the UK Secretary of State for Environment Food and Rural Affairs to publish a draft Bill and the on-going consultation on the proposals applies in relation to England, and to reserved matters across the rest of the UK. In the absence of a devolved government and with no apparent consideration of the specific challenges experienced in Northern Ireland (in contrast to on-going work on these issues in Scotland and Wales).[61] It is thus uncertain whether there has been any meaningful political consideration of whether the proposed watchdog will be a

[57] https://www.independent.co.uk/news/uk/politics/michael-gove-environment-secretary-green-brexit-andrew-marr-show-european-union-a8050626.html
[58] Andy Jordan and Brendan Moore, (12 July 2018) 'Could fines be the green watchdog's sharpest teeth?' <https://www.brexitenvironment.co.uk/2018/07/12/fines-green-watchdogs-sharpest-teeth/> accessed 20 July 2018.
[59] Ole Pedersen, 'A new post-Brexit environmental watchdog: The importance of context' https://www.brexitenvironment.co.uk/2018/07/10/new-post-brexit-environmental-watchdog-importance-context/ accessed 30 July.
[60] E.g. Reid (n11).
[61] E.g. https://www.ukela.org/blog/Brexit-Task-Force/Wales-Brexit-and-Environmental-Law-our-latest-report

suitable replacement for the EU enforcement and accountability mechanisms in Northern Ireland post-Brexit. In the absence of a devolved government this is very problematic.

- *Incorrect legislative vehicle*: NGOs have expressed concern that the Withdrawal Act would have been a more appropriate vehicle to ensure protection.
- *Risk of Creating Confusion*: There is also the possibility that adding another domestic accountability body to pre-existing mechanisms (e.g. parliamentary scrutiny bodies, the courts, regulators etc) will create significant confusion.
- *Lack of real 'independence'*: The nature and degree of independence of any new environmental watchdog body must be clarified. Concerns have been expressed about the erosion of the independence of existing environmental bodies such as English Nature and the Environment Agency in England. Meanwhile, criticism of Northern Ireland's current arrangements for delivering environmental regulation have coalesced around the lack of an independent environmental regulator and the problems that this arrangement has given rise to.[62] These considerations must be taken into account in the design of any future accountability mechanisms to ensure credibility.

(ii) The existing process of Judicial Review can play an enhanced role in holding government decision-makers to account with regards to environmental decision-making

The UK Government's consultation document highlights the potential of judicial review as the main existing domestic legal mechanism that enables decisions and actions (or omissions) of public authorities to be challenged through the courts. Its primary function is to allow challenges to the way a decision has been made, rather than to the outcome of the decision-making process. A number of problems with relying on the ordinary judicial review process to replace the EU accountability mechanisms have been highlighted by commentators.

- *Cost*: The prohibitive costs associated with bringing a judicial review are potentially in breach of the Aarhus Convention (of which the UK will remain a signatory post-Brexit) and exist in sharp contrast to the citizens complaint procedure developed by the European Commission which allow anyone to alert the Commission to a possible infringement free of charge.[63] However, in 2017, the High Court instructed the UK government to change new rules for environmental court cases to protect those taking legal action – this may provide an avenue through which effective cost-capping could be delivered.[64]
- *Suitability*: UKELA's 2018 report also considers judicial review to be 'ill-suited to resolving issues by discussion and negotiation which has been a valuable feature of the Commission's investigatory functions'.[65]
- *Standing*: It has been suggested that a key role of a new watchdog body could be to bring judicial proceedings against the government on behalf of the public.[66] However, current proposals do not elaborate on whether the proposed watchdog would have legal standing to undertake this function, and concern has been expressed that by limiting the role of the watchdog in this way an unfair onus will be placed on NGOs and individuals to bring judicial review of environmental decision making.[67] This process is already occurring in Northern Ireland, where NGOs (e.g. Friends of the Earth) are essentially evolving to take over the role of an environmental watchdog in its absence by using judicial review to challenge environmentally harmful activities. There are undoubtedly lessons to be

[62] Turner and Brennan (n 50).
[63] <https://ec.europa.eu/info/about-european-commission/contact/problems-and-complaints/how-make-complaint-eu-level/submit-complaint_en> accessed 20 July 2018.
[64] The Royal Society for the Protection of Birds Friends of the Earth Ltd & Anor v Secretary of State for Justice the Lord Chancellor [2017] EWHC 2309 (Admin) (15 September 2017).
[65] UKELA (n 39).
[66] Pedersen (n 59).
[67] Carol Day, Emperor Gove's New Clothes (May 16 2018) <https://markavery.info/2018/05/16/guest-blog-by-carol-day/> accessed 20 July 2018.

learned from the NGO sector experience in terms of the advantages and drawbacks of this potential accountability avenue. There may be considerable further issues in relation to parties from outside the UK and whether they would be able to demonstrate standing.

- *Outcomes*: In addition, recent research has found that the courts find against claimants challenging administrative environmental law decisions by a higher margin than in other areas of administrative law, albeit with variations dependent on the court and the public authority being challenged.[68] This is an issue which should be borne in mind when considering the degree to which judicial review can 'plug' the accountability gap in the environmental context.
- *Political nature of environmental law*: One reason provided for judicial reluctance to interfere' in environmental decision making processes is 'the dynamics between the 'political' nature of environmental law and the legal focus of judicial review'.[69] In the EU system, CJEU preliminary references were useful because the courts was not concerned with whether their judgments were considered contrary to government policy or not, and they were obliged to answer the specific questions referred to them. There is a risk post-Brexit that the domestic courts may avoid interference in environmental decision-making because it is considered to be too political in nature. This may be a particular problem in relation to controversial NI issues.

4.5 Accountability for Environmental Decision-Making is Urgently Required

In 2018, proposing concrete suggestions for reform of environmental governance in NI or the UK as a whole given the unprecedented levels of political uncertainty at regional, national and local levels is challenging. This is particularly so considering the silence relating to Northern Ireland's environment in the proposed plans published by the UK government to date (including a lack of sufficient detail in the latest government White Paper)[70] and the absence of a devolved government. However, the persistent problems with environmental governance in NI and the continued environmental degradation mean there is an urgent need for action to be taken or at the very least for clear plans to be made. Given the extreme dysfunction that has existed to date in terms of ensuring environmental law is implemented effectively in Northern Ireland, there is a manifest need for clarity relating to the design of accountability and enforcement mechanisms post-Brexit. Enhancement of the currently sub-standard levels of compliance with the rule of environmental law in Northern Ireland should not be postponed until after Brexit negotiations are resolved and preparations should be undertaken for a number of potential outcomes.

While any proposals will ultimately depend on the nature of the UK's final exit deal, as a first step the UK government (in the absence of a restored devolved government) should formally consider establishing an inquiry that focuses on the environmental governance in NI. This could be undertaken by the House of Commons Select Committee on Environment, Food and Rural Affairs, include questions relating to the Irish border and ideally run in parallel with a similar inquiry by the Republic of Ireland Oireachtas Committee on Communications, Climate Action and Environment. This would demonstrate at least some level of political engagement with an issue crucial to preserving Northern Ireland's environment in the future.

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[68] Ole Pedersen, 'A Study of Administrative Environmental Decision-Making Before the Courts' (February 1, 2018). *Journal of Environmental Law*, Forthcoming.

[69] Ibid.

[70] The future relationship between the United Kingdom and the European Union <https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union> accessed 20 July 2018; Charlotte Burns, 'The Brexit White Paper: What does it mean for the environment?' (17 July 2018) <https://www.brexitenvironment.co.uk/2018/07/17/brexit-white-paper-environment/> accessed 20 July 2018.

5. CROSS-BORDER, ALL-ISLAND AND INTERNATIONAL CONSIDERATIONS

5.1 Northern Ireland, Ireland and the Border

The UK's membership of the European Union has meant that while each of its constituent jurisdictions enjoys devolved powers in respect of environmental matters, the extent of potential deviation between them was limited. On departing the EU, the potential for divergence of these devolved administrations both in terms of creation and implementation of environmental law emerges as a potential issue. Although it could be argued that similar potential divergence issues face Scotland, England and Wales, there are distinctive issues associated with the Irish border and the island of Ireland as a whole that make NI's situation unique.

The outcome of the Brexit negotiations, and particularly decisions about the border, all-island economy and extent to which regulatory alignment occurs on the island of Ireland will be critical in terms of shaping the relationship between NI, the other constituent parts of the UK and the ROI. This will also extend to shaping environmental governance across the island and may bring new opportunities but also introduce new threats to the environment. In order to ensure environmental standards do not diminish post-Brexit, it is essential that the features of Northern Ireland that have created a challenging environmental governance landscape to date are fully considered in any future governance reforms. These features include both political and historical considerations, as well as physical and environmental factors.

5.2 Political and Historical Considerations

- The recent historical political context and conflict: The deeply regrettable absence of a Northern Ireland Executive at this time leaves a considerably policy and governance gap at this critical juncture. Brexit has also served to heighten political tension and divisions. Effective co-operation on the key challenges of maintaining the peace, governing NI, and supporting the needs of people and business and the environment, and addressing Brexit have been to a large extent paralysed. A further consequence of this is that urgently needed processes of environmental governance reform in Northern Ireland have stagnated,[71] and that Northern Ireland is without a voice in shaping future governance arrangements. This is particularly problematic as Northern Ireland is arguably the part of the UK most in need of systemic reform of its existing environmental governance structures.

- The Good Friday Agreement/Belfast Agreement, (GFA/BA): The GFA/BA provides for a framework of co-operation across its multiple strands – and allows the pace of that co-operation to be dictated by the relative appetites on both sides and the prevailing sensitivities at any particular time. The mechanisms it provides for could potentially be used to promote a level of co-operation on an environmental governance framework that makes sense for the island of Ireland and its economic links to the UK and the EU; in light of the missing NI Executive from the North South Strand 2 mechanism, the Strand 3 mechanisms such as the British Irish Intergovernmental Conference could be particularly relevant.[72]

- Maintaining a 'non-border' – the NI 'red line': The jurisdictional land border which will become manifest between the UK and the EU on the island of Ireland, between NI and ROI has greater potential for regulatory divergence than elsewhere in the UK. It is also understandably feared that the manifestation of a physical border on the island of Ireland would draw tensions to the fore, and

[71] Just prior to the collapse of the devolved government there were renewed political attempts to reintroduce proposals for an independent EPA for Northern Ireland.

[72] https://www.gov.uk/government/news/joint-communique-of-the-british-irish-intergovernmental-conference-25-july-2018 accessed 30 July 2018.

that it would also serve to compromise the social and economic integrations across the island which underpin the current fragile peace. In addition, the practicalities of managing such a border are self-evident. The potential for divergences and poor governance to further stimulate unlawful operations is a major concern. From an environmental perspective, issues with waste trafficking are of particular concern and the associated impacts not just from the associated immediate environmental pollution – but the potential issues with the transport of pathogens and invasive alien species. Therefore the political focus must now be on elements which have made sense in the recent past for the island of Ireland with a view to preserving them, and avoiding avoidable divergences which will only serve to compromise co-operation and fuel unlawful activities.

- The Draft Article 50 Withdrawal Agreement, in particular the Northern Ireland Protocol:[73] This protocol effectively specifies the backstop arrangement – further to the 8th December Joint Report.[74] However, as is well understood fundamental aspects of this remain the subject of controversy and on-going negotiations, despite the earlier agreement on the December 2017 document. These matters have major implications for environmental governance, with key requirements specified within the Protocol,[75] such as "Common regulatory area" in Article 3, the extensive reliance proposed for wider environmental considerations on the GFA/BA in Article 8, the more detailed specifications in relation to phytosanitary matters, the proposed Joint Committee and the overall effect.

- The jurisdictional disputes over the Loughs: The sensitive jurisdictional dispute between the UK and ROI over the Loughs along the Irish border might prove an important testing ground to arrive at a non-partisan all-island governance model including a regulatory dimension which is compatible with, and non-regressive in respect of, EU requirements, and provides for at least as high a standard as the UK into the future. Equally such jurisdictional disputes and the increasing rhetoric from both sides in relation to the jurisdictional dispute serve to highlight how important it will be that an accommodation is realised which works for all, and compromises none, and ensures the widest public interest throughout the island is respected.

5.3 Physical and Environmental Considerations

- While the exact effect of factors such as continental drift and the last ice age in forming the island of Ireland's single biogeographic identity are the subject of on-going scientific debate, there is no dispute that it is a unique and single biogeographic unit. This has created a unique situation from the point of view of landscape, and the presence of and evolution of the habitats and species on the island and the other localised factors influencing them.

- The biogeographic context for the Marine environment is admittedly more complex – and we note in this regard some of the work done by the JNCC in considering such matters in the definition of Marine Protected Areas.[76] Clearly the other international conventions such as OSPAR[77] to which both ROI, the UK and the EU are party will be important for co-operation on such matters and in

[73] https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf accessed 31 July 2018.
[74] Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf accessed 30 July 2018.
[75] https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf accessed 31 July 2018.
[76] JNCC Report No: 496 A review of the use of biogeography and different biogeographic scales in MPA network assessment Susan Gubbay April 2014, ISSN 0963 8901 http://jncc.defra.gov.uk/pdf/Report496_web.pdf accessed 30 July 2018.
[77] https://www.ospar.org/convention accessed 30 July 2018.

particular relation to pollution as will the UNECE Convention on Environmental Impact Assessment in a transboundary context, (The Espoo Convention) which is dealt with further below.

- Efforts to conserve habitats or species or control invasive alien species or biosecurity are self-evidently best managed co-operatively and at an all-island level, and to exploit the opportunities for protection consequent on the isolation afforded by its island nature. In the absence of such intense co-operation at all levels of governance on such matters, the positive investments and actions of one jurisdiction on the island could be undermined and setback if not complemented appropriately by those in the other jurisdiction.

  Given the island nature of Ireland it presents important opportunities to protect what is unique to the island. In practical terms, in particular those habitats and species which pervade the border area, the protected areas which effectively span the border, and the river basins which traverse it and the coastal regions which encompass them can only be effectively be conserved and protected together.[78] This is also necessary to effectively uphold international obligations under various environmental conventions to which NI (through the UK) and ROI are party to – such as the Bern Convention, Convention on Biological Diversity etc.

  Such consistency is not just in terms of specific conservation initiatives, but on a more general front as outlined in the submission made to the House of Lords Energy and Environment Sub-Committee on Brexit: Plant and Animal Biosecurity and Invasive Alien Species by the Environmental Law Implementation Group, ELIG at the Irish Environmental Network[79]. The importance of Ireland having been treated as single epidemiological unit has been highlighted not just in that submission, but also acknowledged in a number of expert submissions made to the committee from bodies such as the British Veterinary Association[80], and it is a fundamental policy plank of the All Island Animal Health and Welfare Strategy[81]. It was also explicitly highlighted in the NI DAERA's submission to the inquiry in May 2018.[82]

5.3 Drivers for an all-island Environmental Governance Framework

Although environmental governance in Northern Ireland has been the subject of significant criticism, it should be equally noted that the compliance record of ROI with its EU environmental law obligations[83] cannot be characterised as optimal. For example, as of July 27th 2018, the ROI has failed to transpose one of the most fundamental pieces of Environmental legislation typically referred to as the Environmental Impact Assessment Directive as amended in 2014[84] and which was due to have been transposed by May 17th 2017 and is now over one year late. Additionally, the extent to which the ROI's Environmental Protection Agency, EPA can exercise independent regulatory oversight is also

[78] Further specification of River Basins and Protected sites in a cross-border context in Northern Ireland Environment Link and Environmental Pillar submission of 1 June 2017 to the Joint Committee on the Implementation of the Good Friday Agreement, in the Oireachtas, http://environmentalpillar.ie/wp/wp-content/uploads/2017/06/EP-NIEL-Submission-to-Dail-GFA-Committee-1-June-2017-Final.pdf accessed 30 July 2018.
[79] http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-energy-and-environment-subcommittee/brexit-plant-and-animal-biosecurity/written/86370.pdf accessed 30 July 2018.
[80] http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-energy-and-environment-subcommittee/brexit-plant-and-animal-biosecurity/written/81408.pdf accessed 30 July 2018.
[81] https://www.agriculture.gov.ie/media/migration/animalhealthwelfare/allislandanimalhealthandwelfarestrategy/All%20Island%20Animal%20Health%20and%20Welfare%20Strategy%20Final.pdf accessed 30 July 2018.
[82] http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-energy-and-environment-subcommittee/brexit-plant-and-animal-biosecurity/written/84124.pdf accessed 31 July 2018.
[83] http://ec.europa.eu/environment/legal/law/statistics.htm accessed 31 July 2018.
[84] Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, [2014] OJ L124/1.

debatable, given the highly fragmented consent system and the extent of Local Government and Ministerial Consents provided for therein over which the EPA has no effective role.

An all-island governance model which holds both Governments to account and which operates in a manner somewhat but not identically similar to the UNECE compliance mechanisms for the Aarhus Convention may provide one option. Also importantly it could focus on the addressing the legacy issues arising from the extensive non-compliance, environmental pollution and degradation which have occurred on both sides of the border.

In the absence of such an externalised authority there is little prospect for appropriate resolution and reparation with increased risks for human health particularly from contamination of water sources. Given the multiplicity of factors identified in past analysis, including the decades of failures to address the issues at sources and the specific environmental issues which have resulted, and the limited interest and priority on such matters from the main political parties concerned – such an external body seems to be essential and for it to be afforded substantial powers to direct action be undertaken.

5.5 International Obligations

A final and further factor of concern which must be considered is the extent to which the UK has observed its international consultation obligations under the UNECE Conventions. This is not limited to just the Aarhus Convention, but also includes the Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention). This is a key concern particularly in the context of the experiences with the development of the UK's new nuclear power programme, and this has been the subject of formal findings of non-compliance[85] by the Espoo Implementation Committee and the Aarhus Convention Compliance Committee[86].

While many critiques can quite properly be levelled at the UK's DEFRA governance proposals, the absence of the international accountability dimension is perhaps its most significant omission. There is no meaningful reference to the Espoo Convention, nor is there any effective mechanism to provide oversight of the application of derogations in any manner consistent with the role currently exercised by the EU Commission. This could have major implications for plants operating under new national regulations arising from the Industrial Emissions Directive, and derogations under the Water Framework Directive and Habitats Directive Art 6(4) etc. with major transnational boundary implications.

This has relevance not just in terms of the potential concern identified at the introduction of this document that in the absence of an NI Executive the DEFRA proposals with all its deficiencies might be imported as it were for NI. But also, and equally importantly for NI is its ability to govern and protect its environment in the context of decisions elsewhere in the UK impacting on its environment, such as but not limited to air pollution, climate change, marine pollution, and nuclear. Thus, what avenues of input and recourse NI will have under the DEFRA proposals to decisions which impact the environment in NI is of critical importance.

In particular, the marine environment presents the potential to carry pollution, and is particularly difficult to manage, and in that context if is important to note the UK's nuclear activity extends right up to the 12 mile limit from the island of Ireland. In this context the implications of the UK's withdrawal from the EURATOM treaty will also warrant particular consideration.

[85] https://www.unece.org/fileadmin/DAM/env/documents/2016/EIA/IC/REPORT_ENG_ece.mp.eia.ic.2016.2_e.pdf accessed 31 July 2018.
[86] https://www.unece.org/fileadmin/DAM/env/pp/compliance/CC-58/ece.mp.pp.c.1.2017.14.e.pdf accessed 31 July 2018.

6. CONCLUSIONS

This is a pivotal time for environmental governance in Northern Ireland, as well as for the UK as a whole and the ROI. Problematic as environmental governance is currently, post Brexit considerable gaps may appear and the suggestions to-date, including DEFRA's proposals, will do little to resolve these. There has been a large degree of rhetoric, but less substance and binding commitments when it comes to the environment post Brexit in the UK.

Common frameworks are essential to environmental protection and need to be carefully formulated and developed by all 4 jurisdictions in cooperation with each other. Yet, the UK position on common frameworks predominately omits environmental focus points and DEFRA's proposal makes no substantive comments or suggestions on this issue – other than to say that joint action would be beneficial. Political wrangling, a lack of trust and a focus on trade seem to have stymied the development of environmental frameworks to date.

A glimmer of hope appears in the context of principles, in the form of the EU Withdrawal Act, the White Paper, and DEFRA's proposal – as several principles are outlined within these. However, firstly, the proposal and Gove's comments since do not accurately reflect the nature and current role of these principles, which impacts on the proposed role and force. Secondly, the DEFRA proposal is limited in the range of principles, objectives and duties. It also omits rights entirely. Finally, the scope is limited regarding subject matter and object (ministerial functions regarding English environmental law and non-devolved matters). A common (legislative) framework on environmental principles is called for that encompasses a broad range of binding principles applicable across all stages and directed at all relevant parties. Objectives, rights and corresponding duties must also be included.

Compliance and accountability form the main focus of DEFRA's proposal and are essential to environmental governance throughout the UK. Whilst the EU accountability and enforcement mechanisms have been by no means perfect, they have nonetheless contributed significantly to areas where NI has achieved compliance – primarily due to the threat of infraction fines for continuing non-compliance. DEFRA's proposals raise a series of interesting questions for England, NI and the UK as a whole. In particular they firstly raise the possibility of a new watchdog to replace the role of the EU Commission and Court of Justice, but with limited capacity and teeth and undetermined independence. This is already problematic, but especially for NI with its poor history of compliance. Secondly, the proposals bring in to focus judicial review, as it is mooted as an alternative to the watchdog and a mainstay of ensuring environmental compliance – yet, whilst judicial review is exceedingly important, it nonetheless remains a considerably flawed tool in the context of environmental decision-making. Greater consideration needs to be given to suitable mechanisms that might be able to ensure effective deterrence and thereby compliance across not merely England but NI and the rest of the UK. Once again arguments can be made for some common framework and shared bodies for the provision of advice and/or enforcement.

Finally, linking in to each theme is the fourth focus point of cross-border issues and the distinctive nature of NI, which are fundamental to environmental governance. Yet, these and the potential impacts on the other devolved jurisdictions (if this document is adopted by either England for itself and not the other jurisdictions or indeed by the England for the other jurisdiction by default) are not addressed by the DEFRA proposal at all. Whether a common framework is created or not, addressing cross-border issues is essential – for within and beyond the UK. Whilst relevant to all 4 jurisdictions, this becomes more significant for NI due to the numerous linkages it shares with both the ROI and with the rest of the UK. In conclusion, north-south and east/west common frameworks may be appropriate (including for standards). Environmental principles will be required regarding cross-border cooperation and transboundary harm, including enabling public participation. Finally, suitable shared bodies (both within

the UK and on the island of Ireland) and cooperation regarding enforcement will be a necessary feature of any future environmental governance arrangements..

Ultimately, to see a UK proposal regarding potentially legislation on environmental principles and governance is very positive, but for instance the fact that the document notes that a watchdog's binding notices are to be created as a 'last resort' is very worrying – it reflects the more aspirational nature of the document and the unwillingness to be constrained or bound in future. What is presented by the document is a series of principles and body that would work only to support the government in what they already want to do and not something to hold them truly accountable by or capable of ensuring specific approaches. There are also simply gaping holes regarding common frameworks, cross-border issues and international law commitments. In considering the future of environmental governance in NI, it is important to challenge and build upon what has been proposed for England – in light of the distinctive characteristics of NI. In their current form, the DEFRA proposals are inadequate for England, the 3 other jurisdictions individually and the UK as a whole.

7. REFERENCES

All Island Animal Health and Welfare Strategy, https://www.agriculture.gov.ie/media/migration/animalhealthwelfare/allislandanimalhealthandwelfarestrategy/All%20Island%20Animal%20Health%20and%20Welfare%20Strategy%20Final.pdf

Baynes, C. (2017), 'Government to set up environmental watchdof to deliver 'green Brexit', says Gove', Independent, 12 November 2017, https://www.independent.co.uk/news/uk/politics/michael-gove-environment-secretary-green-brexit-andrew-marr-show-european-union-a8050626.html

Brennan, B., (2016), 'The Enforcement of Waste Regulation in Northern Ireland: Deterrence, Dumping and the Dynamics of Devolution' Journal of Environmental Law (28)3, 471-496.

Brennan, C., Purdy, R., & Hjerp, P. (2017), 'Political, economic and environmental crisis in Northern Ireland: the true cost of environmental governance failures and opportunities for reform', *NILQ*, *68*(2), 123–157.

British Veterinary Association, (2018), Evidence Submitted to the EU Energy and Environment Committee Inquiry into the Impact of Brexit on the UK's Plant and Animal Biosecurity, http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-energy-and-environment-subcommittee/brexit-plant-and-animal-biosecurity/written/81408.pdf

Burke, T., Bell, G., and Turner, S., (2007), Foundations for the Future: The Review of Environmental Governance http://www.ukela.org/content/doclib/135.pdf

Burns, C., (2018), 'The Brexit White Paper: What does it mean for the environment?' (17 July 2018) https://www.brexitenvironment.co.uk/2018/07/17/brexit-white-paper-environment/

Burns, C., Jordan, A. and Gravey, V., (2016) 'The EU Referendum and the UK Environment: The Future Under a "Hard" and a "Soft" Brexit' (London: UK in a Changing Europe), 1–16 https://www.brexitenvironment.co.uk/policy-briefs

Day, C., (2018) 'Emperor Gove's New Clothes', (May 16 2018) https://markavery.info/2018/05/16/guest-blog-by-carol-day

Day, C., (2018), 'Brexit and Aarhus: Key challenges for environmental governance', Presentation at 3rd ELIG Environmental Law Seminar, King's Inns, Dublin, 14th July 2018.

DAERA, (2018), Evidence Submitted to the EU Energy and Environment Committee Inquiry into the Impact of Brexit on the UK's Plant and Animal Biosecurity, http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-energy-and-environment-subcommittee/brexit-plant-and-animal-biosecurity/written/84124.pdf

DEFRA, (2018), *A Green Future: Our 25 Year plan to improve the environment*, 5. https://www.gov.uk/government/publications/25-year-environment-plan

DEFRA, (2018), *Environmental Principles and Governance after the United Kingdom leaves the European Union Consultation on environmental principles and accountability for the environment*. London: DEFRA. https://consult.defra.gov.uk/eu/environmental-principles-and-governance/supporting_documents/Environmental Principles and Governance after EU Exit Consultation Document.pdf

DEFRA, (2018), *Health and Harmony: the future for food, farming and the environment in a Green*

Brexit. London. https://www.gov.uk/government/consultations/the-future-for-food-farming-and-the-environment

Delreux, T., and Happaerts, S. (2016), 'The Evolution of EU Environmental Policy', in *Environmental Policy and Politics in the European Union* (London: Macmillan),12–40

Dobbs, M., (2016), 'Attaining Subsidiarity-Based Multilevel Governance of Genetically Modified Cultivation?' 28:2 *Journal of Environmental Law* 245-273.

———, (2017), 'Flexible Rationality: Legitimising the Precautionary Principle?', Presentation at the UK IVR Conference, Sheffield, November 2017.

Doyle, A., (2018), 'Anarchical Fallacies: the Duty of the Citizen, a Complete System of Judicial Protection, Equality before the Law, Access to Justice, and the Aarhus Convention', Presentation at 3rd ELIG Environmental Law Seminar, King's Inns, Dublin, 14th July 2018.

Doyle, A. & Carney, T., (1999), 'Precaution and Prevention: Giving Effect to Article 130r Without Direct Effect', 8 *Eur. Envtl. L. Rev.* 44, (1999).

Dworkin, R. M., (1967), "The Model of Rules" 35 *The University of Chicago Law Review* 14.

Engel, A. & Petetin, L., (2018), 'International obligations and devolved powers – ploughing through competences and GM crops' 20:1 *Environmental Law Review* 16-31.

Environmental Law Implementation Group, (2018), Evidence Submitted to the EU Energy and Environment Committee Inquiry into the Impact of Brexit on the UK's Plant and Animal Biosecurity, http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-energy-and-environment-subcommittee/brexit-plant-and-animal-biosecurity/written/86370.pdf

Committee for Agriculture, Environment and Rural Affairs, (2016), Minutes of Evidence, meeting on Thursday, 16 June 2016, <http://aims.niassembly.gov.uk/officialreport/minutesofevidencereport.aspx?AgendaId=18395&eveID=10674>

Good Friday (Belfast) Agreement 1998, Strand 2 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf>

Gravey, Viviane, (2018) 'Evidence Submitted to the Welsh Assembly Climate Change, Environment and Rural Affairs Committee Inquiry into UK Common Frameworks on Agriculture and the Environment' (Cardiff: Assembly for Wales), <http://senedd.assembly.wales/documents/s75638/UK 01 Dr Viviane Gravey - Queens University Belfast.pdf>

———, (2018) 'Oral Evidence to Welsh Assembly Climate Change, Environment and Rural Affairs Committee Inquiry into UK Common Frameworks' (Cardiff: Assembly for Wales) <http://record.assembly.wales/Committee/4882>

Gravey, Viviane, and Mary Dobbs, (2018) 'Written Evidence from Dr Viviane Gravey and Dr Mary Dobbs - Northern Ireland Affairs Committee Inquiry on Brexit & Agriculture' (London: House of Commons), http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/northern-ireland-affairs-committee/brexit-and-northern-ireland-agriculture/written/81579.pdf

Gubbay, S., (2014), *A review of the use of biogeography and different biogeographic scales in MPA network assessment,* JNCC Report No: 496, April 2014, ISSN 0963 8901 http://jncc.defra.gov.uk/pdf/Report496_web.pdf

Hedemann-Robinson, M., (2015) *Enforcement of European Union Environmental Law* (Routledge: London).

HM Government, (2018), 'FRAMEWORKS ANALYSIS: BREAKDOWN OF AREAS OF EU LAW THAT INTERSECT WITH DEVOLVED COMPETENCE IN SCOTLAND, WALES AND NORTHERN IRELAND' (London: HM Government), <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/686991/20180307_FINAL__Frameworks_analysis_for_publication_on_9_March_2018.pdf>

HM Government, (2018), 'Joint Communiqué of the British-Irish Intergovernmental Conference 25 July 2018', https://www.gov.uk/government/news/joint-communique-of-the-british-irish-intergovernmental-conference-25-july-2018

HM Government, (2018), ' The future relationship between the United Kingdom and the European Union', White Paper, <https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union>

HM Government, and Welsh Government, 'Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks' (London: HM Government, 2018), <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/702623/2018-04-24_UKG-DA_IGA_and_Memorandum.pdf>

Joint Ministerial Committee (EU Negotiations), 'Communique 16 October 2017' (London: HM Government, 2017) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/652285/Joint_Ministerial_Committee_communique.pdf>

Jordan, A. and Moore, B., (2018), 'Could fines be the green watchdog's sharpest teeth?' (12 July 2018) <https://www.brexitenvironment.co.uk/2018/07/12/fines-green-watchdogs-sharpest-teeth/>

Krämer, L., (2016), *Enforcement of Environmental Law*, (Edward Elgar).

Lee, M. (2017) 'Accountability for Environmental Standards after Brexit' (2017) *Environmental Law Review* 19(2) 89-92.

Lee, R., (2017) 'Always Keep a Hold of Nurse: British Environmental Law and Exit from the European Union' 29 *Journal of Environmental Law* 155.

Macrory, R., (2004), *Transparency and Trust: Reshaping Environmental Governance in Northern Ireland* (UCL Press, London).

NIEL and the Environmental Pillar, (2017) Submission to the Joint Committee on the Implementation of the Goof Friday Agreement, http://environmentalpillar.ie/wp/wp-content/uploads/2017/06/EP-NIEL-Submission-to-Dail-GFA-Committee-1-June-2017-Final.pdf

Office of the Deputy Prime Minister, (2001) Memorandum of Understanding and Supplementary Agreements: Between the United Kingdom Government Scottish Ministers and the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee (Cm 5420, 2001).

Pedersen, O., (2018), 'A new post-Brexit environmental watchdog: The importance of context', <https://www.brexitenvironment.co.uk/2018/07/10/new-post-brexit-environmental-watchdog-importance-context/>

———, (2018), 'A Study of Administrative Environmental Decision-Making Before the Courts' (February 1, 2018). *Journal of Environmental Law*, Forthcoming.

Reid, Colin T, (2017) 'Brexit and the Devolution Dynamics', *Environmental Law Review*, 19, 3–5 <http://dx.doi.org/10.1177/1461452917693337>

Taylor, M., (2017) 'Michael Gove as environment secretary is 'fox in charge of hen house'' (The Independent, 12 June 2017) <https://www.theguardian.com/politics/2017/jun/12/michael-gove-entirely-unfit-to-be-environment-secretary-says-greens>

Turner, S., (2006), 'Transforming Environmental Governance in Northern Ireland: Part One: The Process of Policy Renewal' 18 *JEL* 55.

Turner, S. and Brennan, B., (2012), 'Modernising Environmental Regulation in Northern Ireland: A Case Study in Devolved Decision Making' (2012) 63 *NILQ* 509.

UKELA, (2017), 'Brexit and Environmental Law: Wales, Brexit and Environmental' (Bristol: UKELA, 2017), <http://dx.doi.org/10.1080/09615768.2016.1258779>

UKELA, (2018), Brexit and Environmental Law: Enforcement and Political Accountability Issues, <https://www.ukela.org/content/doclib/317.pdf>