

Environmental policy in a devolved United Kingdom

Challenges and
opportunities after Brexit

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This brief has been funded by the Economic and Social Research Council's UK in a Changing Europe programme, which highlights the major challenges and opportunities of Brexit across the UK. It is based on interviews and workshops with a range of stakeholders¹ in February 2018 on the options available for future UK environmental governance, as well as the growing body of parliamentary evidence, academic publications and think tank reports on these issues.



¹ Workshop stakeholders included representatives from local and devolved government, public agencies, and environmental NGOs.

Executive Summary

The European Union (EU) has had a profound effect on UK environmental policy and governance. The EU provides treaty-based principles to underpin and inform new policy development and a well-developed system of monitoring and enforcement to ensure it is implemented. The EU's system of environmental governance provides a set of structures that establishes minimum common standards across the UK. These structures have allowed the devolved nations to develop their own policies, some with a higher level of ambition than the UK's. EU membership, therefore, provides a common framework that enables both transboundary cooperation and local policy innovation.

Brexit consequently represents a major change to environmental governance in the United Kingdom (UK), raising significant opportunities and challenges. Environmental policy in the UK is devolved, but UK devolution is asymmetrical: England has no formal representation or parliament. For environmental policy this means that the Department for Environment, Food and Rural Affairs (Defra) often acts on behalf of England. This model of devolution raises concerns amongst stakeholders in the devolved nations that Defra approaches policy with an English mind-set, which suggests that English interests will dominate after Brexit. There are also concerns that Brexit will lead to greater instability and weaken environmental protections.

In addition, Brexit has prompted a constitutional dispute between the Scottish and UK governments, which may jeopardise future environmental governance. These tensions have created uncertainty, making Brexit preparations highly challenging for both government and civil society actors. Crucially, the key planks of the UK government's 'Green Brexit' strategy—the 25 Year Environment Plan (25 YEP) and Defra's consultation on environmental governance and principles—do not cover governance in the devolved nations. This gap in coverage raises the prospect of policy divergence and inconsistent implementation and enforcement across the UK. More importantly, there is a strong fear in Scotland and Wales that their environmental policy ambitions could be thwarted by Brexit and deregulatory pressures emanating from England.

Meanwhile Northern Ireland, which has a history of weak environmental governance and sits alongside the politically sensitive border with Ireland, has no government and therefore no

voice in the Brexit negotiations. As a result, it is poorly represented in the discussions over the future shape of UK-wide environmental policy and governance.

Key Points

- There are many incentives for the governments of the devolved nations and the UK government to cooperate on environmental policy in ways that allow Scotland, Wales and Northern Ireland to develop policies sensitive to local conditions whilst cooperating on areas of shared concern.
- However, the limited trust between the devolved nations and the UK government may jeopardise the future development of environmental governance structures after Brexit.
- The lack of a Northern Irish government voice in discussions about a post-Brexit environmental settlement raises the risk that policies and structures may not suit the Northern Irish context.
- The current machinery for coordinating policy (the Joint Ministerial Committee) is not fit for purpose and should be reformed.
- New environmental governance structures (including new national watchdogs) should be coordinated across the nations of the UK and be transparent and accountable to their respective legislatures and citizens.
- Environmental policy should be properly resourced to enable the development of new policies and the implementation and enforcement of existing policies.

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1. Introduction

The most effective environmental policy facilitates transnational cooperation to deal with transboundary and shared environmental problems, while simultaneously remaining sensitive to local conditions and circumstances. Public awareness and participation have long been regarded as essential ingredients of good environmental policy-making. Citizens need to feel a sense of ownership of environmental goals if they are to act to protect the environment, and it is often through citizenship engagement that environmental problems are brought to the attention of policy-makers and the wider public.

These features mean that in order to be effective, post-Brexit environmental policy must enable the UK government and the devolved administrations to engage in international/regional environmental cooperation, and to coordinate their own policies whilst using local knowledge to create enforceable environmental policies that are transparent and accountable to citizens. There is also increasing interest in designing policies around landscape features (such as water catchments), which do not respect political boundaries such as national borders. Hence transnational intra-UK cooperation, communication and coordination are essential for environmental protection.

Membership of the European Union (EU) has profoundly shaped environmental policy and governance across the UK.² Environmental policy is a devolved matter and the ways in which powers will be exercised after Brexit have become the focus of a mounting constitutional dispute. The EU Withdrawal Act (EUWA) states that powers that are currently exercised at the EU level should generally be repatriated to the devolved administrations but gives the UK government the ability to restrict their policy-making authority in areas where common UK-wide frameworks are determined to be necessary.³

The *Scottish government* has adopted a Scottish Continuity Bill, which is subject to legal challenge in the Supreme Court, with a ruling expected in Autumn 2018.⁴ The Scottish position on environmental policy is that Scotland has been and wishes to continue to be a

² Burns, C., Jordan, A. and Gravey, V., 2016. [The EU referendum and the UK environment: the future under a 'hard' and a 'soft' Brexit](#).

³ HM Government, 2018. [European Union \(Withdrawal\) Act](#), Clauses 10-12. For further information, see: House of Commons Public Administration and Constitutional Affairs Committee, 2018. [Devolution and Exiting the UK: reconciling differences and building strong relationships](#), especially paragraphs 48-50.

⁴ Scottish Government, 2018. [UK Withdrawal from the European Union \(Legal Continuity\) \(Scotland\) Bill](#).

global environmental leader.⁵ Both for these reasons and to retain access to the EU's single market⁶ the Scottish government has committed to maintain and improve EU standards, to continue to align with EU environmental policy and to implement EU environmental policy principles.⁷ However, the Scottish government cannot move forward with its Brexit plans until the Supreme Court has ruled on the Continuity Bill, which means that the UK and Scottish governments' timelines for action are not synchronised.

By contrast, the *National Assembly for Wales* has given its consent to the EU Withdrawal Act, which contains an explicit requirement for the government to bring forward legislation on environmental principles and lists those principles that should be included (see Table 1). However, because environmental policy is a reserved power, the requirements in the EUWA on environmental principles do not apply to Wales. However, the Welsh government has committed to non-regression on environmental principles and standards, and to continuing to improve upon EU standards. It has also committed to enshrining key environmental principles in legislation, but there is scope for the UK and Welsh governments to commit to different principles and to interpret them in different ways.

Northern Ireland has long lagged behind the rest of the UK (and indeed the rest of the EU) in the quality of its environmental governance. It also faces distinct cross-border and all-island environmental challenges that it shares with Ireland – such as how to tackle pollution or invasive species that affect both jurisdictions.

At UK level, the government has adopted a 25 Year Environment Plan (25 YEP) and issued a consultation on environmental principles and governance with a bill expected anytime from Autumn 2018 onwards.⁸ This bill will be limited to England, although the consultations suggest that co-designed policies or approaches may be developed. However, it is unclear how such co-design will work in practice. There is a suspicion amongst stakeholders in the devolved administrations that co-design simply means Defra deciding its position and then informing them of the outcome, with limited opportunity for genuine input.

Consequently, determining the immediate contours of the post-Brexit environmental settlement is difficult, let alone its longer-term future. The UK is composed of countries with distinct histories and traditions that hold complementary yet diverging preferences on

⁵ Scottish Government, 2018. [Developing an environment strategy for Scotland: discussion paper](#).

⁶ Scottish Government, 2018. [Scotland's place in Europe: people, jobs and investment](#).

⁷ Scottish Government, 2018. [Developing an environment strategy for Scotland: discussion paper](#).

⁸ HM Government, 2018. [A green future: Our 25 year plan to improve the environment](#); Department for Environment, Food and Rural Affairs, 2018. [Environmental principles and governance after EU Exit](#).

environmental policy and which are operating on different timelines against a background of constitutional conflict.

This context of deep uncertainty raises the risk that the environment will be downgraded on the policy agenda. Brexit presents an opportunity to reform and improve UK environmental policy ambition, coherence, and coordination to deliver well-designed policy that is fit for 21st century environmental challenges. The 25 YEP, environmental principles and governance consultation, the Scottish Environmental Strategy consultation, the Welsh government's *Securing Wales Future* all demonstrate a desire and willingness to develop and improve environmental policy and governance. However, current political and constitutional disagreements make it unlikely that the opportunities for reform presented by Brexit will be realised.

A major risk is that the UK government will seek to 'muddle through' by making incremental adjustments to policies and structures that are already unfit for purpose. Doing so may compromise environmental policy ambition across the UK and hence undermine overall policy coherence.

This policy brief draws together the insights of practitioner workshops organised by Brexit & Environment under Chatham House rules to discuss the implications of Brexit for environmental policy. These workshops were held in Scotland, Wales, Northern Ireland and England, with a specific focus on devolution, a topic which has all too often been overlooked in these debates. The views of practitioners from the devolved nations are central to this work and we hope we have captured their concerns whilst also developing recommendations that offer practical remedies. We identify several core challenges and provide ten recommendations for delivering well-coordinated, coherent and effective environmental governance after Brexit.

2. Brexit, Devolution and Environmental Policy

Devolution in the UK is asymmetrical. England does not have its own representation (instead it is governed directly by Westminster). Scotland, Wales and Northern Ireland enjoy varying degrees of autonomy, but each has responsibilities for the environment, agriculture, fisheries and energy. These devolution settlements were created in the context of EU membership, and therefore the EU's minimum standards for environmental protection apply to all parts of the UK.⁹

Under the environmental guarantee principle, enshrined in Article 193 of the Treaty on the Functioning of the European Union, territories within member states can adopt 'more stringent protective measures' than those stipulated in EU legislation.¹⁰ The intersection of the devolution settlements with EU membership has allowed for 'upward divergence' in environmental policy across the four UK nations. In particular, the Scottish and Welsh governments have sought to create environmental policies that go beyond the EU's minimum requirements.

For example, *Scotland* has more ambitious targets in the areas of climate and energy policy and plastic waste and has also generally performed better at implementing some EU Directives and going beyond their requirements.¹¹ *Wales* has sought to create more ambitious environmental policies than the UK in relation to climate change and waste.¹² Notably, the Welsh government has also passed innovative environmental legislation, including the Well-being of Future Generations (Wales) Act 2015 and the Environment (Wales) Act 2016.¹³ It has re-fashioned environmental governance to develop distinctive institutions by creating a

⁹ Burns, C., Gravey, V., and Jordan, A., 2018. [UK environmental policy post-Brexit: A risk analysis](#).

¹⁰ [Treaty on the Functioning of the European Union, Article 193](#).

¹¹ On climate and energy, see: Royles, E. and McEwen, N., 2015. [Empowered for action? Capacities and constraints in sub-state government climate action in Scotland and Wales](#). *Environmental Politics* 24 (6): 1034-1054; On implementation, see: Reid, C., Burns, C., Carter, N., Cowell, R., Eckersley, P., Farstad, F., Gravey, V., Jordan, A and Moore, B., 2018. Scotland: Challenges and opportunities for post-Brexit environmental governance.

¹² On climate change, see: Royles, E. and McEwen, N., 2015. [Empowered for action? Capacities and constraints in sub-state government climate action in Scotland and Wales](#). *Environmental Politics* 24 (6): 1034-1054. On waste, see: Cowell, R., Flynn, A. and Hacking, N., 2017. [Assessing the impact of Brexit on the UK waste resource management sector](#). Cardiff University.

¹³ Cowell, R., Burns, C., Carter, N., Eckersley, P., Farstad, F., Gravey, V., Jordan, A., Moore, B. and Reid, C., 2018. Wales: Challenges and opportunities for post-Brexit environmental governance, p. 8.

Future Generations Commissioner for Wales. However, whilst Wales has shown environmental leadership ambition in some areas, in others it has performed less well, most notably in relation to air quality, where the Welsh government has struggled to meet the targets established by EU legislation.¹⁴

The ambitions shown by Wales and Scotland could lead to the conclusion that devolving power to subnational authorities always leads to positive outcomes. However, Northern Ireland is an outlier with a poor history of environmental governance, which is illustrated by the frequency of environmental crimes, such as quarrying or mining taking place without proper planning permission or environmental impact assessments, and waste crimes that are often cross-border, such as illegal dumping of waste in bogs, rivers and fields. The recent Renewable Heat Incentive scandal, which saw the Northern Ireland Executive greatly overspend on a badly-designed renewable energy scheme that generously subsidised the use of wood pellet burners with few controls, is one of many Northern Irish environmental governance scandals.¹⁵

The UK government has included some ambitions in its 25 YEP, which is currently intended to apply to England. But the plan has been criticised for providing insufficient detail on planned targets and monitoring for England. It is also not clear whether and how these ambitions might be coordinated with the other nations of the UK.

Similarly, whilst it appears that Scotland, Wales and England will commit to similar environmental principles, the way in which those principles are interpreted and given force may vary (see Table 1). For example, the Scottish Continuity bill provides for environmental principles to be interpreted in a way that is consistent with the EU Treaties and jurisprudence. In England, the EUWA requires a longer list of principles to be addressed but there is no requirement to interpret them in line with the EU Treaties. As the provisions in the EUWA do not apply to the devolved administrations it is uncertain how Wales and Northern Ireland will interpret and apply environmental principles.

Moreover, if Scotland aligns itself strongly with EU environmental policy there is scope for greater divergence between Scotland and the rest of the UK. EU policies tend to be written and framed with clear targets and expectations backed up by a relatively stringent enforcement regime. UK governments, by contrast, have tended to frame legislation with

¹⁴ See, e.g. ClientEarth, 2018. [Welsh Government makes last-ditch application to delay air pollution plan.](#)

¹⁵ BBC, 2017. [Renewable Heat Initiative Timeline.](#)

flexible wording that is open to interpretation; they have been more open to a consensual and negotiated approach to environmental policy-making.¹⁶ Hence the 25 YEP has been roundly criticised for its failure to include clear measurable targets along the lines of those developed at EU level.¹⁷ Therefore a key challenge for coordinating future UK environmental policy is how to manage the different approaches to policy that may emerge.

Table 1: Environmental principles, the EUWA and the devolved nations.¹⁸

EU Withdrawal Act	Scottish Continuity Bill	Welsh Position
<p>The EUWA requires the UK government to bring forward legislation on principles including at a minimum:</p> <ul style="list-style-type: none"> • the precautionary principle, • preventative action principle, • pollution at source principle, • the polluter pays principle, • sustainable development principle, • environmental protection principle, • public access to environmental information, • public participation in environmental decision-making, • access to justice in relation to environmental matters. <p>There is no requirement for these principles to be interpreted in line with the EU Treaties.</p>	<p>The Continuity Bill requires that the following principles be recognised:</p> <ul style="list-style-type: none"> • Polluter pays principle • Preventative action principle • Tackling pollution at source principle <p>These principles are to be interpreted in line with EU Treaties.</p> <p>Article 3 TEU and 191 TFEU require the pursuit of a high level of environmental protection.</p>	<p>As environmental policy is devolved the Welsh government is not covered by the EUWA’s provisions on environmental principles. The Welsh government has committed to:</p> <ul style="list-style-type: none"> • non-regression on environmental principles and standards, • maintaining and continuing to improve upon EU standards, • enshrining key environmental principles in legislation. <p>However, there is scope for divergence. For example, whilst the EUWA includes a commitment to a sustainable development principle it is unclear how this principle will interact with the sustainable development principles to which the Welsh government has committed in domestic legislation.</p>

¹⁶ Jordan, A., 2004. The United Kingdom: From policy-taking to policy shaping. In: Jordan, A. and Liefferink, D. *Environmental policy in Europe: The Europeanization of national environmental policy*. Routledge, Abingdon, pp. 204-223.

¹⁷ House of Commons, Environmental Audit Committee, 2018. [The Government’s 25 Year Plan for the Environment](#). Eighth Report of Session 2017-19. HC 803.

¹⁸ The Northern Irish position has yet to articulated.

3. Challenges to UK Environmental Governance and Ambition after Brexit

Our meetings with stakeholders and wider engagement with the policy process have highlighted a range of challenging issues for the future of UK environmental governance.

1. Different ecological conditions, histories and ambitions. The UK ecosystem is diverse, ranging from arable lands in South East England to uplands in England, Scotland and Wales. There is variability in income levels, land use planning and commitment to environmental policies. Northern Ireland has a difficult history of environmental governance, while Wales and Scotland have sought to develop their own ambitious environmental policies.
2. England shares terrestrial borders with Scotland and Wales and marine borders with Scotland, Wales and Northern Ireland. But environmental issues do not respect such national borders. Cooperation and coordination of policy goals and of enforcement and monitoring will be necessary.
3. Scotland wants to retain control for devising and managing environmental policy. Wales is prepared to pool environmental governance with the UK government, but its position is still uncertain. Northern Ireland has no official position, but stakeholders suggested that taking a lead from the UK government might be beneficial given the history of weak environmental governance. There is therefore scope for policy divergence across the UK underpinned by different ambitions.
4. There is a fundamental lack of trust between the devolved and UK governments.¹⁹ This trust deficit presents an obstacle to policy coordination.
5. There is also a suspicion that Defra (and Westminster-based politicians more generally) fail to understand or fully respect devolved competences. Officials in Defra seem to forget whether they are 'wearing' an English, or UK 'hat' and often prescribe

¹⁹ House of Commons, Public Administration and Constitutional Affairs Committee, 2018. [Devolution and Exiting the UK: Reconciling differences and building strong relationships](#), pp. 20-21.

solutions which, whilst appropriate for England, may not be suited to other parts of the UK.²⁰

These factors have combined to create a challenging policy context within which four key issues now need to be addressed: policy co-ordination, trade, governance gaps and resources.

3.1 Policy Co-ordination

The devolved nations and the UK government meet to discuss and coordinate ‘devolved’ and ‘reserved’ powers in the Joint Ministerial Committee (JMC), which was created in 1999.²¹ The JMC is comprised of a set of committees composed of ministers from those governments. It is designed to provide central co-ordination of the overall relationship between the UK and the devolved nations.

The Joint Nature Conservation Committee (JNCC) brings together representatives from conservation bodies of the UK’s four nations.²² This body provides advice and recommendations, is charged with establishing common standards across the UK for monitoring and researching nature conservation, and analyses the resulting information. Its recommendations are then left to be implemented by the competent legislative authorities in each country. The UK-wide Committee on Climate Change operates on a similar basis, although in relation to devolved matters in Scotland it operates in its distinct capacity as the Scottish government’s designated advisory body on climate change.²³

The agencies responsible for helping to implement environmental policy across the UK (the Environment Agency, the Scottish Environmental Protection Agency, Natural Resources Wales and the Northern Ireland Environment Agency)²⁴ have fora for cooperation but the perception of stakeholders is that cooperation is not well developed. There is also a North South Ministerial Council set up under the Good Friday Agreement to coordinate all-island

²⁰ House of Commons, Public Administration and Constitutional Affairs Committee, 2018. [Devolution and Exiting the UK: Reconciling differences and building strong relationships](#), pp. 28–29.

²¹ United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee, 2013. [Devolution: Memorandum of understanding and supplementary agreements](#). See also: Thimont Jack, M., Owen, J., Paun, A., and J. Kellam, 2018. [Devolution after Brexit: Managing the environment, agriculture and fisheries](#). Institute for Government.

²² Joint Nature Conservation Committee, 2018. [About JNCC](#).

²³ Scottish Government, 2009. [Climate Change \(Scotland\) Act 2009](#), sections 24–25.

²⁴ Northern Ireland does not have an independent environment agency, those functions are carried out by Northern Ireland’s Department for Agriculture, Environment and Rural Affairs.

cooperation between Northern Ireland and Ireland, which has environmental protection as one focus.²⁵

These policy coordination mechanisms were designed to fit a system in which the nations of the UK were tied to common standards decided at the EU level. They therefore were designed to accommodate distinctive policies and approaches in each nation but within a common envelope. Brexit has highlighted some key limitations, especially in the operation of the JMC.

JMC meetings are infrequent and irregular.²⁶ In addition, they can only be convened when the UK government deems it necessary.²⁷ The JMC on European Negotiations, set up to deal with Brexit, has failed to meet on the planned monthly basis, and did not meet for 8 months between February and October 2017.²⁸ The lack of regular engagement at the highest level has also contributed to a general neglect of devolution issues in the Brexit debate and negotiations.²⁹

The current system of cooperation is bilateral with the devolved administrations dealing mostly with the UK government directly; the opportunity for all four UK environmental ministers to meet and work together is rare. Similarly, there is no arrangement for joint working between the parliaments and assemblies of the UK's four nations. This issue is starting to be addressed with more in-depth working between the four administrations via civil service 'deep dives' to discuss where common frameworks are necessary and what legal form they could take, with fisheries, environment and agriculture being central to these exercises. At least 30 'deep dive' exercises had been completed by April 2018, addressing all areas in which common legislative frameworks are planned. However, current tensions between the Scottish and UK governments have seen them grind to a halt.

Hence, while the deep dives illustrate greater cooperation on devolved matters, there are ongoing issues with the JMC. In addition, existing arrangements for cooperation related to international environmental policy are weak, with little engagement of the devolved nations in international negotiations.

²⁵ Gravey, V., Burns, C., Carter, N., Cowell, R., Eckersley, P., Farstad, F., Jordan, A., Moore, B. and Reid, C., 2018. Northern Ireland: Challenges and opportunities for post-Brexit environmental governance.

²⁶ See Institute for Government, n.d. [Devolution and the Joint Ministerial Committee](#).

²⁷ House of Lords European Union Committee, 2017. [Brexit: Devolution](#).

²⁸ See Institute for Government, n.d. Devolution and the Joint Ministerial Committee.

²⁹ Farstad, F., 2017. [Green Gove woos environment sector: But what about devolution?](#) Brexit & Environment Blog.

These issues are exemplified by the UK government's recent actions in relation to environmental policy. As noted above, the UK government has committed itself to a 'Green Brexit' and pushed ahead with the adoption of a 25 Year Environment Plan and a governance and principles consultation to address concerns that Brexit could lead to an environmental governance gap and weaker environmental standards.³⁰ However, neither the 25 YEP nor the consultation applied to the devolved nations. The way in which UK-wide environmental policy will be managed and enforced is still to be decided.

These moves by the UK government have caused irritation within the devolved nations. The UK government has given little notice of its plans and the mode of consultation has been more in the style of telling the devolved administrations what the UK government's plans are, with little if any opportunity to comment.

The JMC has agreed a set of principles (see Box 1) to guide post-Brexit policy.³¹ It has suggested that 142 policy areas will be allocated into three groups:³²

1. Areas where no further action is necessary (covering 49 areas including 9 related to the environment such as water quality and land use policy);
2. Areas that could require new non-legislative arrangements (covering 82 areas including 10 related to the environment such as biodiversity and air quality policy);
3. Areas that may require new common legislative frameworks (24 including 19 related to the environment such as chemicals and pesticides policy).

There are twelve further areas that the UK government believes are reserved but which will still be subject to discussion with the devolved nations, including two areas related to the environment: eco-design and energy labelling, and environmental regulations on the international trade in timber.

The allocation of policies to these groups has raised a set of concerns. First, it is unclear why some policy sectors have been allocated to particular groups. For example, water policy is identified as an area where no further action is necessary despite the transboundary implications of water use and pollution. There also seems to have been little consideration of

³⁰ HM Government, 2018. [A green future: Our 25 Year Plan to improve the environment](#); Department for Environment, Food and Rural Affairs, 2018. [Environmental principles and governance after EU Exit](#).

³¹ HM Government, 2017. [Joint Ministerial Committee communique: 16 October 2017](#).

³² HM Government, 2018. [Frameworks analysis: Breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland](#).

how to manage the interaction between policies covered by legislative frameworks (such as chemicals) and those which are not covered (such as water).³³

Box 1: Common Frameworks in the Joint Ministerial Council

Common frameworks will be established where they are necessary in order 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;
- safeguard the security of the UK.

JMC Conclusions (16 October 2017)³⁴

The Environmental Audit Committee noted that whilst there is no indication that current administrations would seek to weaken regulation, there is also no guarantee that future administrations would not do so.³⁵ Therefore failing to put in place legislative frameworks underpinned by a commitment to high standards leaves the environment vulnerable over the longer term.

In 2017, the Welsh government proposed a constitutional convention to develop a UK Council of Ministers on the grounds that ‘the current intergovernmental machinery will no longer be fit for purpose’ after Brexit.³⁶ The First Minister of Wales has stated that he is happy to accept the idea of common frameworks, but he has expressed concern about the process by which they are agreed.

³³ See National Assembly for Wales, Climate Change and Rural Affairs Committee, 2018. [Common frameworks for the environment after Brexit](#); Gravey, V. 2018. [Written evidence](#) provided to the Welsh Assembly Climate Change, Environment and Rural Affairs Committee inquiry into UK common frameworks on agriculture and the environment.

³⁴ HM Government, 2017. [Joint Ministerial Committee communique: 16 October 2017](#).

³⁵ House of Commons, Environmental Audit Committee, 2018. [The Government's 25 Year Plan for the Environment](#). Eighth Report of Session 2017-19. HC 803.

³⁶ Welsh Government, 2017. [Securing Wales' future: Transition from the European Union to a new relationship with Europe](#), p.8.

For example, the April 2018 inter-governmental agreement between the Welsh and UK governments setting out the process for agreeing common frameworks, provides for the UK government to draft the common frameworks, and then allows forty days for the devolved legislatures to grant consent.³⁷ If consent is withheld, regulations can still be agreed if the UK Parliament votes in their favour. As a result, the devolved legislatures only have the right to consent to, rather than to amend, proposed common frameworks. They are also afforded only forty days to consult with relevant stakeholders. This approach limits the scope for legislative and citizen participation, as well as the transparency and accountability of the process.

Conclusion: Environmental policy co-ordination across the nations of the UK will be necessary. Current mechanisms are not fit for purpose. They lack transparency and do not allow for full involvement of the devolved administrations in decision-making. Decisions on where and how legislation may be needed have been taken without public consultation and, moreover, seem poorly thought through.

3.2 Trade

Brexit raises environmental policy concerns with regard to both internal and international trade.

Internal (intra-UK) trade: The agreement of common frameworks is intended to prevent a ‘race to the bottom’ in environmental standards between the four nations. If the UK and its devolved governments are able to agree a unified position, their combined strength vis-à-vis businesses and potential polluters will make it easier to adopt ambitious standards across all four nations. However, if standards across the UK differ significantly, polluters may ‘dump’ (literally, in the case of solid waste) in the nation that has the least stringent regulations. There are therefore practical commercial advantages to having single standards across the UK to avoid pollution tourism.

However, the greater size of the English economy and the greater familiarity with it in Whitehall may lead to decisions that fail to take account of the diverse needs of the different nations of the UK. The devolved administrations may be reluctant to develop policies that differ significantly in ambition from those in England, especially if those policies are perceived to impose additional burdens on local industry. For example, after the UK

³⁷ UK Government and Welsh Government, 2018. [Intergovernmental Agreement on the European Union \(Withdrawal\) Bill and the establishment of common frameworks.](#)

government dropped its policy commitment to ensuring that new homes in England would be carbon neutral by 2016, the Welsh government felt compelled to move its regulations in the same direction due to pressures from major housebuilders.³⁸

International trade: Negotiations of international trade agreements are reserved to the UK government, but such agreements can significantly impinge upon the devolved nations' policy objectives and competencies (see Box 2).

Box 2: International Trade and Genetically Modified Organisms

The issue of Genetically Modified Organisms (GMOs) illustrates the intersection of devolved competences with those matters reserved to the UK government, such as international trade. Wales, Scotland and Northern Ireland have adopted more restrictive policies on GMOs than England in line with the EU Deliberate Release Directive. This divergence between the devolved administrations and England on the cultivation of GMOs has implications for intra-UK and international trade. For the UK government, ensuring harmonisation and the absence of barriers to trade within the UK internal market is crucial. Divergence in standards may restrict such trade. Moreover, as the UK government is responsible for negotiating future trade agreements, there is scope for it to reach a deal with pro-GMO states such as Brazil, Argentina and the US that undermines the policy preferences of the devolved nations. Consequently, this is an issue area where there is scope for policy conflict in future.³⁹

To date the operation of existing coordination mechanisms has not facilitated meaningful involvement of the devolved nations in international trade negotiations.

Future trade agreements may lead to competitive deregulatory pressure if products that have been subject to lower standards enter the UK market. The EU and UK have both committed in principle to the inclusion of an environmental non-regression principle in any

³⁸ National Assembly for Wales, Climate Change, Environment and Rural Affairs Committee, 2018. [Low carbon housing: the challenge](#).

³⁹ See Petetin, L., 2018. [GMO cultivation in the UK: Brexit, the devolved administrations and international trade](#). Brexit & Environment Blog.

future trade agreement.⁴⁰ However, that agreement has yet to be negotiated and these commitments will become moot in the event of a no-deal outcome.⁴¹

Conclusion: There is a risk of deregulatory pressures arising from new trade agreements or from differential standards adopted across the UK market. There is scope for environmental ambitions within the devolved nations to be undercut by:

1. A failure to coordinate trade policies in a way that respects these environmental ambitions;

and/or

2. A post-Brexit trade deal that undercuts domestic standards.

3.3 Governance Gaps

New institutions will be required for environmental policy development, implementation and enforcement after Brexit. Policy formulation has largely been centred on Brussels where the European Commission develops policy in the Directorate-General for the Environment and Directorate-General for Climate Action. After Brexit, this power will in principle rest within the UK. In practice, it is likely to be dispersed across the devolved nations subject to agreement about joint frameworks and the UK Supreme Court ruling on Scotland's Continuity Bill.

The UK contributes to and benefits from membership of the European Environment Agency (EEA), which gathers comparable cross-national data to inform EU and national policy development and implementation. Whilst the UK government has expressed a preference to participate in some EU agencies after Brexit, it has not included the EEA in that list.⁴² There is consequently the risk of uncertainty about whether and how the UK will gather and access environmental data. The Scottish government has proposed setting up a series of knowledge accounts to ensure that the best available data are used to inform Scottish environmental policy development.⁴³ The UK government has made no such commitment. There is consequently scope for different types of data being used to inform policy development and

⁴⁰ For the EU, see: Barnier, M., 2018. [Is Brexit a threat to the future of the EU's environment?](#) Speech given to the European Parliament, 10 April 2018; For the UK, see: HM Government, 2018. [The future relationship between the United Kingdom and the European Union](#), p.38.

⁴¹ UK in a Changing Europe, 2017. [Cost of no deal](#), p. 16; UK in a Changing Europe, 2018. [Cost of no deal revisited](#), p. 29.

⁴² HM Government, 2018. [The future relationship between the United Kingdom and the European Union](#), pp. 8-10.

⁴³ Scottish Government, 2018. [Developing an environment strategy for Scotland: Discussion paper](#), p. 9.

implementation across the UK. Such divergence may have implications for citizens wishing to access environmental data under the terms of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.⁴⁴ It may also affect the way the different nations measure performance, raising the risk of further divergence and potential conflict in the future over environmental damage.

EU institutions such as the Commission and the Court of Justice of the European Union (CJEU) provide ways to hold member state and devolved governments to account and to settle environmental disputes (see Box 3). For example, between 2003 and 2016 the Commission brought 29 cases against the UK on environmental matters, 24 of which resulted in a judgment wholly or partly against the UK government. Notably, these cases represent almost half of all the Court's judgments on UK infringements, thereby illustrating the importance of such legal mechanisms for enforcing environmental policy.⁴⁵ Once the UK leaves the EU it will need to develop its own mechanisms to hold government to account and to resolve problems around the interpretation of common frameworks.⁴⁶ Defra's governance and principles consultation suggests a new watchdog but the current proposals have been widely criticised for being too weak.⁴⁷ They also do not apply to the UK, but rather to England alone; the way in which the body will coordinate with the devolved nations is still highly uncertain. There is scope for the new body to work with equivalent bodies in Scotland, Wales and Northern Ireland, but it is uncertain which bodies will assume monitoring and enforcement powers.

The Future Generations Commissioner in Wales does not currently have the power to take on a watchdog role, and National Resources Wales is not independent from Government, so both appear to have been discounted.⁴⁸ Consequently, the Welsh government's plans in relation to a watchdog are still under development.

⁴⁴ See United Nations Economic Commission for Europe, n.d. [Public Participation](#).

⁴⁵ Hogarth, R. and Lloyd, L., 2017. [Who's afraid of the ECJ? Charting the UK's relationship with the European Court](#). Institute for Government.

⁴⁶ Lee, M., 2017. [The UK needs a new independent body to protect the environment after Brexit](#). Brexit & Environment Blog.

⁴⁷ House of Commons, Environmental Audit Committee, 2018. [The Government's 25 Year Plan for the Environment](#). Eighth Report of Session 2017-19. HC 803.

⁴⁸ National Assembly for Wales, Climate Change, Environment and Rural Affairs Committee, 2018. [Environmental governance arrangements and environmental principles post-Brexit](#).

Box 3: Enforcing Environmental Law—The Challenge of Air Quality

Air quality is a devolved issue and meeting EU targets has been a challenging across the UK, but the ability of non-governmental organisations to use EU law to pursue the government has been critical in pushing UK authorities to take action. For example, the UK government has been taken to court three times by the environmental group Client Earth over its failure to meet the requirements of the EU Ambient Air Quality Directive.⁴⁹ The enforcement mechanisms of the EU have provided the framework that has allowed Client Earth to take the government to court. There is concern amongst stakeholders that without such a framework the UK would adopt weaker targets.

Within the UK, Scotland has taken a leadership position on this issue. In 2016, it moved to become the first country in Europe to adopt the World Health Organization's recommended guideline value for PM 2.5.⁵⁰ In contrast, in 2017 it became apparent that the Welsh government had failed to put in place appropriate measures to reduce air pollution in line with the requirements of the EU Ambient Air Quality Directive. Following legal action, the Welsh government agreed to introduce a new air quality plan by the end of July 2018.⁵¹ This deadline has now been missed. The High Court has granted an extension until 30 November 2018 for the Welsh government to introduce its plan.

The air quality case demonstrates the scope for divergence in performance even when there are common rules, and the importance of access to legal redress to hold governments to account and to ensure that poor policy implementation is addressed.

Scotland has established an expert roundtable to offer advice on the impacts of Brexit on the environment and climate change.⁵² The Scottish Continuity Bill also requires the government to prepare and consult on proposals for new legislation. However, the timetable for developing a new English and possibly Scottish watchdog is not aligned.

There is a strong case for an independent environment watchdog in Northern Ireland as there is no independent Environment Agency (the Northern Irish Environment Agency sits within

⁴⁹ Client Earth, 2018. [Government loses third air pollution case: Judge rules air pollution plans unlawful](#).

⁵⁰ O'Brien, F., 2016. [Air quality in Scotland](#). SPiCE Briefing.

⁵¹ Client Earth, 2018. [Wales concedes but UK Government contests air pollution case](#).

⁵² See Scottish Government, Roundtable on Environment and Climate Change, 2018. [Environmental governance in Scotland after Brexit: Assessment and options for consideration report](#).

the Department of Agriculture, Environment and Rural Affairs [DAERA]). However, because there is no Northern Irish government and the UK government has not instituted direct rule, any discussion on future watchdogs is taking place behind the scenes with little public involvement.

The lack of clarity on how environmental watchdogs will operate, and the different timelines and processes to create enforcement mechanisms across the four nations of the UK, creates risks of governance gaps for environmental policy. These risks would be especially serious in the case of a 'no deal' Brexit. In that scenario, it is possible that the UK could leave with EU environmental legislation in place (via the EUWA), but without the monitoring and enforcement powers of the European Commission and the CJEU.⁵³

There are on-going discussions on future dispute resolution mechanisms across the four nations. Disputes are currently decided via the JMC, but as noted above it is regarded as being unfit for purpose. Moreover, there may be a case for a specialist environmental dispute resolution mechanism to provide policy-specific expertise.⁵⁴

It is unclear whether and to what extent members of the public and civil society organisations will be able to use such bodies to secure the implementation and enforcement of environmental policy in line with international law obligations under the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.⁵⁵ The UK's current performance is poor: in 2017, the UK was found to be in breach of its Aarhus obligations due to the high cost of judicial reviews. There is an opportunity to address these failings in developing a watchdog that is transparent and accountable.

However, it also remains to be decided how any new body would be held to account. There is a strong presumption in favour of parliamentary accountability. The question then arises as to which legislatures should be involved.

If a UK-wide watchdog is developed there is a case for the UK Parliament holding the body to account. The Environmental Audit Committee (EAC) has proposed establishing a new Environmental Enforcement and Audit Office that would report to the Parliament and have

⁵³ Greener UK, 2018. [What would a no deal Brexit mean for the environment?](#) p. 4.

⁵⁴ Thimont Jack, M., Owen, J., Paun, A., and J. Kellam, 2018. [Devolution after Brexit: Managing the environment, agriculture and fisheries](#). Institute for Government.

⁵⁵ See United Nations Economic Commission for Europe, n.d. [Public Participation](#).

its budget set by a statutory group of Parliamentarians to ensure its independence.⁵⁶ Whilst the EAC proposals are for an England-only body they could be extended to a UK-wide watchdog. However, there should be a mechanism for devolved legislatures to be involved so as not to encroach upon devolved competences.

If a series of four watchdogs is developed, there is a case for an approach where each legislature holds each watchdog to account. If a mixed (4+1) system is adopted with four watchdogs for England, Scotland, Wales, Northern Ireland and the UK as a whole, both levels could be included. Hence, a cross-national committee comprising representatives from each of the four legislatures could also be used to review and hold to account either a UK-wide watchdog with cross-national powers or a group of watchdogs.

Conclusion: New institutions and coordination will be required for policy development, monitoring and enforcement. Important decisions are urgently required on data collection and coordination of enforcement functions and accountability mechanisms. New governance bodies should be subject to legislative oversight from all relevant parliaments and assemblies.

3.4 Resources

The National Audit Office ranks Defra second in the list of Whitehall departments most affected by Brexit. It must create new fisheries and agriculture policies as well as put in place 151 statutory instruments required by the EUWA before the end of March 2019.⁵⁷ Over 1,300 new staff members have been recruited to Defra to help pave the way to an orderly Brexit.⁵⁸ The issues of resources and staffing are also important for the devolved nations both in preparing for Brexit and in managing the immediate aftermath. The Scottish government has registered its objection that the funds, which have been released to enable the civil service to prepare for Brexit, have not been distributed to the devolved administrations in line with the Barnett formula, which is used for allocating resources within the UK.⁵⁹

⁵⁶ House of Commons, Environmental Audit Committee, 2018. [The Government's 25 Year Plan for the Environment](#), pp.3-4.

⁵⁷ National Audit Office, 2017. [Implementing the UK's exit from the European Union: The Department for Environment, Food and Rural Affairs](#); National Audit Office, 2018. [Department for Environment, Food and Rural Affairs: Progress in implementing EU Exit](#).

⁵⁸ National Audit Office, 2018. Department for Environment, Food and Rural Affairs: Progress in implementing EU Exit.

⁵⁹ Courtsoyan, P., 2018. [SNP accuses Westminster of short-changing Scotland over Brexit fund](#). *The Scotsman*, 13 March.

Brexit also follows a long period of austerity and significant staffing cuts. For example, the Scottish government has already seen reduced capacity as a consequence of budgetary constraints: the budget it received from Westminster fell by 7.4% between 2010/11 and 2017/18.⁶⁰ Moreover, the Barnett formula is based on population share rather than need, which is the main criterion used for distributing EU funds. Hence, the Welsh government is currently a net beneficiary of EU funding and receives more from the EU than it would under the Barnett formula. Unsurprisingly, therefore, the Welsh government has called for a new formula for distributing funds after Brexit based on need rather than population share.

In Northern Ireland, DAERA had also seen its staff cut in recent years, which has limited the number of staff members available to deal with Brexit. In spring 2018 there were 1,200 staff working on Brexit in Defra, compared to just thirty in DAERA. Although staff numbers for Brexit preparation are increasing through the application of the Barnett formula, Northern Ireland will remain a small administration faced with a growing number of responsibilities.⁶¹

Overall, there is a risk of fewer resources being available for environmental policy in the devolved administrations. On-going uncertainty about funding also compromises the ability of key stakeholders (such as farmers and landowners) to make decisions.

Moreover, Brexit has tight timeframes, with the government setting a deadline of 29 March 2019 for the UK to leave the EU and the EU suggesting that any transition period should end in December 2020. It will be difficult to develop the necessary administrative and governance capacity in such a short space of time.

The 'opportunity costs' of Brexit, such as the resources (staff, money and time) that will be necessary to undertake the administrative challenge of carrying it out, are also considerable.⁶² There is a risk that Brexit is currently and will continue to occupy so much civil service time and energy across the UK that neither the UK government nor the devolved administrations will be able to advance ambitious environmental protections. Moreover, new bodies to coordinate policy and ensure comparability of enforcement will also require resourcing. Here it is important to ensure that the resourcing models adopted for the new bodies do not compromise their independence.

⁶⁰ Scottish Government, 2017. [Scottish Budget: Draft Budget 2017-18](#), pp. 3-4.

⁶¹ Gravey, V., Burns, C., Carter, N., Cowell, R., Eckersley, P., Farstad, F., Jordan, A., Moore, B. and Reid, C., 2018. Northern Ireland: Challenges and opportunities for post-Brexit environmental governance.

⁶² National Audit Office, 2017. [Implementing the UK's exit from the European Union: The Department for Environment, Food and Rural Affairs](#).

Conclusion: A Green Brexit cannot be delivered without adequate resources. Brexit raises the risk that with the loss of pooled capacity at the EU level and a further squeeze on devolved public finances, environmental policy will be subject to spending cuts and other resource constraints.

4. Future Directions

Brexit offers an opportunity to re-think the design and future ambition of environmental policy in the UK. The Scottish, Welsh and UK governments have indicated a willingness and ability to think strategically about how to deliver environmental policy that respects local conditions whilst meeting global environmental challenges. However, the way that Brexit has unfolded has obscured the common environmental ambitions that unite them and heightened the risk that the environment will be downgraded on the policy agenda. There is also a strong risk that without a voice in current discussions Northern Ireland will be forced to adopt whatever is agreed, regardless of whether it works in the Northern Irish context.

We found a range of challenges that could obstruct UK environmental policy ambition. We suggested in the introduction that the best environmental policy is one that facilitates transnational action whilst remaining sensitive to local conditions. Environmental policy works best where policy-makers can take account of local conditions and allow local communities to get involved whilst also facilitating cooperation and coordination on transboundary problems. Thinking at a landscape scale requires thinking across political boundaries and borders. Developing well-integrated policies has commercial as well as environmental benefits. We also suggested that policy must be transparent and accountable, allowing for citizen involvement and be based upon effective communication, cooperation and coordination.

The current model of UK environmental governance falls short on all counts and the opportunity to address these flaws in developing a post-Brexit environmental settlement has yet to be embraced. We propose the following recommendations to address these challenges.

4.1 Recommendations

1. As a matter of priority, the devolved administrations and UK government should reach agreement on how to align their respective environmental policy ambitions in ways that respect the environment and facilitate intra-UK commerce. Such an agreement should be genuinely co-designed.

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2. The UK government and devolved administration should commit to delivering a high level of environmental protection. Common agreement on environmental policy principles and their interpretation must be negotiated.
 3. Common frameworks must be agreed and there should be a presumption in favour of transparent legislative frameworks underpinned by common standards and principles to avoid gaps in implementation and to create the conditions for successful policy coordination and cooperation.
 4. The Joint Ministerial Council is unfit for purpose and should be reformed to allow parity for the devolved nations. Sufficient notice should be given of policy developments and the process should be genuinely consultative.
 5. Scotland has a different legal system from the rest of the UK and has expressed a preference to align with the EU. There is therefore a case for Scotland either to have its own environmental watchdog or to empower an existing set of institutions to perform this role. Having a Scottish environmental watchdog could foster a deeper sense of ownership of environmental policy.
 6. As the Welsh and Northern Irish position on environmental watchdogs is undecided, one possibility is that two bodies could be developed: one to cover England, Wales and Northern Ireland and a separate one covering Scotland.
 7. Co-operation and coordination between a Scottish body and its equivalents in England, Wales and Northern Ireland will be essential. There is a strong case for a UK-wide coordinating body, such that a 4+1 model is adopted, which combines watchdogs within each nation of the UK with a UK-wide oversight committee.
 8. The new watchdog(s) must be independent, transparent and accountable and provide access to citizens and be subject to parliamentary scrutiny and accountability.
 9. A dispute resolution mechanism should be established to manage any environmental disputes between the nations of the UK. Citizens that have suffered negative environmental consequences from policies in one of the other nations of the UK should be able to raise environmental issues with the watchdog in that state and vice versa.
 10. Environmental policy must be properly resourced to enable the development of new policies and the implementation and enforcement of existing policies.

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