

Agenda – Climate Change, Environment and Rural Affairs Committee

Meeting Venue:

Committee Room 3 – The Senedd

Meeting date: 20 June 2018

Meeting time: 09.30

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- 1 Introductions, apologies, substitutions and declarations of interest**

- 2 Presentation on 'A New Perspective on UK Common Frameworks: the opportunities for the Sustainable Management of Natural Resources in Wales'**
(09.30–10.20) (Pages 1 – 53)
Dr Victoria Jenkins, Swansea University

Attached Documents:
Research Brief
Paper: A new perspective on UK common frameworks

- 3 Inquiry into UK common frameworks on agriculture and the environment – first oral evidence session**
(10.20 – 11.10)
Steve Gibson, Joint Nature Conservation Committee
Dr Roisin Willmott, Royal Town Planning Institute
Dylan Morgan, National Farmers' Union Cymru



Break

(11.10 – 11.20)

4 Inquiry into UK common frameworks on agriculture and the environment – second oral evidence session

(11.20 – 12.10)

Dr Viviane Gravey, Queens University, Belfast

Nigel Ajax-Lewis, Wales Environment Link

Rebecca Williams, Country Land and Business Association

Nick Fenwick, Farmers' Union of Wales

5 Motion under Standing Order 17.42 to resolve to exclude the public from the meeting for item 6 a'r cyfarfod ar 28 Mehefin

6 Discussion of the draft short report on: 'Environmental governance arrangement and environmental principles post-Brexit' and Forward Work Programme

(12.10 – 12.30)

(Pages 54 – 68)

Attached Documents:

Draft short report

Forward Work Programme

Document is Restricted

Research Briefing:

A New Perspective on UK Common Frameworks: the opportunities for the Sustainable Management of Natural Resources in Wales



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Research Briefing:

A New Perspective on UK Common Frameworks: the opportunities for the Sustainable Management of Natural Resources in Wales

Author: Dr Victoria Jenkins, Hillary Rodham Clinton School of Law

Date: June 2018

Paper number: 18-041





The National Assembly for Wales Research Service has established a fellowship scheme to enable academics at a senior career level (post-PhD) to spend time working with Assembly staff on a specific research project in areas of mutual benefit to the academic and the National Assembly.

In this paper **Dr Victoria Jenkins**, Associate Professor, Swansea University, Hillary Rodham Clinton School of Law, with research assistance from Caer Smyth, discusses the requirement for common frameworks between the UK and devolved governments in environmental policy areas post-Brexit. The report focuses on structural concerns for the Sustainable Management of Natural Resources in Wales as a lens through which to consider the impact of UK Common Frameworks in this respect. It is intended that the ideas in this report will be further developed to form the basis of an academic article.

Victoria would like to thank, Rachel Sharp, CEO Wildlife Trusts Wales, and Karen Whitfield, Liz Smith and Maliha Majeed of Wales Environment Link for taking the time to discuss this project. The views expressed by the author are her own and do not represent the views of the Research Service.

The outputs from this research will inform the Climate Change, Environment and Rural Affairs Committee's wider work on UK Common Frameworks.

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1. Summary

Brexit will have **significant implications (PDF 201KB)** for environmental protection in Wales. The vote for Brexit took place only shortly after the introduction of a new Welsh framework for the Sustainable Management of Natural Resources (SMNR). It is essential that the Brexit process does not interfere with Wales's ambitions in this respect. One of the key challenges presented by Brexit is how to provide for the allocation of powers currently held by the EU among the UK and devolved governments. At a Joint Ministerial Committee (JMC (EN)) meeting on 16 October 2017, the UK Government and the devolved governments agreed a set of principles governing the establishment of UK Common Frameworks (**JMC (EN) Communiqué** (PDF 72KB)). The JMC (EN) Communiqué states that frameworks will be established 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; and
- safeguard the security of the UK.

On 9 March, the UK Government published an outline of the areas in which it envisages common frameworks at the UK level (**the Framework Analysis**). The current UK Government proposals for common frameworks are focused on political and trade concerns. Notwithstanding the significance of these broader perspectives, this report focuses on the structural concerns for SMNR as a lens through which to consider the implications of UK Common Frameworks. For reasons of expediency, the context of this report is Sustainable Land Management (SLM).

This report argues that the guiding principle for the development of UK Common Frameworks in this field should be the 'safeguarding of natural resources'. This argument is developed and explained with reference to the existing frameworks

for environmental protection in EU law and the way in which they currently operate to support Wales's opportunities for SMNR. Focusing on 'safeguarding of natural resources' results in attention to the merits of working together to create UK Common Frameworks for SMNR. These should be used to develop targets, standards and, crucially, management practice in this respect. This process should also be supported by an institutional framework for the development of 'ecosystems knowledge'. 'Ecosystems knowledge' includes not just scientific developments but 'local knowledge' and experience of management practice, hence, the exchange of ideas regarding the latter will also be significant.

The role of devolved governments will be crucial in contributing to the development of 'ecosystems knowledge' and agreeing the parameters of UK Common frameworks. Devolved governments must, therefore, be given the discretion to develop innovative approaches to management practice at a more local level. The EU Directive has been a useful legal tool in creating a careful balance between agreement on core targets, standards and essential tenets of management practice while allowing Member States (MS) discretion in meeting those aims. It is, therefore, argued that, in the first instance in order to achieve parity in environmental protection with current EU laws a legal framework will be necessary. Applying the approach advocated in this report to the areas listed in the UK Government's Framework Analysis, relevant to SLM, results in a proposal for a legal framework in most areas (see Annex 1).

There will be significant political and resource implications resulting from these proposals and the impact on trade of any UK Common Framework will always be an important concern. However, this perspective helps to focus on what is necessary to forward Wales's ambitious agenda for SMNR. It highlights the imperative for full co-operation among devolved states in creating UK Common Frameworks and the need for an institutional framework to support their future development. This report can also inform current debates around environmental principles and governance after Brexit. The approach advocated suggests that core environmental principles should underline the UK Common Frameworks. It also highlights the importance of distinguishing between the governance 'gap' arising from Brexit that relates to the accountability and enforcement of law, and that which applies in the context of the development of future legal frameworks. Agreeing the necessary UK Common Frameworks on exit day is only the first step. The process of developing those frameworks in the future will be essential to environmental protection and the achievement of SMNR in Wales.

2. Introduction

Brexit will have significant implications for environmental protection in Wales. Nevertheless, current debates are dominated by political and economic perspectives. The European Union Withdrawal Bill has raised concern among the devolved nations about the impact of the repatriation of European Union (EU) powers on the devolution settlement. Meanwhile, the media debate also centres on the UK's future trading relationships with both the EU and third countries. On the UK's withdrawal from the EU it is proposed that the allocation of existing powers will be guided by the principles in the JMC (EN) Communiqué issued by all parties. Applying these principles, the UK Government has created a provisional Framework Analysis of current EU measures and set out where it believes common action might be required in law or policy. However, it does not provide any indication as to how these 'principles' have been applied and there are still ongoing discussions between the governments around the categorisation of policy areas.

This report will explore the opportunities for Sustainable Management of Natural Resources (SMNR) in Wales, focusing on the development of UK Common Frameworks in Sustainable Land Management (SLM). The vote for Brexit took place only shortly after the introduction of a new framework for SMNR in Wales. It is essential that the Brexit process does not interfere with Wales's ambitions for this. Political and economic perspectives are important in this context. Trading agreements may include detailed requirements for environmental protection, given the need to ensure a 'level playing field' in an economic context; whilst the extent to which the UK and devolved governments are committed to environmental protection is **clearly relevant (PDF 1.8KB)**. Nevertheless, this report focuses on the structural concerns for SMNR from an environmental perspective to inform current debates on the UK Common Frameworks.

The report begins by outlining current approaches to the allocation of power in the EU, according to the principle of subsidiarity, and, in the UK, in the principles set out in the JMC (EN) Communiqué. Turning to the challenges of multi-level governance for SMNR, three main concerns are described and explained: the physical cross-boundary nature of environment problems; its significance as a cross-policy concern; and the cross-boundary nature of these challenges in terms of knowledge requirements from the viewpoint of both science and society. The way in which these concerns have been addressed in the EU and JMC (EN)

Communique are considered before the argument is made for a central principle of 'safeguarding natural resources'.

The main body of the report outlines the approach to SMNR in Wales and the key opportunities that have been identified for progress here. It then explains how current multi-level governance approaches, including EU legislation, impact in these areas. This includes consideration of the role of: targets; standards; management approaches; and processes for 'knowledge' exchange and development. The paper concludes by considering how these examples can inform current debates about UK Common Frameworks and might suggest a different approach to that currently advocated by the UK Government in the Framework Analysis.

3. Approaches to the Allocation of Power in the EU and UK

The notion of multi-level governance has at its heart the idea that operating across different levels of government, such as international, national, regional and local, is more efficient than relying on action only by nation states.¹ The advantage of a multi-level governance system is that it combines strategic and more decentralised approaches. Strategic direction is important in the interests of economies of scale and can address 'spill-over', where action in one policy area impacts on another at different spatial scales. Meanwhile, more local approaches can be more responsive to community conditions, allow for participative approaches and provide greater accountability to citizens.

There are different forms of multi-level governance. In the EU the focus is the operation of the EU and Member State (MS) governments whilst in the UK it will be the UK and devolved governments. In any system of multi-level governance there must be a means of allocating power between the different levels of government. The allocation of power can be viewed from a political perspective or functional approaches, such as economic concerns around 'efficiency'.

In the EU, the principle of subsidiarity has operated, since 1992, to address this challenge. **This states (PDF 585KB)** that "the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the MS,

¹ This concept also includes reference to the need to operate not just as governments, but with non-state actors such as business and non-governmental organisations. There is insufficient space to consider this aspect of multi-level governance in this report.

either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.” This principle **guides the EU Commission** in proposing legislation and as a legal principle may be invoked in the European Court to challenge legislation. Other mechanisms also exist to allow national parliaments to hold the EU institutions to account with respect to this principle.

The introduction of the principle of subsidiarity was a response to political concerns about the loss of sovereignty from MS to the EU. Subsidiarity was a particular concern in EU environmental protection, arguably, because action was initially taken in this field without a specific legal base. Environmental laws were introduced under internal market provisions because of concerns about the impact of different MS approaches on trading relations. This remains an important concern. Nevertheless, today, the overall objective is to achieve a ‘high level of environmental protection’ according to a number of environmental principles.²

The EU has struggled to gain the agreement necessary to introduce Directives, such as the **Environmental Impact Assessment Directive (PDF 600KB)** in the 1980s, and more recently, in the late 1990s, the **Water Framework Directive (PDF 858KB)**. On the other hand, the EU has introduced a wealth of EU law on environmental protection and there have been few attempts to challenge this either politically or in action before the Court of Justice (see Annex 2).

The justification for action by the EU in the field of environmental protection is useful in considering the current debate around the UK Common Frameworks. The arguments in favour of EU action are as follows:

- complying with international obligations;
- cross-border concerns;
- cross-policy concerns (i.e., the need to take a strategic approach to an issue on which its other policies have an impact). This argument has gained increasing weight as the competence of the EU has grown; and
- the need to intervene in the interests of environmental protection where MS themselves have failed to take action (see Annex 2).

On the UK’s withdrawal from the EU, it is proposed that the allocation of existing powers will be guided by the principles in the JMC (EN) Communiqué issued by all parties.

² Article 191 Treaty on the Functioning of the European Union.

The principles in the JMC (EN) Communiqué of relevance to SMNR are focused on trade concerns and maintaining compliance with obligations under international agreements. They also mention ‘managing common resources’ a reference to cross-border concerns around air and water. The need to maintain the current competence of devolved institutions is also key. Indeed, it specifically states that the aim will be to significantly increase their decision-making powers. This goes beyond the principle of subsidiarity that operates in an EU context by including a positive obligation to ensure that devolved nations gain more power over policy areas currently governed by the EU. In addition, the JMC (EN) Communiqué notes that where UK common frameworks exist they will be created with reference to the importance of maintaining, as a minimum, the current levels of flexibility provided in EU rules to allow the tailoring of policies to the needs of each region.

The principle of subsidiarity and the JMC (EN) Communiqué set out the political principles governing the allocation of powers between the relevant governments and addressing some functional concerns. However, it is important to consider how they work in the context of SMNR.

Strategic versus Decentralised Approaches

	General	Environmental
Strategic approach	Economies of scale	Development of scientific knowledge
	Spill over	Cross-border Cross-policy responses
Decentralised approach	Responsive	Cross-policy responses
	Accountable	Experimentation
		Local knowledge
		Participation



4. Sustainable Management of Natural Resources and the Challenges of Multi-level Governance

Multi-level governance can assist in meeting environmental objectives for several reasons.³ First, environmental problems are often transboundary in a physical sense and involve common resources, such as air and the oceans. Secondly, environmental problems require cross-policy responses. Thirdly, ‘ecosystems knowledge’ is essential in understanding environmental challenges which are also cross-boundary in the sense that must account for both scientific knowledge and societal perspectives. ‘Ecosystems knowledge’ is mostly associated with scientific developments that improve our understanding of ecosystems, but it is also important to recognise the significance of the ‘knowledge’ of practitioners and stakeholders about ecosystems and effective management practice. **Multi-level governance approaches** can assist in this process by: (i) supporting scientific collaboration at a strategic level; and (ii) creating iterative procedures to ensure that knowledge of ecosystems and management practice at different spatial scales inform strategic approaches.⁴ Thus, it will be important to ensure that any strategic approach allows for the discretion to adopt innovative techniques at lower levels of governance. This approach is evident in the system of SMNR in Wales (discussed below) to the extent that the scientific knowledge of Natural Resources Wales (NRW) and that gained in the practice of Area Management influences the Welsh Government’s Natural Resources Policy (NRP).⁵

Addressing cross-border issues is central to the approach to the allocation of power in both the EU and JMC (EN) Communiqué. Meanwhile, the need to address cross-policy concerns was a central justification for EU action relevant to

³ These issues are referred to here as cross border, cross policy and cross boundary in terms of ‘knowledge’. These distinctions are inspired by the explanation of the ‘systemic complexity’ of environmental law in Elizabeth Fisher, Bettina Lange and Eloise Scotford *Environmental Law: Text Cases and Materials* (OUP, 2013), 23-32.

⁴ This is the view of the author developed from her recent work on SMNR in Wales, Victoria Jenkins *Sustainable Management of Natural Resources: Lessons from Wales* *Journal of Environmental Law* (2018). This was inspired, in particular, by the work of Olivia Woolley. Olivia Woolley *Ecological Governance: Reappraising Law’s Role in Protecting Ecosystems Functionality* (Cambridge University Press, 2014).

⁵ Although the author has suggested that the iterative nature of the process is not supported in the legal framework (*ibid*).

SMNR. This is also important in justifying action by devolved governments in this field given that they have substantial powers across a range of relevant policy areas. However, 'ecosystems knowledge' development and exchange is also vital in responding to the inherently complex and difficult issues that arise in the context of SMNR. This report argues that collaboration at the UK level will be essential in this regard and UK Common Frameworks should support a shared understanding of the most appropriate action for SMNR based on the current state of 'ecosystems knowledge'.

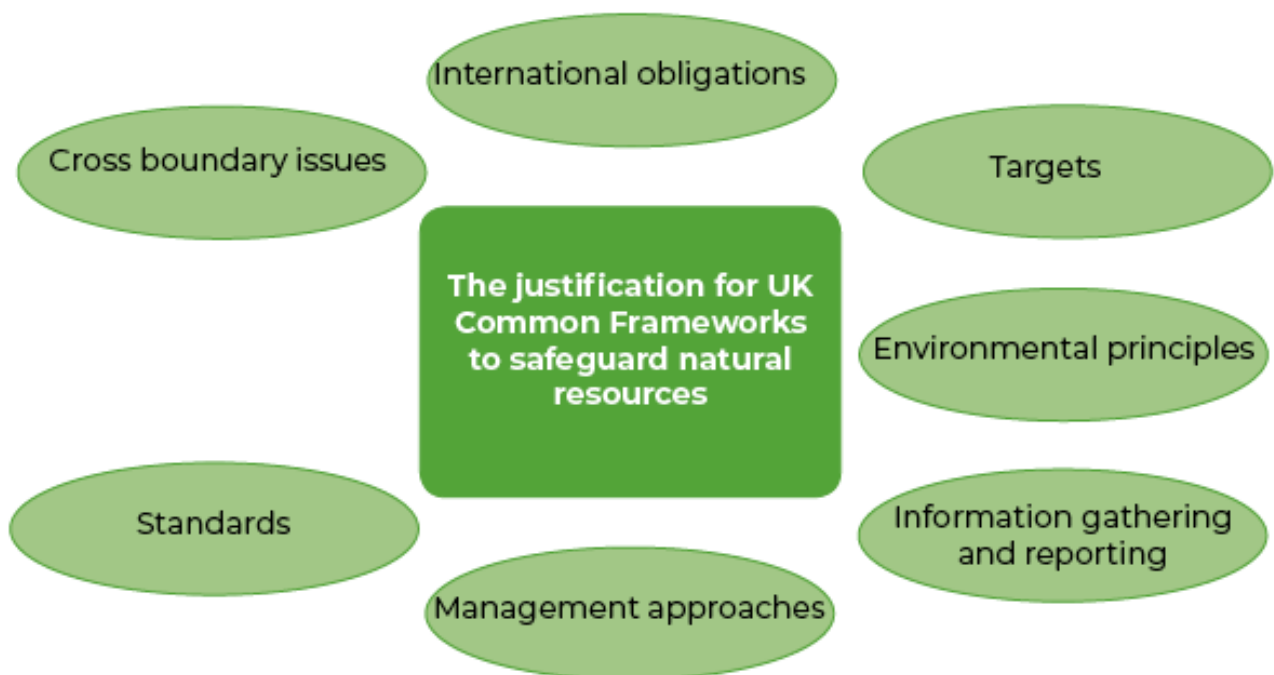
In the EU, environmental policy has the overall aim of a 'high level of environmental protection'. This only comes into play once it has been established that the principle of subsidiarity has been adhered to. Nevertheless, the EU has developed a comprehensive framework of environmental protection built on a system that acknowledges the contribution of multi-level governance in responding not just to cross-boundary and cross-policy concerns, but the requirements for 'knowledge' development and exchange. Thus, it is arguable that, to maintain current levels of environmental protection, 'safeguarding natural resources' should be viewed as a shared aim of the UK nations and a key principle of the UK Common Frameworks in the field of SMNR.

The range of tools included in EU law, that might be retained and developed in UK Common Frameworks for 'safeguarding natural resources', include:

- targets;
- standards;
- management approaches; and
- processes for information gathering and reporting to support the development of scientific knowledge and best practice.

The role of UK Common Frameworks in creating environmental 'standards' currently dominates the debate in this area. The attention to standards is driven, to some extent, by the pre-occupation with trade concerns. This approach is reflected in the UK Government's proposals for regulatory frameworks under the Framework Analysis. However, many EU environmental Directives do not simply create targets and standards, but outline the key features of management approaches in specific areas, sometimes with reference to the core environmental principles. They do so either simply referring to the need for an 'effective' system, but more usually setting out the main criteria to be followed. This can involve:

- the identification of priority or high risk areas generally and in specific policy areas;
- prior assessment/risk assessment of the impact of potential threats to natural resource management, generally and in specific policy areas; and
- a framework for planning and management in specific policy areas.



5. Sustainable Land Management and Sustainable Management of Natural Resources in Wales

SLM in Wales will require the nurturing of the natural environment to ensure that the country can meet its objectives in terms of agricultural and forestry practice, as well as vibrant rural communities, a strong tourism sector and effective water management. Focusing on natural resources, the key indicators of the health of our natural environment and strength of SLM practice are:

- river water quality;
- soil quality;
- the condition of 'special' habitats; and
- the sustainability of forestry.

The key threats to these aspects of the health of the natural environment stem from:

- climate change;
- agricultural practice;
- other development;
- invasive species; and
- individual behaviour.

The Environment (Wales) Act 2016 created a framework for SMNR that involves the implementation of the **NRP** by NRW through an area-based approach referred to as Area Management. The NRP is based on information about the challenges and opportunities for SMNR in Wales in a **State of Natural Resources Report (SoNaRR)** created by NRW. NRW are currently still in the process of developing Area Management, but carried out three Area Trials to support the development of this legislation. These **Area Trials** were based around the river basins of the Dyfi, Tawe and Rhondda.

The main opportunities for SMNR in Wales were identified in SoNaRR and, together with evidence from the Area Trials, can provide us with an insight in this regard. Of relevance to all these opportunities is the need to protect biodiversity as

central to ecosystems resilience. Notwithstanding the importance of the diversity of species, for reasons of expediency this report will focus on ‘protected habitats’.⁶

Green infrastructure in and around urban areas to deliver multiple benefits.

Green infrastructure has multiple benefits, but is particularly important in addressing individual behaviour. On the one hand, the extent to which individuals cause damage in the natural environment is minimal in comparison to, for example, climate change or agricultural practice. On the other hand, connecting communities with their local environment is, arguably, important in helping society to appreciate natural resources and change behaviours. Furthermore, it is increasingly acknowledged that access to the natural environment is **important to health and well-being**. This was a particular concern, for example, in **the Rhondda trial** where it was noted that anti-social behaviour in the natural environment is not just physically damaging, but can create a barrier to wider engagement.

Access to land is a devolved matter and one in which very different approaches may be taken.⁷ In particular, it depends on the balance between private rights to land and public interest in enjoyment of the countryside. Evidence of good practice is currently subject to informal methods of exchange. Laws governing anti-social behaviour in the natural environment, such as forest fires and fly-tipping, are introduced on an England and Wales basis primarily under the Anti-social Behaviour, Crime and Policing Act 2014. Meanwhile, the Wildlife and Countryside Act 1981 provides offences for damage to ‘protected habitats’ carried out by individuals, either in the knowledge of the status of the site or in ignorance of it. Anti-social behaviour affecting the natural environment is an area that is underexplored. In future, there may be room to develop new approaches, but as Wales is part of a shared jurisdiction with England it will be constrained in doing so. More generally, there may be an argument for a more formalised system of knowledge development and exchange in this area supported by an institutional framework. The loss of EU Structural Funds, such as the Environment for Growth

⁶ The term ‘protected habitats’ includes Sites of Special Scientific Interest designated under the *Wildlife and Countryside Act 1981* and Special Areas of Conservation designated under the EU Habitats Directive. This approach will exclude discussion of EU law on invasive species, but this is not to detract from the significance of this or its notable absence from the Framework Analysis.

⁷ See for example the different approaches in Wales and Scotland under the *Land Reform (Scotland) Act 2003* and *Countryside and Rights of Way Act 2000*.

projects supported by the European Convergence Fund in 2006-2013, may be significant in this context.

Increasing woodland cover and bringing more of our existing woodlands into appropriate management.

Afforestation and sustainable woodland management is particularly important in addressing climate change, river and soil quality. Woodlands are an important part of the natural environment in Wales and were a particular concern across the Area Trials.

Forest management is not obviously a matter requiring a multi-level governance approach, but at the **United Nations Conference on Environment and Development** a set of forest principles were agreed. Similarly, the EU does not directly regulate forestry, but it has **a policy strategy (PDF 164KB)** and action plan based on increasing woodland cover and more sustainable management.⁸ The EU also has a governance structure to support the provision of technical information and provide a forum for debate.⁹

In the UK, there is a devolved structure in Forestry governance with the Forestry Commission Scotland, Forestry Commission England and NRW. On the other hand, the **UK Forestry Standard (PDF 31MB)** applies to public and privately-owned forestry across the four nations.¹⁰ This is important in: setting out the approach to sustainable forest management; defining standards and requirements; and providing a basis for regulation, monitoring and reporting. Compliance is evidence that a company or public authority has met its legal requirements and is operating sustainably. The **Forestry Commission asserts (PDF 31MB)** that:

⁸The only EU legislation relevant to forestry relates to the sale of illegal timber in the EU and prevention of forest fires.

⁹ The Standing Committee on Forestry provides the main forum for discussion of forestry issues and provides for the co-ordination and coherence of the forestry policy. It works with the Advisory Committee on Forestry and Cork which is a multi-stakeholder platform for discussing issues related to forestry and sustainable forest management and the Advisory Committee on Forest Based Industries that remains the platform for issues related to industrial value chains.

¹⁰ The UK Forestry Standard: the Government's Approach to Sustainable Forestry (Forestry Commission England, Forestry Commission Scotland, NRW and Forestry Service, 2017)

The UKFS has been developed by the forestry authorities in England, Scotland, Wales and Northern Ireland, through an open and consensual process in accordance with government guidance. This has involved many interested parties and the general public in a formal consultation.

Forestry practice in the UK is also supported by **Forest Research** which operates across the devolved nations to develop knowledge around forestry management.

Despite the lack of a regulatory framework for forestry at EU or UK level there is policy guidance from the EU and a UK approach based on standards developed by the regulators who have created an institutional research mechanism to support this.

Maintaining, enhancing and restoring floodplains and hydrological systems

Building on floodplains, sustainable drainage and catchment management were found to be particular concerns for water quality. The Area Trials were based around the areas designated for the purposes of river basin management under current EU rules. **River quality in Wales** is impacted by abandoned mines, contaminated land, acidification and forestry practice, but the main problem is agricultural pollution.

There is little in the way of international agreement on water courses other than in a transboundary context at a global level which does not apply in an English/Welsh context. The most significant EU legislation is the **Water Framework Directive (WFD) (PDF 858KB)**. The WFD requires MS to set up an administrative system of planning for River Basin Management. River Basin Management plans must set out a programme of measures with the overall aim of achieving 'good ecological status'. 'Standards' are usually associated with specific measures and this is reflected in the context of chemicals regulation relevant to SLM, such as pesticides regulation. In contrast, setting the objectives for river quality is technically complex and, to some extent, linked to local conditions. The Directive also sets out the basic tenets of a system of river basin management and is supported by an institutional mechanism involving experts and other stakeholders in creating a **Common Implementation Strategy**.

Flooding is also an area where the EU has recently introduced legislation, and the Common Implementation Strategy under the WFD also supports work under the **Flooding Directive**. The Flooding Directive requires MS to introduce a basic management system. This involves carrying out preliminary flood risk assessments

of river basins from which to denote ‘high risk’ areas that should be subject to management planning. The necessary basic content of these plans is also set out in an Annex to the Directive.

The system of **Environmental Impact Assessment (EIA)** is important in addressing the environmental effects of any plans and projects, including building development. EIA is discussed here in the context of building development on floodplains and any plans or projects affecting water resources. However, it is also clearly particularly relevant to forestry and agricultural practice. EIA is an essential means of ensuring that environmental considerations are taken into account in land use decision making and to allow for a preventive approach in this respect. EIA is one of the few specific instruments required by the **Rio Principles for sustainable development** that were signed at UNCED, in 1992. It has also been adopted by many countries around the world.

The EIA Directive has been amended several times in its long history to include greater detail about the approach in response to increasing knowledge about effective management practice. Nevertheless, within these parameters, there has been room for discretion at the MS level and Wales has had the opportunity to provide devolved approaches (see Annex 3). However, the system is not without criticism. For example, relying on the developer to carry out the assessment, which has been a key requirement of the system since its introduction, may lead to a fundamental bias in favour of development.¹¹

This discussion has highlighted the importance of the WFD in creating a system to address the complex challenges in freshwater ecosystems. It also exemplifies the need to co-ordinate common frameworks in this context, for example, in terms of flooding and catchment management. The EIA Directive is perhaps the best example of the way in which a common framework can support prior assessment as a management tool.

Notwithstanding the significance of agricultural practice to river quality, for reasons of expediency, it will be discussed in the context of uplands management.

Better soil management

Soil is particularly important in the context of SLM. Soil management is essential to carbon storage (in tackling climate change), water quality and agricultural

¹¹ See further Jane Holder Environmental Assessment: The Regulation of Decision Making (OUP, 2004).

productivity. Yet soil is only just gaining recognition as an area requiring specific attention.

Soil quality is not just a priority in Wales, but has been of concern to the EU for some time. The EU agreed a **strategy for soil protection** in 2006. This included a proposal for **a new Directive** that would: set out key principles of soil protection; introduce a system of prior assessment; require land users to adopt a precautionary approach; identify specific areas of risk; require MS to take measures to limit the introduction of dangerous substances to soil; and to set up an inventory of contaminated sites. This Directive is yet to be accepted so the common framework at EU level currently relies on the policy strategy. However, it is a good example of the way in which a newly identified challenge in relation to SMNR might initially be addressed by a regulatory framework.

Utilisation of our uplands to deliver multiple benefits

Uplands include mountains, moorland and heath and are a distinguishing feature of Welsh habitats. They are particularly important in soil carbon management and water regulation. The **'uplands' is a term (PDF 477KB)** that distinguishes between higher land, fridd (the upland fringe that encompasses land occurring between the intensively managed lowlands and the open moor) and lowland heath. The diversity of habitats in the fridd is vulnerable to climate change and land use whilst for lowland heath nitrates deposition and grazing is particularly problematic. This highlights the fact that 'the uplands' cannot be characterised in a unitary fashion. Nevertheless, it is clear that climate change and agricultural practice are key threats and are discussed in this context. This is also notwithstanding that these are relevant to nearly all the areas of 'opportunity' identified for SMNR. Uplands are also important areas for endangered habitats, notably peat bog which will also be discussed here. The **SoNaRR report concluded (PDF 504KB)** that Special Areas of Conservation and Sites of Special Scientific Interest across Wales were mostly in an unfavourable condition.

Climate change and biodiversity are two of the biggest challenges for global 'sustainable development'. The **United Nations Convention on Climate Change (UNCCC) (80.9KB)** has created targets that have driven action across the EU and the UK. Climate change is an area where the importance of a multi-level governance approach has long been acknowledged. Climate Change targets are agreed at the EU level, but the approach has left room for both UK and devolved

governments to set targets in a regulatory framework.¹² Addressing climate change is an infinitely complex goal supported by **a wide range of measures in different policy areas**, focused on carbon reduction. Nevertheless, often the key drivers are economic mechanisms. The **EU Emissions Trading Scheme (EU ETS)** is very significant in this regard; but there has also been considerable room to adopt different approaches, including the Welsh Government's provision for carbon budgeting.¹³

The United Nations Convention on Biodiversity (UNCBD) has set a target to halt biodiversity loss by 2020. Both the EU and UK have adopted this and other more detailed targets in a policy framework;¹⁴ and the devolved governments in the UK co-operate in developing a broad framework to implement the UNCBD.¹⁵ Biodiversity targets are to be met using a range of tools, but the central mechanism is the management system for endangered species and vulnerable habitats under EU and UK law. The **EU Habitats Directive** was implemented alongside existing measures under the Wildlife and Countryside Act 1981 to provide a complex web of provisions. The most important distinction in EU and UK protection is the system of prior assessment that operates for Special Areas of Conservation protected under the EU Habitats Directive and the adoption of a central 'goal' or 'standard' of maintaining those sites at a 'favourable conservation status'. These differences are problematic from the point of view of transparency in nature conservation law and this could be an area of interest in developing UK Common Frameworks in the future, but, in the meantime, it will be important to maintain current levels of protection.

Agriculture has a number of important impacts on the SMNR in Wales. There are specific EU laws to address threats from pollutants, such as pesticides and fertilisers. Chemicals regulation creates clear standards that have a direct impact on trade and are easily included in an enforceable regime. Nitrates are dealt with

¹² UK's overall domestic emission reduction targets, embedded in the Climate Change Act 2008, are more ambitious than those emanating from the EU. Statutory targets for Wales were introduced by the Environment Act (Wales) 2016.

¹³ *Environment (Wales) Act 2016*.

¹⁴ There are a number of other more specific targets set by the UNCBD that form part of its Strategic Plan for 2011-2020, referred to as the Aichi targets. The lack of statutory targets with respect to biodiversity is a key concern for environmental groups. See for example the discussion in the context of the Environment (Wales) Act 2016 National Environment and Sustainability Committee *Environment Wales Bill: Stage 1 Report (2015)* 32-33.

¹⁵ UK Post-2010 Biodiversity Framework Published by JNCC and Defra on behalf of the Four Countries' Biodiversity Group (JNCC, 2012).

by a more complex management system that nevertheless allows for discretion at the UK and regional levels. Perhaps the most important driver in agricultural practice is the subsidies currently provided under the Common Agricultural Policy (CAP). This currently provides for food production as well as concern for the natural environment and rural communities. The UK and Welsh governments have indicated that they wish to refocus the funding regime for agriculture on 'public goods'. The inclusion of matters related to 'safeguarding natural resources' and an understanding of how this supports other 'public goods' will be vital in developing opportunities for SMNR in Wales. However, currently there is much controversy around the definition of 'public goods'.¹⁶

A UK Common Framework could provide an outline of key targets and parameters for the agriculture subsidy regime whilst allowing for discretion in devolved approaches. However, this example is important in demonstrating the problems of agreeing even primary goals in UK Common Frameworks across the devolved nations.

6. Conclusions

This report has argued that we should consider adopting a principle of 'safeguarding natural resources' as the basis for developing UK Common Frameworks supporting SMNR. This is very different to the current approach adopted in the JMC (EN) Communiqué that refers only to international commitments and managing common resources as functional concerns. In the context of SLM, addressing challenges such as the quality of soil, sustainability of forestry and the state of biodiversity are not obviously cross-boundary concerns. Yet, the protection of the natural environment in all its forms should be a concern to us all. Human impacts and the response of ecosystems is inherently complex and 'ecosystems knowledge' is essential to SMNR which includes both 'scientific knowledge' and 'management practice'. The development and exchange of ideas in these respects can be supported by a multi-level governance approach to SMNR.

The UK Government has applied the principles in the JMC (EN) Communiqué to existing policy areas relevant to SLM in its Framework Analysis. The focus on trade,

¹⁶ See the approaches in Health and Harmony: the future for food, farming and the environment in a Green Brexit (UK Government, 2018) Cm 9577, p.8 Welsh Government Written Statement 'Future of agriculture and land management' Lesley Griffiths AM, Cabinet Secretary for Energy, Planning and Rural Affairs 21 March 2018.

international obligations and ‘common resources’ has resulted in few areas being viewed as requiring a common regulatory framework (Annex 1). Without a full explanation of the way in which the principles of the JMC (EN) Communiqué have been applied, it is difficult to be certain of the rationale for the choices that have been made in any individual circumstance. Focusing on ‘safeguarding natural resources’ highlights the importance of UK Common Frameworks in most areas relevant to SMNR. It is also arguable that these should take the form of legal frameworks. Law is advantageous in providing enforceable obligations but is sometimes referred to as a ‘blunt instrument’ in tackling complex issues around the safeguarding of natural resources. However, EU Directives are specifically designed to provide a balance between meeting central objectives and allowing MS discretion in doing so.

EU frameworks have sometimes been politically controversial and many years in development, but they have undoubtedly created important frameworks of standards and management practices to support Wales in responding to the opportunities for SMNR. The current debate focuses on ‘standards’ in common frameworks, but this report has demonstrated how EU Directives have been significant in establishing the basic tenets of management practice. If the current proposals in the Framework Analysis are accepted agreement on management practice in many aspects of EIA, river basin and flood risk management and habitat protection will no longer be part of a regulatory framework. This could have very important implications for the achievement of SMNR in Wales and across the UK.

Agreeing the necessary UK Common Frameworks on exit day is only the first step. The process of developing those frameworks in the future will be essential to environmental protection and the achievement of SMNR in Wales. EU Directives often include institutional structures that ensure the ongoing development of those frameworks according to increasing scientific knowledge and stakeholder experience.¹⁷ Creating a mechanism to develop and collate the relevant evidence will be essential. This could be achieved on a sectoral basis or by handing these responsibilities to an institution that supports the creation of the UK Common Frameworks.

The approach advocated will require a shared understanding of, and commitment to, ‘safeguarding natural resources’ among governments across the UK. It will also require a robust institutional mechanism for agreeing those frameworks according to those interests, and carefully balancing them against political and

¹⁷ Perhaps the best example is the Common Implementation Strategy under the WFD.

trade concerns. Thus, co-operation is essential in the operation of any multi-level governance system but will be particularly important in the context of SMNR. Much attention has rightly been given to the mechanisms by which common frameworks after Brexit will be developed and implemented across the UK. This includes discussion of appropriate procedural rules.¹⁸ This report focuses on the structural issues to be addressed rather than the detailed inter-institutional arrangements for agreeing UK Common Frameworks. Nevertheless, the approach advocated will only work if governments are truly committed to co-production of UK Common Frameworks to support the ‘safeguarding of natural resources’.

Finally, the conclusions of this paper have significant implications for the current debates regarding the EU environmental principles and environmental governance after Brexit. Currently, the overall aim of a ‘high level of protection for the environment’ in the EU is met through the adoption of some core environmental principles. The preventive, precautionary and polluter pays principle are included in international and EU law. The ‘integration principle’ is also advocated as a core principle.¹⁹ Along with the preventive principle, this is strongly supported by the notion of Environmental Impact Assessment (EIA). Furthermore, the principle of participation is essential to EIA and many other decision-making processes in EU law.²⁰ The debate about environmental governance after Brexit currently focuses on issues of accountability and the enforcement of EU law. Reporting mechanisms are important in providing accountability, but this report has highlighted how reporting requirements also support the development and exchange of knowledge in creating effective common frameworks for SMNR.

18 See for example evidence submitted by Prof. Colin Reid to the Environment, Climate Change and Land Reform Committee of the Scottish Parliament 23 January, 2018.

19 See **evidence** of Maria Lee to Climate Change, Environment and Rural Affairs Committee of National Assembly for Wales 10th May 2018.

20 The Aarhus Convention has been particularly important in this respect. Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998 entered into force 30 October 2001) 2161 UNTS 447.

Annex 1: The Framework Analysis and Sustainable Land Management

This Annex outlines the provisions of the Framework Analysis relevant to Sustainable Land Management and their categorisation in terms of ‘No further Action’; a ‘Common Policy Framework’; or a ‘Legal Framework’. Alongside this is an indication of the consequence of adopting the approach outlined in the report based on the principle of ‘safeguarding natural resources’. The report also argues strongly that this will only be appropriate if a robust mechanism can be developed to allow the governments of the UK to work together in developing these frameworks; and that this is supported by a system for developing ‘ecosystems knowledge’.

- Current approach in the Framework Analysis (coding: **bold**)
- Proposed approach based on the ‘Principle of Safeguarding Natural Resources’ (coding: *italics*)

Forestry

Policies and regulations covering timber production and woodland management.	
No further Action	<i>Policy Framework and UK Forestry Standard (as currently exists)</i>

Water quality and management

Policies and regulations (primarily the EU Water Framework Directive and the EU Drinking Water Directive) that aim to improve the ecological and chemical status including that of the UK’s rivers.	
No further Action	<i>Legal Framework</i>
Flood risk management policies and regulations (primarily the EU Floods Directive) that aim to reduce the risks to from flooding.	
No further Action	<i>Legal Framework</i>

Biodiversity

Policies and common standards covering the conservation of the UK's terrestrial habitats in compliance with international obligations, including the Birds and Habitats Directives.	
Common Policies	<i>Legal Framework</i>

Climate Change

Directives 2003/87/EC establishes the European Union Emissions Trading Scheme for greenhouse gas.	
Legal Framework	<i>Legal Framework</i>

SEA, EIA and Land Use

Environmental Impact Assessment (EIA) Directive	
No further Action	<i>Legal Framework</i>
EU Environmental Impact Assessment in the context of Forestry	
No further Action	<i>Legal Framework</i>
Elements of Environmental Impact Assessment Directive and Strategic Environmental Assessment Directive covering rural land use.	
No further Action	<i>Legal Framework</i>
Environmental Impact Assessments for generation stations and overhead lines (Planning Act 2008).	
Common Policy	<i>Legal Framework</i>
Strategic Environmental Assessment (SEA)	
Common Policy	<i>Legal Framework</i>

Agriculture

Policies and Regulations under the EU Common Agricultural Policy covering Pillar 1 (income and market support); Pillar 2 (rural growth, agri-environment, agricultural productivity grants or services and organic conversion and maintenance grants); and cross-cutting issues, including cross compliance, finance & controls.	
Legal Frameworks	<i>Legal Framework</i>
Regulations providing common standards for compositional ingredients, labelling, packaging, sampling and analysis of fertilisers. The UK is also signed up to a number of international agreements (e.g. the Gothenburg Protocol) and EU agreements (the National Ceilings Directive) related to fertiliser regulation.	
Legal Frameworks	<i>Legal Framework</i>
EU regulations on plant protection products (e.g. pesticides).	
Legal Frameworks	<i>Legal Framework</i>
Regulation of the manufacture, authorisation and sale and use of chemical products primarily through the REACH regulation but also including: Persistent Organic Pollutants (POPs),	
Legal Frameworks	<i>Legal Framework</i>
Regulations governing the authorisation and use of pesticide products and the maximum residue levels in food, and a framework for action on sustainable use of pesticides.	
Legal Frameworks	<i>Legal Framework</i>

Annex 2: Sustainable Land Management and Subsidiarity in the EU.

This Annex includes some examples of the way in which the principle of subsidiarity has operated in the EU in the context of Sustainable Land Management. It includes reference to the response of Member States to proposals for EU action; the approach of the Court of Justice in applying the principle; and, the justification of the EU Commission for adopting measures in this area.

Subsidiarity and the Member States

A recent example of a Member State (MS) questioning a proposal for legislation on the grounds of subsidiarity relates to invasive species (Proposal on the prevention and management of the introduction and spread of invasive alien species (COM (2013) 620)). This generated a reasoned opinion from the Austrian Bundesrat on subsidiarity. The Bundesrat was concerned that Article 10 of the proposal requiring MS to take action against the intentional release of invasive alien species applied to species that were not endemic to the total area of the Union, but the national territory. In its response, the Commission contended that the response so far to invasive alien species was fragmented and insufficient, and therefore required a Union level response. The Commission maintained that the fact that the measure could not be applied uniformly throughout the Union, did not negate the need for a Union response.

Subsidiarity and the Court of Justice

There have been very few cases that have reviewed subsidiarity, and fewer still that have touched upon issues of subsidiarity and environmental policy. An example is *Federal Republic of Germany v European Commission* (Case T-28/16) heard by the General Court in April 2017. This involved a dispute between the European Commission and Germany concerning the selection criteria for “land consolidation and village renewal operations” under the European Agricultural Fund for Rural Development. Germany argued that the Commission was in breach of the principle of subsidiarity by “encroaching on the procedural autonomy of the Member States and the municipalities in the field of spatial planning”. The Court found that the Commission, as the body responsible for the EU budget, needed to have the capacity to check whether obligations set as conditions for receiving financial support under this fund had been met. The Court did not agree with Germany that the Commission had encroached on its area of competence and consequently rejected this plea.

Subsidiarity and the European Commission

Since the introduction of more stringent requirements to justify action at EU level under the principle of subsidiarity, the EU Commission has been required to set out its reasoning in full. The recent development of a Proposal for a Directive on Soil Protection provides an indicative example. The reasons for EU action were outlined as follows:

- Soil degradation in one MS or region can have transboundary consequences;
- There are wide differences between national soil protection regimes. In some cases these can impose very different obligations on economic operators affecting the internal market;
- Soil degradation affects other areas of environmental protection on which EU law exists;
- Having common principles to define 'sustainable use of soil' helps to articulate the research agendas at national and EU level (and thus make a more efficient use of research and development funds); and
- Only nine MS have specific legislation on soil protection.

(Proposal for a Directive of the European Parliament and of the Council establishing a framework for the protection of soil and amending Directive 2004/35/EC Para 320-327).

Annex 3: The Implementation of the EIA Directive in England and Wales

This Annex outlines the way in which the EIA Directive has been implemented in England and Wales by the adoption of joint and separate regulations. This demonstrates the possibilities for responding to sectoral differences in the two countries within the basic framework provided by the EU Directive.

Environmental Impact Assessment Regulations in England and Wales

England

General

Town and Country Planning (Environmental Impact Assessment) Regulations 2017/571

Specific

Environmental Impact Assessment (Agriculture) (England) (No.2) Regulations 2006/2522 (amendment 2017/593)

Wales

General

Town and Country Planning (Environmental Impact Assessment) (Wales) Regulations 2017/567

Specific

Town and Country Planning (Environmental Impact Assessment) (Undetermined Reviews of Old Mineral Permissions) (Wales) Regulations 2009/3342

Environmental Impact Assessment (Agriculture) (Wales) Regulations 2017/565.

England and Wales

Infrastructure Planning (Environmental Impact Assessment) Regulations 2017/572

Electricity Works (Environmental Impact Assessment) (England and Wales) Regulations 2017/580

Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003/164.

Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999/1783 (England and Wales).

Environmental Impact Assessment (Forestry) (England and Wales) Regulations
1999/2228

Agenda Item 6

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