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All at sea?

Marine protection in post-Brexit Wales

BLAISE BULLIMORE & KERRY LEWIS

Recent developments in Welsh environmental legislation have been described as progressive. Building on the 1998 duty to promote sustainable development in Wales, the Well-Being of Future Generations (WBFGA) and the Environment (Wales) Acts (EWA) place new duties on government and public bodies to carry out sustainable development and to exercise their functions whilst seeking to maintain and enhance biodiversity and promote the resilience of ecosystems. The [Resilient Wales goal](#) aims to deliver:

“a nation which maintains and enhances a biodiverse natural environment with healthy functioning ecosystems that support social, economic and ecological resilience and the capacity to adapt to change (for example climate change)”.

The EWA aims to deliver the ecosystems approach in environmental decision making. Fine words; but what is the reality in a Brexit land? We set out below our view on the possible implications for the marine environment in Wales.

Marine reserves now?

Under domestic legislation it took the UK 20 years to designate just three marine nature reserves, and it was not until the advent of the Birds and Habitats Directives (the Nature Directives) that the UK designated multiple, substantially sized marine protected areas (MPAs) – which remain inadequately managed. Despite its powers under the Marine and Coastal Access Act (MCAA), Welsh Government has spectacularly failed to designate any new Marine Conservation Zones (MCZ), yet refers proudly to the fact that 69% of Welsh waters are protected pursuant to the Nature Directives.

The UK approach to nature conservation is thus driven by its EU membership. Under the Nature Directives member states designate sites for their importance for nature conservation, forming the pan-European *Natura 2000* network (N2K). It is a robust regulatory framework which has public support: following a record-breaking public consultation response, the recent [European Commission](#)

[fitness check on the nature directives](#) affirmed that they are fit for purpose, and that any shortcomings in delivering the aims of N2K lie in poor implementation by member states.

Terrestrial N2K sites are usually underpinned by [SSSI status](#), providing a legal framework for both regulating use and providing protection, which will buffer the impact of losing N2K status. The same cannot be said for marine sites: the overwhelming majority of marine N2K sites are not underpinned by any national designations, leaving the marine environment below the intertidal vulnerable to regime change post-Brexit.

Nature conservation in neither the UK nor Wales has been held back by the EU regime. The Nature Directives require minimum standards and there is nothing to prevent “gold-plating” in Wales or the rest of the UK. In fact, often times, even minimum compliance has been an issue, leading to many infraction proceedings against the UK for inadequate implementation, several for sites in Wales.

Since 2013, Wales has had neither a statutory nature conservation nor an environmental protection agency; instead it has Natural Resources Wales. NRW was created from new (Welsh Government stressed that was not a merger) to take over the functions of the former Countryside Council for Wales, Environment Agency Wales and Forestry Commission in Wales. If the name alone fails to provide the clearest hint where the priorities of NRW lie, it's remit – to “pursue sustainable management of natural resources” – should do the rest.

Brexit means Brexit

The post-Brexit legislative landscape is unknown. Despite its name, the “[Great Repeal Bill](#)” [White Paper](#) proposes not to repeal but save the body of EU legislation in UK law, [rather than tackle some 8,000 pieces of secondary legislation before March 2019](#). Instead, executive authority is granted for future amendment or repeal, but such a transfer of legislative power to the executive raises [serious constitutional questions](#). The future of N2K in Wales should be a matter for the Welsh Assembly (the legislature), not the Welsh Ministers (the executive). Indeed, all UK legislatures should ensure that amendment or repeal of domesticated EU law is subject to the usual cross-party parliamentary scrutiny process.

The UK government is, however, emphatic that quitting the EU means the provisions of the EU Treaties, including the principles relating to the environment, and the future jurisprudence of the Court of Justice of the EU (CJEU), will cease to bind UK courts and decision makers. Much of the robust protection afforded by the Nature Directives is a result of the interpretation of the legislation by the CJEU, for example, in the **Waddenzee case**. This was an influential European Court of Justice judgment which clarified the concept of "likely significant effect" and the use of the precautionary principle in Habitats Directive decision-making.

It remains to be seen whether the UK Courts will see a flurry of developers seeking to re-interpret any part of the appropriate assessments process.

Since the UK's devolution settlements require compliance with EU law, opportunities for policy and legislative divergence within the UK have been limited. The EU has placed great importance on N2K being a "coherent European ecological network". Removal of the EU umbrella may well impact on policy making and, to avoid further fragmentation to the detriment of biodiversity, Wales must surely collaborate with the other UK administrations and legislatures to agree a precautionary and evidence-based UK wide approach to take the place of EU measures. Adopting a common approach is not to suggest that a progressive administration or legislature should be prevented from raising the bar itself.

Withdrawal will also deprive MPA management from access to the significant funding streams that have pump-primed nature conservation management projects and support wildlife monitoring. These will need to be replaced, though it is difficult to imagine how this will be achieved in Wales in a climate of austerity. Perhaps greater risks will arise from future domestic grant aid to economic development and activities such as fisheries that are less integrated with environmental policy and result in increased environmental pressures.

On the plus side, the government proposals may provide sufficient time to determine how the post-Brexit landscape might lie and what new or modified measures may be needed or, indeed, what new threats may emerge from any bonfire of environmental legislation deemed to hinder economic progress. We should not be sanguine about this prospect; look at the drastic dismantling of environmental

protection across the Atlantic under a radical right-wing administration.

Holding decision makers to account

Failure to follow correct process and/or permitting damaging fisheries methods have resulted in complaints to the European Commission in at least four of Wales' N2K marine sites. A [long standing investigation](#) into alleged procedural irregularities to consent a power station discharging into Pembrokeshire Marine SAC remains one step away from CJEU and just in May this year, the [CJEU ruled](#) that the UK was in breach of EU directives for the discharge of sewage and waste water into Carmarthen Bay SAC.

Withdrawal from the EU will leave the Welsh (and British) public with no recourse to EU infraction processes or the CJEU. NGOs or private individuals who believe that directives are being infringed by a member state can refer the matter to the Commission, which can elect to bring proceedings in the CJEU. Post-Brexit the UK will be left with domestic judicial review, which is arguably [not compliant](#) with the [Aarhus convention](#), and its effectiveness as a remedy is subject to further erosion under cost-capping proposals. The enforcement teeth offered by the supranational EU framework are unique in terms of state compliance with international law, and within our domestic system there is no obvious legal mechanism which will be so effective in holding UK decision makers to account.

International obligations

Individual nations cannot manage the marine environment independently and, as a minimum, must work on a European scale to make ecological sense. The need for regional sea-scale networks and communication between neighbouring countries will remain, as will existing international obligations and targets relating to biodiversity and the marine environment. Wales, and the rest of the UK, have subsumed the delivery of many of these obligations into the N2K framework, and the marine N2K sites are key to fulfilling the UK's [High Level Marine Objectives](#) and its [marine policy ambitions](#).

At sea, N2K sites comprise the majority and greatest area of the UK's international MPA contributions.¹ Throughout the EU, compliance

¹ UK Contribution to Ecologically Coherent MPA Network in the North East Atlantic Joint Administrations Statement 2012: "The UK MPA network will contribute to a wider

with the Bern Convention's requirement to protect species and habitats is delivered through N2K. In Wales, the [Nature Recovery Plan for Wales](#) makes N2K a cornerstone for meeting the Aichi 2020 biodiversity targets. Yet, having failed to meet its 2010 biodiversity targets, along with most other nations, Wales is likely to fail again in 2020 unless it retains existing N2K designations. Despite their differing perspectives, two recent reports capture this succinctly: the NGO produced *State of Nature in Wales* and Natural Resource Wales' (NRW) *State of Natural Resources Report* (SoNaRR). Both indicate continuing decline in priority species and the unfavourable condition of 55% of the most important wildlife sites. Notably, the statutory SoNaRR focusses on "sustainable management of natural resources" and terms such as "nature" or "conservation" are conspicuously absent.

The OSPAR Convention brings together countries on the north-east Atlantic seaboard (including many of our EU neighbours) to jointly manage their regional seas. Arguably, OSPAR targets for the designation and management of an ecologically coherent series of MPAs could replace N2K marine sites, but the OSPAR Commission, whilst having duties of supervising and "controlling" compliance with the Convention and providing a forum for dispute resolution, has no powers of enforcement. Similarly, although the UK's N2K sites could be re-branded as Bern Convention Emerald sites, doing so would not mitigate the loss of recourse to the CJEU – particularly since the SSSI network was the UK's original offering under Bern.

Glimmers of hope?

In the absence of political will for marine nature conservation to be meaningful, it has proved almost impossible to secure effective MPA designation and management under domestic legislation.

Should we be reassured by the Nature Recovery Plan ambition to "*reverse the decline in biodiversity, for its intrinsic value, and to ensure lasting benefits to society*" and the commitment that "our legislation will ensure biodiversity is a key consideration in all decision-making in Wales"? Perhaps, perhaps not: Welsh Government (WG) has made clear that biodiversity conservation policy and MPAs must align with its broader policy ambition of "blue growth". In this economic context, nature conservation is often seen as a hindrance. The new

Welsh focus on “sustainable management of natural resources” is all about integrating environmental with social, economic and, the newcomer, cultural goals. The evidence so far is that nature or wider environmental conservation is on the losing side.

The WBFGA and EWA potentially put Wales in a more advantageous position for environmental protection than rest of the UK post-Brexit. But we cannot be complacent regarding MPAs. Neither of these two Acts have yet proved themselves and WG will need to do better in their delivery than the lip service previously shown to the sustainable development duty. Whilst the Acts might provide potential safety nets, their value to marine environmental protection and any contribution to MPA management in particular, cannot be assumed. They are not appropriate tools, and were never intended or designed to be.

MPA management in Wales must build on existing N2K mechanisms and management standards as a minimum, in order to deliver Wales’ international obligations.

Despite the intent and authority of the Nature Directives, “marine protected area” remains a misnomer in Wales, perhaps throughout the UK. In reality they are areas of sea in which certain features or species are designated for protection, but in which most are actually afforded little or none.

The clearest exception remains Skomer MCZ (formerly Wales’ only Marine Nature Reserve until its automatic re-designation under MCAA, after the relevant provisions were finally commenced in Wales five years after Royal Assent), the most effectively managed MPA in Wales, and the most comprehensively monitored in the UK. But the protection afforded by its designation is limited. Except for scallop dredging and beam trawling, fishing continues.

N2K marine management groups perform invaluable planning, engagement and enabling roles (in spite of obstructiveness from WG and NRW), though very few tangible practical actions have been introduced, and the single most significant and valuable management measure, the 2010 closure of nearshore waters and sensitive locations to scallop dredging, was a response to two complaints to the EU rather than being proactive. However, the glimmer of hope for improvement of seabed habitats in Cardigan Bay SAC safeguarded from dredging currently looks certain to be compromised now that

WG has decided to extend the existing area open to dredging. Clearly fishing interests still reign supreme and out-trump the greater public interest. Safeguarding the sea seems to be at the bottom of the WG's to-do list despite all its commitments and the fine words of its progressive new environmental legislation.

The glass is half empty and it is difficult to accept that Brexit will not drain it further. Perhaps the brightest hope is the introduction of a [Future Generations Commissioner](#) whose job is to hold both government and public bodies to account. So far, the evidence suggests that she is taking the well-being of future generations at face value and has been robustly frank about the unsustainability of aspects of Welsh Government ambitions; we must hope that her wings are not clipped.

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