

Devolution of energy and environmental powers: is the new settlement a lasting one in the face of Brexit?

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The devolution settlement is changing under the [Wales Act 2017](#) which received royal assent on 31 January 2017. This article explores what this means for energy and environmental powers in Wales, and also highlights the different attitudes to the devolution of powers following withdrawal from the EU.

Devolution – the current ‘conferred powers’ model

The current devolution settlement is based on a ‘conferred powers’ model. Schedule 7 of the



[Government of Wales Act 2006](#) sets out the 21 devolved areas for which the Assembly can legislate. Everything else falls to the UK or European Parliaments. Areas devolved to Wales include, amongst other things, the environment, agriculture, fisheries, planning and energy. For example, the Assembly has recently passed three key pieces of legislation in relation to the environment in Wales; the [Environment \(Wales\) Act 2016](#), the [Well-being of Future Generations \(Wales\) Act 2015](#) and the [Planning \(Wales\) Act 2015](#). At present all laws passed by the Assembly must comply with EU law which is of particular relevance for the environment as many policy areas are shared with the EU including agriculture, through the Common Agricultural Policy, and nature conservation, via the Birds and Habitats Directives.

Devolution – the ‘reserved powers’ model

The *Wales Act 2017* introduces a ‘reserved powers’ model of devolution. This turns the situation on its head; it sets out the areas outside the Assembly’s legislative competence, leaving everything else devolved to Wales. This is more similar to the situation in Scotland. The reserved powers model is due to come into force in April



2018 and the model in Schedule 7 of the *Government of Wales Act 2006* will apply up until that date.

New powers in the field of energy and the environment brought to Wales

In addition to introducing the reserved powers model, the *Wales Act 2017* brings new powers to Wales in the field of energy and the environment. Most of these changes will not come into effect until next year, with many requiring additional legislation. The *Wales Act 2017* will give Wales:

- Responsibility for [marine licensing](#) in the Welsh ‘offshore region’ – 12 nautical miles out to the median line (currently limited to the ‘inshore region’ – 0–12 nautical miles);
- Power to designate areas in the Welsh offshore region as [Marine Conservation Zones \(MCZs\)](#) (limited to the inshore region currently – Skomer is the only existing Welsh MCZ);
- Power to consent energy projects with a generating capacity of up to 350MW for both onshore and inshore energy extending the current 50MW limit for the onshore and 1MW limit for the inshore. This would include the [planned tidal lagoon](#) in Swansea Bay. Onshore wind projects will continue to have no upper limit;
- Responsibility for licensing onshore oil and gas, including the extraction of shale gas, and for new coal mines;
- Power of consent for ‘associated development’ for energy projects, for example transport links and overhead power lines to the same body that is responsible for the main project;
- Power to make building regulations in respect of ‘excepted energy buildings’ – buildings that form part of energy infrastructure; and
- Additional power to legislate over water supply and sewerage.

Implications of Brexit on the devolution settlement

The *Wales Act 2017* has come at an interesting time as the UK Government prepares to trigger Article 50 and start the formal process for the UK’s withdrawal from the EU. As Wales shares powers with the EU, especially in environmental fields, there are questions around whether the settlement will change as a result of Brexit.



The Welsh and UK Government have expressed different interpretations on where powers currently shared between Wales and the EU will lie. The [UK Government has made reference in its Brexit white paper](#) to the ‘repatriation’ to the UK of existing EU powers to set common regulatory frameworks:

[...] even in areas where the devolved legislatures and administrations currently have some competence, such as agriculture, environment and some transport issues, most rules are set through common EU legal and regulatory frameworks, devised and agreed in Brussels. When the UK leaves the EU, these rules will be set here in the UK by democratically elected representatives.

As the powers to make these rules are repatriated to the UK from the EU, we have an opportunity to determine the level best placed to make new laws and policies on these issues, ensuring power sits closer to the people of the UK than ever before.

The view set out in the [Welsh Government / Plaid Cymru white paper on Brexit](#) is quite different in that powers returning from the EU, in devolved areas, will land in Wales rather than Westminster:

Currently a range of powers already devolved to the National Assembly for Wales and the Welsh Government are operated within an EU regulatory framework. These include agriculture, fisheries, environment and economic development. At the point of UK exit from the EU, when EU regulatory and administrative frameworks cease to apply, these powers will continue to be devolved in Wales.

The [Welsh Government / Plaid Cymru white paper](#) highlights the constitutional implications and challenges of EU withdrawal are particularly acute in the field of environment and rural affairs:

These policy areas are all significantly devolved and over the 17 years since devolution began there has been significant divergence of policy direction between the different parts of the UK.

On Saint David’s Day the Prime Minister addressed devolution and the importance of UK frameworks and an internal single market:



... we are discussing with the devolved Administrations the whole question of the UK framework and devolution of issues as they come back from Brussels. The overriding aim for everything that we do when we make those decisions is to ensure that we do not damage the important single market of the United Kingdom, a market which I remind the right hon.

A key question facing Wales today is whether the ethos of the UK Government's Command Paper, [Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales](#) will be challenged on the UK's withdrawal from the EU.

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