

Consultation on Environmental Principles and Governance after the UK leaves the EU.

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Executive Summary

The Government's proposals to create a world-leading statutory body are welcome but remain limited in a number of ways:

- Any statement of environmental principles must also include the commitment currently enshrined in Article 3 of the Treaty on European Union and Article 191 of the Treaty on the Functioning of the European Union to pursue a **high level of protection** of the environment, which can act as a guiding principle informing the interpretation and application of other environmental principles.
- The enforcement powers proposed are a long way short of those currently vested in the European Commission and the Court of Justice of the European Union (CJEU).
- The planned use of advisory notices as the principal means of securing compliance is inadequate. The body should have the power to levy fines.
- The exclusion of climate change policies from the new body runs the risk of weaker enforcement for climate policies.
- The proposed geographical scope of the body (restricted to England) raises the prospect of diverging standards and principles being applied across the UK, undermining both common resource management and the UK internal market.

¹Brexit & Environment (Brexitenvironment.co.uk) is a network of independent academics working on the impact of Brexit upon UK and EU environmental policy. Its work is funded by the Economic and Social Research Council's UK in a Changing Europe Programme.

Question 1: Which principles do you consider as the most important to underpin future policy-making?

Question 2: Do you agree with the proposals for a statutory policy statement on environmental principles (this applies to both Options 1 and 2)?

Question 3: Should the Environmental Principles and Governance Bill list the environmental principles that the statement must cover (Option 1) or should the principles only be set out in the policy statement (Option 2)?

The European Union Withdrawal Act (EUWA) goes some way to addressing these three questions by requiring the Secretary of State for the Environment, Food and Rural Affairs to bring forward a bill listing the environmental principles and to publish a statement on their application and interpretation. The principles listed in the Act provide a useful starting point.² In addition we agree with the Climate Change Committee³ that the statement should include the principle that the best scientific knowledge be used, in line with the Paris Agreement.

Currently the environmental principles that inform United Kingdom (UK) policy operate within and are logically subservient to a clear framework of aims and objectives guiding European Union (EU) environmental policy. Under Article 191 of the Treaty on the Functioning European Union and the Article 3 on the Treaty on European Union, the aim of environmental policy is unambiguous - to aim for a **high level of environmental protection**. Currently, EU environmental principles interact with one another in the context of this broader, longer-term aim.

In the consultation document there is no mention of this or any other overriding aim (Annex A, Department for Environment Food and Rural Affairs [DEFRA] 2018a). This gap should be rectified, otherwise there is a significant risk that after Brexit, some principles may assume more importance – and hence policy traction - than others. There is also a risk that without a clear aim some principles may be misapplied or override the others. For example, the polluter pays principle should require that payments be set at a sufficiently high level to deter polluting behaviour. Otherwise, the principle could be used to justify pollution as long as a high enough price is paid.

The current position where there is one set of principles in the EU Withdrawal Act and a different set in the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill is one of several unfortunate consequences of the current lack of cohesion between the

² European Union Withdrawal Act, available from <http://www.legislation.gov.uk/ukpga/2018/16/contents/enacted> [Accessed 30/07/18].

³ Committee on Climate Change, Letter 30 May 2018, to Secretary of State, available from <https://www.theccc.org.uk/publication/ccc-writes-to-michael-gove-about-proposed-environmental-watchdog/> [Accessed 10/07/18].

different administrations across the UK. Both the Scottish and UK administrations are legislatively bound⁴ to work towards more developed structures for environmental principles and governance, albeit on different timetables, and the greater the consistency that can be agreed the better.

For example, the Scottish Continuity Bill includes reference to the principles of subsidiarity and proportionality, which are not included in the EUWA. Explicit recognition of these principles is important from an environmental perspective as environmental policy needs to be sensitive to local ecological circumstances and is therefore often best devised and implemented at the local level. Policies should also be proportionate to the aim to be achieved.

The consultation does not explicitly address the question of transboundary pollution within the UK. As the UK Government is a party to the Convention on Environmental Impact Assessment in a Transboundary Context ('Espoo Convention')⁵ and therefore is already committed to the prevention of transboundary harm, explicitly recognising this principle (that transboundary harm should be prevented within the UK) would establish an important principle to underpin transboundary intra-UK environmental cooperation. The inclusion of this principle will be especially useful in the event that joint frameworks on the management of environmental policy are not agreed.

Summary: Extend the principles to include an overarching requirement to pursue a high level of environmental protection within which the principles will operate; to use best available scientific knowledge; to respect subsidiarity; and to prevent transboundary harm.

Question 4: Do you think there will be any environmental governance mechanisms missing as a result of leaving the EU?

There are four governance gaps that the consultation does not directly address.

Policy Formulation Capacity

The European Commission plays a central role in formulating new policy proposals, drawing on the skills of 33,000 civil servants, 500 of whom work in the Commission's DG Environment. In principle, there is no reason why DEFRA (and its devolved counterparts) cannot address this gap, but only with sufficient expertise and resources. DEFRA and its associated agencies and non-departmental public bodies have been subject to extensive cuts. Whilst there has been extensive recruitment to DEFRA in preparation for Brexit, similar levels of additional funding have not been made available for the devolved ministries in Wales, Scotland, Northern Ireland, or agencies such as Natural England. Such funding should be made available to enable bodies to develop policy once we leave the EU.

⁴ Assuming that the Scottish Bill survives the legal challenge in the Supreme Court.

⁵ See <https://www.unece.org/env/eia/ratification.html>.

Long-term Strategic Vision

The Commission helps to set the long-term direction of EU policy, through road maps, action programmes and sustainable development strategies. Freed from the vagaries of the electoral cycle, it uses these to plan for the long term (i.e. more than 10 years into the future). In the past, national bodies such as the Royal Commission on Environmental Pollution and the Sustainable Development Commission helped UK governments to plan beyond the next election. DEFRA and the new watchdog should establish mechanisms to allow them to work together to ensure long-term policy planning and target setting.

Data Provision

At present, most monitoring is undertaken to conform to EU regulatory requirements. The EU has established an independent European Environment Agency in Copenhagen which collects, checks and publishes environmental data, without which it would be impossible to perform policy evaluations. The Agency's quinquennial State of the Environment Reports set the agenda for the next phase of policy making. The UK Government should therefore commit to remaining a member of the European Environment Agency, so that:

- a. It can clearly demonstrate that it is meeting the international 'gold standard' that the Secretary of State has pledged to attain.
- b. The UK can double-check that the EU 27 is not engaging in a race to the bottom after Brexit, and vice versa.
- c. The UK state of the environment assessments (see page 38 of the consultation) dovetail with those undertaken by the Agency for the EU 27.

Independent Policy Evaluation

The Commission evaluates the effectiveness of EU law and policy. A legal requirement to evaluate is often hardwired into the text of new EU laws, alongside an equally important obligation to formulate a new proposal if shortfalls in performance are detected. DEFRA also performs a significant amount of policy evaluation, but the new body should be able to make **independent decisions** about what is failing and what therefore needs evaluating. The watchdog should therefore be empowered to undertake independent policy evaluations, including of all legislation retained after Brexit. The watchdog should also scrutinise the state of the environment assessments produced by the UK Government and the European Environment Agency.

Summary: Resource Defra and associated bodies in England and the devolved nations so that they can deal with new capacity; enable long-term planning; retain access to the EEA to secure good quality data; and ensure independent policy evaluation.

Question 5: Do you agree with the proposed objectives for the establishment of the new environmental body?

We agree with the objectives outlined in the consultation document. The new watchdog will need to act as a strong, objective, impartial and well-evidenced voice for environmental protection and enhancement.

It is especially important to ensure the body's independence and to guarantee an appropriate level of resources to enable the body to carry out its role effectively at holding the government fully to account.

Whilst it is appropriate that the body should operate in a proportionate manner, the line in the consultation document 'recognising that it is necessary to balance environmental protection against other priorities' (p.20) is unnecessary and unhelpful, as the setting of environmental standards and time frames should already have included consideration of economic, social and environmental priorities. The inclusion of this wording implies that environmental protection is in competition with other economic goals, which is inconsistent with the Clean Growth Strategy⁶ and the principle of environmental net gain articulated in the 25 Year Environment Plan⁷.

Finally, we note that the objectives do not include ensuring that the government can be effectively called to account for its performance in meeting its environmental obligations. We recommend including this objective.

Summary: Avoid phrasing objectives in ways that imply the environment is in competition with economic development. Require the new body to hold the government to account to meet its environmental policy obligations.

Question 6: Should the new body have functions to scrutinise and advise the government in relation to extant environmental law?

Yes.

Question 7: Should the new body be able to scrutinise, advise and report on the delivery of key environmental policies, such as the 25 Year Environment Plan?

Yes. An additional useful function, if suitable arrangements can be agreed, would be to compare the UK Government's plan and its implementation with its equivalent in the other nations of the UK (Northern Ireland, Scotland and Wales).

Question 8: Should the new body have a remit and powers to respond to and investigate complaints from members of the public about the alleged failure of government to implement environmental law?

Yes. The European Commission's power to act on citizens' information about environmental problems has been crucial in building a level playing field across the EU. Citizens' access to

⁶ Her Majesty's Government (HMG), 2017. Clean Growth Strategy. Available from: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/700496/clean-growth-strategy-correction-april-2018.pdf.

⁷ HMG, 2018. A Green Future: Our 25 Year Plan to Improve the Environment. Available from: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/693158/25-year-environment-plan.pdf.

justice in environmental matters is also a key component of the Aarhus Convention. In 2017, the UK was found to be in breach of its Aarhus obligations due to the high costs of judicial reviews. Giving the power to respond to public complaints to the new body would enhance environmental protection and meet Aarhus Convention requirements.

The European Commission does not pursue every complaint – the new body should enjoy similar discretion to be able to determine which complaints to address, in accordance with a published policy statement. This decision could be based on risk assessment, policy priorities, or regions. The new body should then justify to Parliament how it selected the cases (or in the case of a four-nation, co-designed body, such justification should be made for all 4 nations to respective legislatures).

Summary: The body should be able to investigate public complaints. It should establish criteria for pursuing cases and its choices should be subject to parliamentary scrutiny.

Question 9: Do you think any other mechanisms should be included in the framework for the new body to enforce government delivery of environmental law beyond advisory notices?

The body should have access to meaningful sanctions to ensure its work is taken seriously. Such sanctions may not often be invoked, but their presence can mean that less formal approaches are taken seriously. An important power that is at risk of being lost once we leave the EU is **the power to fine**. Fines have a strong deterrent effect; they focus the minds of ministers and civil servants in a way that domestic judicial review proceedings do not.

Moreover, there is concern at the EU level that the UK may engage in a race to the bottom by weakening its domestic governance system. A meaningful domestic watchdog, with similar enforcement processes and penalties to those of the EU, may help to facilitate a preferential trading agreement, as it would evince the UK's commitment to environmental non-regression as articulated in the Chequers agreement.⁸

Summary: Include power to fine to reinforce body's enforcement role.

Question 10: The new body will hold national government directly to account. Should any other authorities be directly or indirectly in the scope of the new body?

What subject matter should the new environmental body cover?

The proposals in the consultation document limit the ability of the new body to investigate environmental complaints about Local Authorities and Arms-Length Bodies (ALBs), despite the fact that these organisations are largely responsible for the delivery and implementation of environmental policy. Moreover, failures of implementation at the local level may stem from

⁸ HMG, 2018. Chequers Statement. Available from: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/723460/CHEQUERS_STATEMENT_-_FINAL.PDF.

problems higher up the policy chain, either in the way government has framed advice to ALBs or due to lack of resources.

Summary: Include scope for the new body to investigate compelling cases involving ALBs or LAs in consultation with other bodies.

Question 11: Do you agree that the new body should include oversight of domestic environmental law, including that derived from the EU, but not of international environmental agreements to which the UK is party?

While Brexit creates an urgent need to underpin the implementation of ex-EU environmental legislation, we consider it illogical to exclude key areas of domestic environmental law from the benefits of stronger institutional arrangements. Moreover, as time passes the distinction between ‘ex-EU’ and other law will become increasingly blurred.

After Brexit, the UK Government has indicated its wish to remain a leader in international environmental governance. A body overseeing its delivery of international goals – such as the Sustainable Development Goals – would greatly increase its credibility.

Summary: The new body should have oversight of domestic, retained EU law and international obligations.

Question 12: Do you agree with our assessment of the nature of the body’s role in the areas outlined above?

We agree that the new body should have oversight of fisheries and agriculture policy. We disagree with the exclusion of climate change from its remit, as this raises the risk of weaker enforcement for climate change policies. Moreover this exclusion is not supported by the Committee on Climate Change (CCC).⁹

The new body can coordinate with the CCC to ensure that all environmental legislation is subject to the same standards and enforcement regime. Indeed, the new body could use CCC reports to press the Government to take the necessary actions to meet its commitments under the Climate Change Act.

Summary: Extend the body’s scope to include climate change but devise coordination mechanism with CCC.

Question 13: Should the body be able to advise on planning policy?

Yes. Indeed, there is an opportunity to design the remit of the new body to foster closer integration between planning and environmental regimes and thereby correct anomalies created by the EU’s limited jurisdiction in the sphere of land-use planning (Article 192(2),

⁹ Committee on Climate Change, Letter 30 May 2018, to Secretary of State.

Treaty on the Functioning of the European Union). One obvious reason is that key areas of planning regulation have a basis in EU legislation (notably Environmental Impact Assessment and Strategic Environmental Assessment). It is also the case that decisions made on developments requiring planning consents or cognate forms of permission have significant implications for compliance with environmental goals, whether that be protecting wildlife sites designated under European legislation, putting in place river basin management plans, meeting air quality targets or, looking to the future, achieving 'environmental net gain'.

There are also potential institutional advantages. Designing the remit of the new body to embrace environmental dimensions of planning would reduce the risks of it being confined to a DEFRA silo.

Summary: Allow new body to advise on planning.

Question 14: Do you have any other comments or wish to provide any further information relating to the issues addressed in this consultation document?

The fact that this body currently only covers England is a major drawback. There are clear environmental benefits to a UK-wide approach, as the environment does not respect political borders. There are also clear policy benefits that could accrue from ensuring minimum standards are being met across the UK's four nations, giving oversight to common frameworks, and facilitating policy comparison and learning

The consultation acknowledges the need to work with the devolved administrations to design and manage future policy. However, the consultation appears to have been made with limited involvement or consideration of the devolved nations. Hence, we now face the situation that the timing of policy development across the nations of the UK is not synchronised. Scotland cannot act to address the environmental governance gaps that leaving the EU will create until after the six-month period for consultation and reporting on its Continuity Bill, which cannot begin until after Royal Assent, which can come only after the Supreme Court's decision on Scottish Continuity legislation.

The planned delineation of common frameworks for different policies across the UK (into areas with no framework, those with legislative frameworks and those with non-legislative frameworks) means that there will be different forms of cross-border compliance and enforcement. Under these circumstances it is unclear how cross-border pollution issues will be dealt with where there are no common frameworks. Moreover, the limitation of the watchdog to England means there is also scope for diverging standards, principles and enforcement regimes across the UK.

This divergence matters because environmental governance systems are already differentiated – from the Commissioner for Future Generations in Wales to the absence of an independent

Environment Agency in Northern Ireland. Overlaps and gaps will vary across the four nations – the new body will need to consider how to address these, but should do so through consultation with equivalent bodies in the devolved nations.

If the body remains an England-only body, as environmental damage does not respect political borders, UK citizens living outside of England should have the option to ask the new body to investigate how pollution initiated in England is affecting them.

Summary: More transparent and genuine consultation with the devolved administrations is required. The new body will need to coordinate with the devolved administrations to ensure that policy divergence does not lead to inconsistent environmental protection. This does not mean that there cannot be divergence but that any divergence needs to operate against some common minimum standards and benchmarks.