

## **Response to Defra Consultation on environmental principles and accountability for the environment**

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1. I am grateful for the opportunity to contribute to this important discussion.

### Part 1: Environmental Principles

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

2. Annex A of the Consultation Paper includes the four principles contained in Article 191 TFEU: the precautionary principle, the prevention principle, the polluter pays principle, the rectification at source principle. In the context of leaving the EU, enshrining these environmental principles in UK law should be the priority. The integration principle, contained in Article 11 of the Treaty on the Functioning of the European Union, is another important EU environmental principle that should be incorporated into UK law after leaving the EU.
3. My own view is that sustainable development is an overarching objective, rather than a principle. Its role when we leave the EU is nevertheless important.
4. The proportionality principle, mentioned at various points of the Consultation Paper, is an important general principle of EU law, and does often feature explicitly in EU approaches to the environmental principles. Care needs to be taken to ensure that proportionality strengthens the principles (eg the polluter pays principle would make environmental regulation more difficult if wrongly interpreted to mean that *only* an individual polluter should pay for *only* its own pollution in *every* case) rather than providing a crude way to prioritise 'other national priorities' such as economic growth over environmental protection (paragraphs 40-41). The value of principles is precisely to provide guidance when doing the right thing is difficult.

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

5. Yes, a policy statement on environmental principles should be underpinned by legislation. That legislation should do at least two things.
6. **First**, it should require **all** public bodies (not just 'government') to **act in accordance with** (not to 'have regard to') the policy statement on environmental principles.
7. The Consultation Paper somewhat understates the role of the environmental principles in EU law.<sup>1</sup> They are often binding on public authorities at all levels, extending deeply and routinely into administrative decision making, including individual decisions (cf paragraph 41). The most striking example may be the way in which the Habitats Directive is said to give expression to the precautionary principle: Planning Inspectorate decisions are often notable for their careful, but pragmatic,

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<sup>1</sup> I provided wording along these lines to Greener UK in my capacity as a member of their Brexit Scenarios Group. This response represents only my own views.

application of a very demanding judicial approach to the precautionary principle. And note that the precautionary principle is not contained in the language of the Habitats Directive.

8. So the impact of the environmental principles in EU law goes beyond '[guiding] our environmental policy making and legislation' (paragraph 28). They also guide policy implementation, the interpretation of legislation by administrators and courts, and the exercise of discretion by public authorities. In some cases they provide a standard for judicial review.
9. After the UK leaves the EU, the environmental principles should continue to play their current role of routinely guiding and shaping day to day administration affecting the environment. This would not be novel or disruptive. The principles would not trump the language of the legislation governing the relevant regulatory regime. The legislative language is always central.
10. **Second**, the legislation should set out a statutory procedure by which the statement is initially established, and subsequently amended. That statutory procedure should include wide public consultation and parliamentary approval.
11. I find it difficult to see how new scientific knowledge (paragraph 37) will affect the policy statement. New knowledge and understanding shall of course affect the implementation of detailed legal provisions that are understood and applied in accordance with the principles. But the policy statement will presumably address the meaning and role of the principles at a much higher level.

**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)?**

12. The principles should be listed in the legislation, to ensure full democratic processes around significant change.

Part 2: Accountability for the environment

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

13. Yes. At least three key environmental governance mechanisms will be missing for current purposes. **First**, EU law consistently imposes a framework of planning and reporting obligations on Member States. Member States must plan for implementation of their environmental obligations; they must report on their performance, explaining failures to comply, as well as the lawful use of derogations and exceptions; and they must explain how compliance will be maintained or achieved in the future.
14. This should be replaced with statutory obligations on public bodies (not just the Secretary of State, paragraph 145) to plan and report publicly, in the same level of detail as under EU law, and in defined time frames. In order to ensure consistent expert and detailed scrutiny, the reports should also be provided to the new environmental body, which should have a statutory obligation to respond within a defined time frame.

15. **Second**, the new environmental body is designed to fill the roles of the Commission and the Court in scrutinising and enforcing the national implementation of EU environmental law.
16. **Third**, the EU has a range of governance mechanisms and institutions surrounding the development of new environmental law, policy and detailed standards. I shall return to this below.

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

17. Largely. The 'clear remit' has not yet been spelled out. The new environmental body should be responsible for scrutinising the implementation of environmental law by public bodies, and form part of a set of institutional arrangements that contributes to the political and legal accountability of public bodies when they fall short.
18. The obligation to balance environmental protection should be addressed more cautiously, as above.

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

19. Yes. The obligation to scrutinise should be linked to the receipt of reports, as suggested above. This would ensure detailed and regular reporting on a wide range of environmental issues, including important matters that may not attract a lot of public attention.
20. The new environmental body will not simply ensure the implementation of hard edged (eg numerical) standards, and procedural standards. It will also be able to interrogate whether, eg, a public body has taken reasonable or appropriate steps to endeavour to comply with softer standards.
21. The new environmental body should also be able to undertake investigations of its own initiative.

**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?**

22. Yes, but the new body's role goes beyond the delivery of policy. Government policy must comply with environmental law, and help administrators to comply with environmental law. Balancing against 'other priorities such as housing' (paragraph 83) can only take place within the confines of the law. Government policy should therefore be scrutinised by the new environmental body (as indeed it could be by the European Commission). The new environmental body should be independent, and not dependent upon reports being commissioned by government (paragraph 84); and its reports on policy's consistency with law should have the same status as the rest of its interventions.
23. There will be policy that is more protective than existing legislative obligations, or proposes repeal of legislation or new legislation, as is the case for parts of the 25 Year Plan. It would make sense for the new environmental body to have a role in scrutinising the implementation of that policy. Reporting to parliament with mandatory government responses (paragraph 86) is an important mechanism for enhancing political accountability.

24. The more general need to ensure the evolution of our environmental law and standards raises important governance issues that go beyond the precise role of the new environmental body (or existing bodies and agencies). The EU has a range of imperfect, but well established, mechanisms for developing new overarching approaches and detailed standards. There will of course be debate over each individual change, but setting out some basic principles for the governance of law making and standard setting will save a lot of trouble later. Good standard setting should be:

- a. inclusive, involving a diverse range of interests and perspectives;
- b. expert, taking account of the latest scientific and other evidence;
- c. outward looking, taking account of international and EU standards;
- d. principled, compliant with the environmental principles;

The body taking decisions should be required to explain how these governance principles have been complied with.

**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?**

25. Yes. I see this as a mechanism to ensure that the new body is alerted to failures to comply with environmental law. Some additional access to justice and redress will incidentally be provided, but an accountability body will not be able to ensure full individual access to justice in environmental matters. Full compliance with the Aarhus Convention shall still need to be ensured.

26. The new environmental body must have the power to undertake investigations of its own initiative. The ability to go beyond a purely responsive mode is an important element of independence, and enables more strategic approaches to be taken.

**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?**

27. I agree that most issues are likely to be resolved without formal action, and that the most common formal action will be advisory notices. Mandatory measures are however crucial if there is to be any legal accountability. Negotiation is also much more even handed if the new environmental body has some real legal powers.

28. Binding notices and undertakings are both important and potentially powerful mechanisms for the new environmental body. Binding notices should include the possibility of remedial action, be that fixing environmental damage or compensating for it with environmental enhancement elsewhere, or renewed planning for compliance.

29. In addition to the mechanisms raised in the Consultation Paper, the new environmental body should be able to bring its own judicial review actions against public bodies.

**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?**

30. The new body should be able to hold to account (directly) any public body that is responsible for ensuring the implementation of environmental law. The European Commission, with its origins in international law, is in a completely different position, and replicating the roundabout route to enforcement is unnecessary. As well as being more efficient, direct accountability will help to ensure that public bodies comply with their legal obligations relatively free of political pressure.

**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?**

31. No. The body's remit should extend to the implementation of all UK environmental law. Given the increased importance of international environmental law after Brexit, I do not see why that should be excluded – although any advice on international commitments that are not binding in national law should probably also not be binding.

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

32. The body's remit should extend to the implementation of all UK environmental law, defining 'environmental law' generously (as in paragraph 120), by all public bodies. The new body's role is not to monitor the compliance of (eg) local authorities with pollution permits (that is the job of the Environment Agency), but about monitoring whether (eg) local authorities exercise their powers in a way that best ensures that third parties comply with the law, and that overall environmental quality standards are met.
33. Excluding climate change from that remit would be practically difficult, since climate change pervades other areas of environmental law. Moreover, the CCC does not have the enforcement powers envisaged for the new environmental body, and so without the attention of our new environmental body, the implementation of laws relating to climate change by public bodies would be relatively neglected. Detailed protocols for avoiding overlap would no doubt be worked out between the two bodies, so that the advice and scrutiny of future and current carbon budgets would remain with the more specialist CCC.

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

34. Planning is a core institution in our framework of environmental protection. Planning authorities are public bodies with a key role in ensuring the compliance of third parties with environmental law, and the meeting of overall environmental quality standards. As such they fit precisely within the remit of this new environmental body, in respect of both policy making (planning) and individual decisions (regulation).
35. When planning authorities are subject to obligations to report on compliance with environmental law, the new environmental body will receive and respond to those reports. As with the Environment Agency or Natural England, when individual permitting or policy decisions are in breach of environmental law, they are likely to come to the new environmental body's attention through reporting or through complaints. It is not difficult to imagine a situation in which complaints or reports suggest that the new environmental body should investigate whether there are

widespread or systemic problems around eg the use of planning powers to ensure compliance with air quality standards, or with nature conservation legislation.

36. There seems to be a concern, here and elsewhere in the Consultation Paper, that there is simply 'too much' for the new environmental body to do, both in terms of its own capacity and its intervention in the smooth running of government. The new environmental body is not a planning appeals body or a statutory consultee, it is a body that contributes to ensuring that public bodies implement environmental law. It will need to develop, transparently, protocols to ensure that it focuses on the most significant or strategic environmental issues, as indeed has the European Commission.

### Part 3: Overall environmental governance

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

37. There would be great strength in a single UK-wide body to ensure the environmental accountability of public bodies. Peer review provides additional accountability, and shared funding and responsibility increases the independence and robustness of the new body. A joint body necessarily implies joint design and joint administration between the four nations. The environmental principles should also apply across the UK, again implying agreement.