DEFRA Environmental Principles and Governance After EU Exit inquiry

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Summary points:

- A broad range of updated principles, objectives and rights should be included within the legislation, with appropriate definitions;
- There should be duties on all public authorities and any other relevant parties to abide by these;
- The policy statement should expand upon these, providing insight into implementation measures etc;
- The current proposals for a new environment body are insufficient;
- The new body must be truly independent of government;
- It must have the capacity to initiate legal action and have the proper enforcement tools to respond to varying degrees of non-compliance;
- Judicial review is important, but will not suffice to replace the existing EU mechanisms that give citizens access to environmental justice;
- A robust, accessible and free citizens' complaint mechanism must be involved in any future environmental governance arrangements;
- Any legislation must comply with international obligations;
- Any legislation must also bear in mind the particular situation of Northern Ireland (NI) and its relationship with the ROI/the rest of the UK – the 4 jurisdictions are interconnected but distinct and this needs to be reflected in any common frameworks (CFs) or any significant piece of legislation applicable in a single jurisdiction;
- The England-only scope is problematic. Despite legal and political challenges a UK-wide approach is necessary, especially as its absence risks leaving NI behind with no overarching environmental act/legislation or having to adopt a proposal designed for England by default;
- If an England-only scope is maintained, particular attention must be focused on how it would cooperate with equivalent bodies in the rest of the UK, to tackle transboundary challenges and pool resources;
- Consideration of NI's distinct nature is essential to protect NI's interests, but also in bringing into focus transboundary issues for all of the UK.

1. This submission was informed by the proceedings at a workshop organised by Dobbs and Gravey, in association with Nature Matters NI. The authors would direct the committee to our policy paper (https://www.brexitenvironment.co.uk/wp-content/uploads/dlm_uploads/2018/07/Environmental-Governance-in-NI-Policy-Paper-final-V3.pdf) (co-authored with Brennan and Uí Bhroin) created for that workshop, which provides further insight into the area and is attached as supporting evidence. Both this submission and policy paper consider the issues from a general and NI perspective where relevant and appropriate.

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

2. England and the rest of the UK are not constrained to only a few central principles and should **explore widely to ensure a suitable balance of procedural and substantive principles are adopted** – ones which also can assist with the **specific challenges brought by Brexit** (e.g. changing internal and external relationships, the diminishing or non-existence role of the EU Commission and Court of Justice, lack of access to EU resources, the return of powers to within the UK), **global concerns** (e.g. climate change), and **internal politics** (e.g. NI's current lack of an operational Assembly and the potential power struggles over devolved powers and CFs). There is also the **opportunity** to take once more the lead on an environmental front and create an expansive **Environmental Charter** within the legislation.

3. Thus, a **broad range of (non-exhaustive) complementary principles should be adopted here**, encompassing those traditionally considered as the core environmental principles, governance principles, Aarhus principles (required by the EU Withdrawal Act), Espoo principles and other principles addressing cross-border issues.

4. As per Section 3.3 of our accompanying policy paper, a range of **objectives, rights and corresponding duties should also be incorporated**, strengthening and giving weight and purpose to the principles.

5. Further, environmental principles and objectives have developed considerably since outlined initially in international documents and could be developed still further – **stronger, updated or even new versions should be adopted**.

6. **Please see the Tables in Section 3 of the policy paper for further detail**.

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

7. **Partially.** Principles and rights tend to be quite broad and open to interpretation. **Definitions should be found within legislation**, but further guidance on potential implementation measures or procedures will help ensure effective, consistent and objective implementation, and improve legal certainty. This is especially important for

any new principles (or rights, objectives or duties)[1] or where principles need updating or greater clarity. However, legislation should not be too long or intricate and also legislative amendments can difficult and slow to achieve. **The policy statement is the appropriate place for detailed guidance** and can be more readily amended if the implementing measures prove unwieldy or unsuitable.

8. If the proposed legislation ends up being developed suitably into a UK CF, **the policy statements could either be for the whole of the UK or for each jurisdiction** (with opt-outs possible, provided individual statements were created). This would enable further flexibility for the devolved administrations, whilst maintaining a CF.

9. Two issues of significant concern arise regarding the proposed policy statement – firstly, the exclusion of certain issues/fields and the emphasis on proportionality may undermine the creation of a strong policy statement. Care needs to be taken to maintain efforts to promote a healthy environment in creating the policy statement. Secondly, the government merely to 'have regard' to the principles. This is a very weak obligation, which undermines the principles compared to their potential role as outlined in response to Q3.

10. Consequently, a policy statement is required, but it should be crafted to support the nature and role of principles, as outlined in the following section for the legislation. It should not unduly limit or undermine them.

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)?

11. **Option 1 should be favoured** in order to promote legal certainty, accountability, and legitimacy, provide legal force and ultimately protect the environment. Indeed, Article 16 of the EU Withdrawal Act requires that some principles be included within the legislation. In doing so, an appropriate balance need to be struck between what is contained within the legislation and the policy statement, bearing in mind the nature of principles, e.g. where should the definitions, detail or implementing mechanisms be outlined?

12. **Legal principles have binding force**, just as legal rules do. To achieve this, principles must be incorporated validly within the law – within the legislation or judicial precedent. In contrast with the Secretary of State Michael Gove's comments to the Environmental Audit Committee in July, **environmental principles can and currently do form part of both EU and UK law**. However, principles are more malleable than rules (including specific implementing measures), as they guide without necessitating specific outcomes – they are tools used in achieving objectives that are weighted according to appropriate values. These two traits (binding force and flexibility) ensure principles have a fundamental role for environmental protection at all stages – policy/law formulation, implementation and enforcement, e.g. via purposive interpretation before the courts.[2]

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[1] E.g. Commission's Communication on the Precautionary Principle, COM(2000) 1

[2] *Champion, R (on the application of) v North Norfolk District Council & Anor [*2015] UKSC 52 (22 July 2015).

13. **The principles in Table 1 in Section 3 of our accompanying policy paper should be included in the proposed legislation.** This gives them both legal and political support, making it harder for them to be dismissed or cast aside. Inclusion in legislation confirms that legal status – to exclude them would undermine their role and nature. **The same should be done for the objectives, rights and duties in Table 2.**

14. **Brief, but suitably broad and strong definitions of each concept should be included in the legislation.** Some concepts have multiple meanings or otherwise are opaque – therefore, definitions or similar brief statements elucidating on the concepts are essential for legal certainty, but also can be used to avoid weaker definitions or misconceptions that could seriously undermine their roles. A statement on sustainable development would be benefited by reference to the SDGs. Direct references could be made to definitions/explanations in external sources, e.g. international declarations/conventions or relevant jurisprudence – with the caveat that strong, updated versions are selected.

15. **Sufficient flexibility would remain** due to the nature of legal principles, the concept of sustainable development alongside the principle of proportionality (enabling effective balancing) and the limited (restrictive) detail in the legislation, with legislative amendments available if necessary. The policy statement's more detailed guidance would help promote further legal certainty but still maintain flexibility; as it is only soft law and lacks binding force, it cannot override the legislation or binding precedents.

16. The proposed role of the principles - that Ministers 'have regard to' them - is entirely insufficient from perspective of scope and force. It restricts and weakens them unduly, which would undermine environmental protection considerably. **Binding duties** should be imposed **on all parties** to apply the principles/protect the human rights/promote the objectives **at all stages.** This would more accurately reflect their nature and current role.

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

17. **Yes.** Leaving the EU will deprive the UK of important governance mechanisms that currently play a critical role in ensuring environmental law is upheld. Two key areas within the consultation document where the deficit is most striking are:
    (i) The new environmental body as proposed does not have enforcement powers to replicate those currently held by the European Commission and CJEU
    (ii) There is a lack of clarity and certainty relating to the processes through which citizens will be able to complain about breaches of environmental law.

18. Importantly, the proposed domestic accountability watchdog detailed in the consultation document does not have the power to take proceedings against the government for failure to implement environmental law. Additionally, the proposed reliance on judicial review will be insufficient to replicate the ability of citizens or eNGOs to make complaints to the European Commission or by petition to the European Parliament, nor can JR itself provide for sufficient remedy. Further detail is provided in our accompanying policy paper.

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

19. The objectives are broadly acceptable, but the proposal raises some significant concerns regarding their fulfilment:

(i) In order for the proposed body to be considered 'strong, objective, impartial' as set out in the objectives it must be truly independent from government. More detail is required on how this independence would be achieved and protected;
(ii) The proposals do not currently describe a body which would be able to take meaningful legal action to hold government to account, therefore it would not in its current form have the powers required to fulfil this objective;
(iii) The emphasis on 'proportionality' could lead to potential downgrading of environmental concerns, which could be relegated below other domestic policy interests.

20. The new body's objectives should also include the following:

(i) 'Have the necessary enforcement powers (including the ability to fine) to take legal action against any public bodies which fail in their duties to implement environmental law.'
(ii) 'Provide an easily accessible, free and direct citizens complaint reporting procedure.'
(iii) 'Provide for independent oversight of the application for and oversight of derogations from environmental objectives or standards.'

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

21. The new body should have the power to scrutinise government regarding extant environmental law. It should also have meaningful enforcement powers should its scrutiny exercises uncover non-compliance. The new body's key functions should be scrutiny and enforcement. To create a more accountable system and ensure independence is maintained, serious consideration should be given to locating advisory functions in a separate body who would work closely with government to develop targets.

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, however the new body's core role should be to ensure the rule of environmental law is enforced and to provide access to environmental justice procedures for citizens. The new body should be able to take action if policies like the 25 Year Environment Plan (which itself should be more ambitious) fail to be implemented – however this will most likely require such policies to have a basis in legislation, which we would strongly support.

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?

23. Yes. A core function of the new body should be to ensure continued access to environmental justice for UK citizens in absence of the current EU mechanisms, i.e. the European Commission. This process should be accessible, free and involve complainants throughout the investigation. This requirement cannot be met through existing domestic mechanisms, i.e. JR. It also needs to provide for fair, effective and timely remedies and more generally conform to the characteristics of Article 9(4) of the Aarhus Convention.

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?

24. Yes. Binding notices must be more than merely advisory in nature and should extend to enforcing implementation of environmental law by all pubic bodies. It is essential that the new body has the power to initiate legal proceedings and have access to legally binding enforcement mechanisms. Enforcement undertakings are a potentially valuable mechanism but should be used in addition to, rather than to replace other more punitive enforcement responses – which may be required if cooperation and negotiation with the non-compliant public body fail to achieve compliance. The new body should have access to a range of enforcement responses to enable it to respond appropriately to breaches of varying levels of severity.

25. Contrary to what is proposed in paragraph 98 – it would be imperative for the body to be able to act even where no specific legal obligation exists – otherwise the scope of inaction and failure can be circumscribed and delimited by Government in making the legislation and so compromise rights and principles.

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?

26. Yes. All public bodies with a role in implementing environmental law (e.g. regulators such as the Environment Agency but also local government) should be directly accountable to the new body. Limiting the scope of the body to central government is too restrictive. The suggestion that the new body could request government departments to put pressure on other bodies to achieve compliance is unnecessarily convoluted and would create unacceptable levels of bureaucracy and inefficiency.

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?

27. The source from which environmental law derives is irrelevant. The new body should have meaningful powers to hold government and all public bodies to account for failure to implement any environmental law regardless of its source. This should include domestic environmental law, law derived from the EU and international environmental agreements to which the UK is party. Clearly, this does not mean that the body subverts or undermines compliance mechanisms like the UNECE Espoo Implementation Committee or the Aarhus Convention Compliance Committee.

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

28. Partially agree. The new body should have an enforcement role in relation to all areas connected to the environment. This should include climate change (as the CCC does not currently play an enforcement or scrutiny role) as well as agriculture, fisheries and the marine environment to the extent that these interact with environmental concerns. Failure to include these areas within the scope of the new body will result in significant governance gaps.

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

29. Yes, the new body should have powers to ensure the effective application of environmental law in the context of the planning system. However, there should remain a separate planning body in order to avoid conflicts of interest.

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

Besides the issues above, significant gaps arise that need to be addressed in the proposed legislation or by some other suitable means:

a) Bringing Common Frameworks back in

30. Discussions on CFs across the UK (and, for NI, with Ireland) – be it legislative, non-legislative or no frameworks (with the caveat below)– need to be reconnected to discussions on principles and broader governance.

31. Some CFs are essential for effective environmental governance. A **UK-wide Environmental Charter** in **legislation should be adopted** – this would help address considerable cross-border issues (within and beyond the UK) and concerns over races to the bottom. This should **contain the range of principles, rights, objectives and duties outlined,** but specifically be **underpinned by three sets of principles**:
    a. Environmental non-regression within the UK (irrespective of what is agreed with the EU)
    b. Cross border cooperation principles: obligation to consult each other on decisions having transboundary effects, mechanisms to deal with transboundary harm etc;
    c. Principles guiding the establishment of other CFs, including especially principles of subsidiarity (broad understanding) and proportionality.

32. Further some regimes will necessitate CFs – especially those with cross-border elements, such as water resource management, air pollution, and nature conservation. There should be a presumption in favour of legislative frameworks for the areas of devolved power being returned from the EU to the UK.

33. Different types of CFs will require different types of underpinning governance mechanisms – for example, dispute resolution mechanisms would be different if one of

the 4 governments were to breach a Memorandum of Understanding or a legal framework.

34. Evaluating whether environmental frameworks are working as intended and if more or less commonality is necessary to achieve environmental gains should be one of the missions of the new body, or alternatively, of a reinforced and expanded Joint Nature Conservation Council. It could only serve this mission with a UK-wide remit.

b) Cross-border issues

35. Legal, societal and physical borders have been superimposed upon the environment, despite its permeable nature. Actions in Wales may cause environmental degradation in England or French seas and vice versa. Every jurisdiction and society must be able to manage cross-border issues and facilitate effective engagement by interested parties from jurisdiction A in decision-making and litigation in jurisdiction B.

36. Brexit intensifies this, as the nature of the borders within the UK and between the UK and surrounding States is changing. Currently the EU requires some regulatory alignment within the UK and with other EU States, as well as facilitating and requiring varying degrees of cooperation. Post-Brexit and despite international obligations, there may be considerable regulatory divergence and the compulsion to cooperate will be eroded. Further, challenges in sharing sensitive information with non-EU third parties may increase.

37. Consequently, cross-border principles and mechanisms must be established. This can be done via a UK CF, outlining significant principles on cooperation, collaboration, non-transboundary harm, access to justice etc, as well as more detailed procedures for consultation, cooperation, timely and easy access to information, establishing standing, etc. Without the ability to appeal to the EU Commission or Court of Justice by individuals within the UK regarding matters in the EU (or UK) or vice versa, there is an increased need to be able to engage effectively in decision-making and litigation in the other State(s)/jurisdiction(s).

38. Both legally (the UK represents all 4 jurisdictions internationally) and practically (all 4 jurisdictions are affected and must respect international commitments), cross-border issues especially need to be addressed at UK level – with input from all 4 jurisdictions and preferably also bordering States.

39. Careful consideration needs to be given to the scope of these proposals within the UK, which will require close liaison with the devolved governments. In the absence of a NI Assembly, it cannot be presumed that proposed governance arrangements appropriate for England, Scotland or Wales will function in the same way given the distinctive environmental governance challenges which exist in Northern Ireland (see attached Policy Paper).

c) Distinctive nature of Northern Ireland

40. As outlined in section 5 of our policy paper, NI is distinct for numerous reasons, e.g. land border with the ROI/an EU State; the interdependent relationship of agriculture with the ROI, whilst GB remains NI's biggest export market; the Good Friday/Belfast Agreement;

the backstop; and the impact of the ice-age and other events leading to the creation of a single biogeographic and epidemiological identity on the island of Ireland. Further, the legacy of environmental governance issues – e.g. regarding compliance and the lack of an independent EPA – is a significant concern that needs to be borne in mind.

41. The creation of any CFs will need to bear in mind the distinct characteristics of NI, along with any distinguishing features of the 3 other jurisdictions. The distinct characteristics emphasize the significance of having input from all jurisdictions in initially creating any and highlight the potential for problems if CFs are unilaterally imposed by default on the jurisdictions instead.

42. This highlights a significant problem for NI: there is no operational Assembly that can engage effectively in developing CFs or providing feedback on such a proposal. In light of the existing environmental governance regime's flaws, the failures in environmental protection on the island of Ireland and the real potential for a 'no-deal', there is considerable urgency in addressing and improving environmental governance in an effective and tailored fashion. The lack of an operational Assembly means that there is a need for both the UK and ROI to help address these issues, by whatever appropriate mechanisms are available to them including Strand 3 of the Good Friday/Belfast Agreement – and to not risk even greater environmental governance gaps arising or an unsatisfactory proposal applying by default instead.

43. Firstly, some minimal standards and regulatory convergence will be required via the creation of North-South CFs, as with East-West CFs. Secondly, the jurisdictions' characteristics need to be recognised now to incorporate the flexibility to create appropriate legislation and policy in the future, e.g. through inclusion of strong and varied principles regarding cross-border issues. NI's emphasis on borders can help England/the UK develop this necessary aspect. Thirdly, the relationships and organisations/bodies need to be developed and cemented now, ensuring their continued operation post-Brexit. Finally, further steps will be required to bolster NI environmental governance now and in the future, e.g. developing fresh legislation, funding and an independent NIEA.

d) Other concerns?

44. Further issues beyond our submission's scope arise, e.g. any **framework legislation** encompassing principles, objectives, rights, duties and enforcement bodies **should apply not only across the UK as noted above, but also across all areas of environmental protection**. The environment is too complex and interrelated to silo to such an extent.