



Response to Defra Consultation: Environmental Principles and Governance after the United Kingdom leaves the European Union

1 August 2018

We are the Environment Agency. We protect and improve the environment.

We help people and wildlife adapt to climate change and reduce its impacts, including flooding, drought, sea level rise and coastal erosion.

We improve the quality of our water, land and air by tackling pollution. We work with businesses to help them comply with environmental regulations. A healthy and diverse environment enhances people's lives and contributes to economic growth.

We can't do this alone. We work as part of the Defra group (Department for Environment, Food & Rural Affairs), with the rest of government, local councils, businesses, civil society groups and local communities to create a better place for people and wildlife.

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Executive summary

The Environment Agency welcomes the Government's proposals, as set out in the consultation document and the EU (Withdrawal) Act 2018, to put into UK law a set of environmental principles and establish a new independent body to hold the government to account. Taken together, and with the sustained work of the Environment Agency and other existing bodies, we believe these new arrangements will help protect and enhance the environment for future generations.

We welcome the Government's agreement in the EU (Withdrawal) Act 2018 that the environmental principles should be spelt out in primary legislation and we endorse the principles identified.

We support the proposal for a new independent body, accountable to Parliament, and welcome the Government's agreement that this body will have proportionate enforcement powers against Ministers of the Crown, including the ability to initiate legal proceedings if necessary. This will help to ensure that the new body can effectively hold the government to account when the UK leaves the European Union. We agree, as the consultation spells out, that the new body should not replace or duplicate the role of other bodies, including the Environment Agency.

Environment Agency response to Defra consultation questions

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

We agree that the suite of principles set out in the EU (Withdrawal) Act 2018 are the right ones to underpin future policy-making to help protect and enhance the environment.

Environmental principles play an important role in influencing the substance of the law itself, in developing policy but also in guiding decision-makers in how to apply that law. When the Environment Agency is required to make decisions to protect and manage the environment clear environmental principles are essential.

Embedding sensibly defined principles through the forthcoming Bill into domestic law will help to ensure good environmental policy decision-making continues after EU Exit. It will also support the aims of the 25 Year Environment Plan (25 YEP).

The proposed principles have formed part of Treaties, International Agreements and domestic law in various forms for many years and it is right to include these within the proposed Bill.

Principles enshrined fully in law will help provide certainty to industry and reassurance to the public that environmental standards in England will be maintained.

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

We support the requirements of the EU (Withdrawal) Act 2018 for the government to publish a statement that sets out the application and interpretation of the principles in connection with the making and development of policy by Ministers.

Environmental principles underpin the development of policy and legislation by the EU institutions, requiring the EU to ensure that its environment policy incorporates consideration of these principles throughout the policy and law-making process. For example, Article 191(2) of the EU Treaty requires that EU policy on the environment ‘shall be based on’ certain key principles and these aim to provide a high level of environmental and human health protection. In this way the principles feed through into EU legislation.

The EU (Withdrawal) Act 2018 requires the government to have regard to the statement in the circumstances provided for in the forthcoming Bill. It will be important to show that the environmental principles continue to have a real influence on the development of environmental policy and legislation, the subsequent interpretation of that legislation through case law, and ultimately the delivery of important environmental outcomes on the ground. In order to achieve this, either a further principle of high environmental protection could be added, or the statement could state that the principles aim to achieve a high level of protection.

The statement mechanism should allow further principles to be adopted as domestic and international understanding and implementation of environmental principles improves, for example, environmental net gain.

The principle of environmental net gain is an aim of the 25 YEP, but it is still in a development phase. We suggest that the Bill could provide a mechanism for the adoption of new environmental principles, and how they can be understood, tested and then applied to provide for future policy-making. For example, the current 25 YEP Pioneer projects, two of which are being led by the

Environment Agency, are being used as pilots to test the principle of environmental net gain. This approach would allow flexibility for innovation and new approaches.

We welcome the proposal (paragraph 36) that the government would consult on the draft policy statement and future changes, and present these to Parliament for scrutiny. The consultation does not propose timescales for the draft policy statement and future changes to be reviewed, updated and scrutinised or agreed by Parliament. We recommend that periodic review of the statutory policy statement is set out in the Bill, and that aligning this with a periodic review of the 25 YEP would be a good approach (see our response to question 7).

So that all government departments have regard to the environmental principles, we also support the approach that the new body would scrutinise how the government has had regard to the statement on principles, advise government departments on possible improvements and, if necessary, take legal action (paragraph 42).

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 EU (Withdrawal) Act 2018 has resolved this question.

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

The consultation states that it is important to consider how government takes on responsibilities currently fulfilled by the European Commission within the full context of sustainable development.

The consultation itself identifies two specific roles of the European Commission: ensuring that the government implements EU environmental law; and operating a complaints service to address alleged breaches of environmental law. The consultation suggests these roles could be fulfilled by the new body. We agree with this and address the proposals in our responses to questions 8 and 9.

Government may face pressure to reduce environmental standards in some areas. There should, therefore, be an independent and authoritative voice able to speak publicly for the environment in such cases, and ensure the continued maintenance of high environmental standards as the UK leaves the EU. The Environment Agency itself already plays part of this role by providing unvarnished and evidence-based advice to government on environmental policy, law and the state of the environment, and by commenting publicly on these issues. We therefore think the proposed role for the new body in this respect will sit well alongside the existing role of the Environment Agency.

In order to ensure that environmental standards do not drop in future we also advocate the inclusion in the forthcoming Bill of a non-regression clause – a requirement on the government to take steps to ensure that EU exit does not result in removal or diminution of standards to protect or improve environmental outcomes. We welcome the government's proposal in the July White Paper on the future relationship between the UK and the EU that the UK and EU should commit to the non-regression of environmental standards.

We have considered other potential gaps in the framework for protecting the environment, as the UK leaves the EU. We think it is important that existing EU law requirements on the government to report information to the European Commission on the implementation of EU environmental law are replaced with a requirement on the government to publish appropriate reports. If reporting obligations are lost this would affect the ability of the new body, and existing environmental bodies such as the Environment Agency, and non-governmental organisations and the public, to be able to properly scrutinise the implementation of environmental law and policy and give appropriate advice to the government.

In addition, reporting requirements are often linked to requirements on the European Commission to review the implementation and effectiveness of legislation in the light of the information in these reports, and report to the European Parliament. We recommend that the new body receives relevant information and reports and then provides the government with appropriate advice and recommendations.

It is also the case that most EU Directives and Regulations require member states to provide penalties for breach of environmental law which are effective, proportionate and dissuasive, and member states are required to notify these provisions to the European Commission. Again, this is an important requirement on the government that should ideally be maintained and where the new body could have an advisory role.

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

We support the proposed objectives for the establishment of the new body.

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

This question concerns the advisory role of the new body as described in paragraphs 81 and 82 of the consultation paper. We agree that the role of the new body to scrutinise the implementation of existing environmental legislation means it will be well placed to offer feedback on the effectiveness of that legislation and its possible improvement.

In view of this, we also support the suggestion that the new body could be asked to provide independent advice if the government is planning to change existing environmental law significantly. The new body would consider whether the environmental outcome would be enhanced, maintained or diminished. We think this would provide additional reassurance in relation to future changes to environmental legislation that may be proposed by the government after EU Exit, where there may be fears that present standards could be reduced.

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?

We recommend that the new body should scrutinise, advise and report on the delivery of key environmental policies, including the 25 YEP.

In line with our response to question 12, it would be appropriate for the Committee on Climate Change and the Adaptation Sub-Committee to have the same role with respect to the climate change policy and actions within the 25 YEP.

Publication of the 25 YEP has raised public expectations for future environmental protection and improvement. One way of fulfilling these expectations would be to place the 25 YEP on a statutory footing. For example, the forthcoming Bill could set out a duty for the Secretary of State to publish, review and report on the 25 YEP on a regular basis. It could also place a duty on the new body to provide advice to the Secretary of State on the 25 YEP and make regular progress reports to Parliament, to which the Secretary of State is obliged to respond. This would be similar to the architecture for carbon budgets and the National Adaptation Programme under the Climate Change Act.

At the heart of the 25 YEP is the government's commitment to not just arrest the decline of England's natural resources but to enhance them. The 25 YEP supports this outcome by setting long-term goals.

A statutory footing would ensure the plan is pursued beyond the life of the current Parliament, providing certainty to businesses, landowners and all those working to improve the environment. This would allow long-term investment to deliver environmental benefits with reduced risk of policy change.

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?

The new body should respond to and investigate material complaints about any alleged failure to implement or comply with environmental law. This is needed to ensure that there are similar opportunities for members of the public to those that currently exist with the EU institutions.

The new body will need a discretionary power to ensure that it can focus on addressing matters of national significance or key points of principle. An assessment or filtering mechanism to prioritise complaints and manage workload will be crucial. As part of this, we think that complainants should be required to have exhausted the internal complaints mechanisms of the body being complained about, before being considered by the new body.

It will be necessary to avoid any duplication with the roles of the Parliamentary and Health Service Ombudsman and the Local Government and Social Care Ombudsman. Any material complaint which alleges a failure to implement environmental law could in future be made to the new body. Complaints against bodies responsible for that implementation but which relate to other issues of maladministration such as poor communication or service, should continue to be made to the relevant Ombudsman. We think this would serve to avoid any duplication in roles and would best utilise the strengths of the respective bodies.

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?

We welcome the requirement in the EU (Withdrawal) Act 2018 whereby the forthcoming Bill will provide for the new body to have proportionate enforcement powers against Ministers of the Crown, including the ability to take legal proceedings if necessary.

We agree that in the first instance the new body should be able to issue advisory notices where there has been a failure to comply with environmental law, setting out what is required to rectify this. This would be equivalent to the reasoned opinion stage of infringement proceedings commenced by the European Commission. We would anticipate that most cases could be resolved through this mechanism.

However, where resolution is not possible, a judicial review would be one mechanism to allow the body to seek compliance with environmental law.

Judicial review will always be an available route to secure a legal ruling on the question of illegality. If the court finds that a government decision or other action or inaction has been unlawful, it can quash the decision and order it to be retaken in accordance with the law, require action to be taken to secure the law or make a declaration about the law.

Alternative mechanisms for enforcement could also ensure compliance with environmental law.

Fines levied by an independent body on an arm of the government, simply reallocate finite government (taxpayer) money. Although fines could be spent on environmental schemes for the wider public good (a form of environmental undertaking) this could reduce the budgets of bodies that were already responsible for protecting the environment.

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?

We believe that holding the national government directly to account is the right scope for the new body. Arms-length bodies, such as the Environment Agency, are already held to account, by a sponsoring Department, the National Audit Office and various parliamentary scrutiny committees, for example the Environment, Food and Rural Affairs Committee and the Environmental Audit Committee.

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?

The new body should oversee domestic environmental law, including that derived from the EU. This would be a more coherent approach than trying to separate retained EU law from purely domestic law, particularly in the longer term.

We agree that the new body should not duplicate existing enforcement mechanisms within international agreements.

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

The Committee on Climate Change (CCC) and Adaptation Sub-Committee (ASC) currently scrutinise climate change policy in the UK, but do not have enforcement powers to take government to court. We agree with the CCC that the new body should not duplicate their scrutiny role. We also agree with the CCC that the new body does have a role with respect to wider natural environment and climate change issues such as climate resilience and adaptation. The new body should use the CCC and ASC progress reports to Parliament and the UK climate change risk assessment as part of this broader assessment.

We think that this approach would ensure there is no duplication of role between the CCC and the new body. It would also maintain the robust framework that is already in place.

However, environment and climate change would not be fully integrated and the new body's enforcement powers would not apply to the Climate Change Act (CCA). In mitigation, the new body should be required to have regard to advice from the CCC.

We agree that agriculture activities are intrinsically linked with the wider environment and natural capital and it would not be right to exclude this from the role of the new body.

We agree with the proposal that the new body should also be given a remit with respect to species-specific legislation, again as part of an integrated approach to the environment and natural capital.

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

We believe that it is essential that the body has a role with respect to planning policy. The body could provide independent oversight on the effectiveness of the spatial planning system and scrutinise relevant policy. It should be able to advise the government on environmental policy as part of delivering sustainable development. Following EU Exit, the body might advise on appropriate and consistent application of environmental assessment policy, including Strategic Environmental Assessments, Environmental Impact Assessments and Habitats Regulations Assessments.

We do not think there is a role for this body to advise on individual planning decisions or development plans, which is a function already performed by the Environment Agency and others.

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

No

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