



Consultation on environmental principles and accountability for the environment

Consultation response from the Institution of Environmental Sciences (IES), August 2018

Background

The Institution of Environmental Sciences (IES) is a membership organisation that represents professionals from fields as diverse as air quality, land contamination and education, wherever you find environmental work underpinned by science. The organisation leads debate, dissemination and promotion of environmental science and sustainability, and promotes an evidence-based approach to decision and policy making. The Institution stands up for science, scientists and the natural world.

The IES is also parent organisation to two communities of specialists, the Institute of Air Quality Management (IAQM), for scientists and practitioners engaged in the monitoring, modelling and management of air quality, and the Committee of Heads of Environmental Sciences (CHES) which serves and the Institution's education committee.

Part 1 – Environmental principles

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

We welcome the Government's proposals to underpin environmental regulation and policy-making with a clear set of environmental principles.

We support the inclusion of all the principles listed in Annex A of the consultation document, as well as those now mandated by Section 16 (Maintenance of environmental principles etc.) of the European Union (Withdrawal) Act 2018.

Further to these lists, we would support the inclusion of the following additional principles:

- **A non-regression principle**, whereby no action should be taken which represents a recession of current standards of environmental protection.
- **A principle of evidence informed policy and decision-making**, whereby the best available science, evidence and expertise is used to inform effective decision-making.

We also support the call of the Environmental Policy Forum (a coalition of environmental professional bodies and learned societies, of which the IES is a member) in its submission for the inclusion of the following principle:

- **A principle of transparency and inclusivity**, whereby multi-level and multi-sector engagement, accountability and empowerment underpin environmental policy development, and local buy-in and participation guide the design of local solutions;

It should be highlighted that many of the principles listed here and in the EU (Withdrawal) Act do not exclusively relate to the environment (which cannot be considered in isolation from its links



with social and economic factors). The environmental principles should be considered to apply cross-government, and across policy areas.

2. Do you agree with these proposals for a statutory policy statement on environmental principles?

We agree with the proposals for a statutory policy statement further defining the principles, and explaining how they should be interpreted and applied. We also support the commitment in paragraph 36 of the consultation document, to ensure that the statement is fully consulted upon, and subject to parliamentary scrutiny. We would emphasise however, that this consultation should be genuinely participatory, and take place throughout the process of the statement's development.

However, we do not believe that simply listing the principles in a policy statement is sufficient. The Environmental Principles and Governance Bill must place a duty on ministers to "act in accordance with" a list of principles included on the face of the Bill, whilst having regard to the policy statement for detail on how these principles should be interpreted.

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)?

Building on our answer to question 2, **we support option 1**. However, we would go further: it is crucial that the Bill must place a duty on ministers and all public authorities to "*act in accordance with*" a list of principles, which are further defined through a policy statement.

Part 2 – Accountability for the environment

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

Yes. As the Government's consultation paper recognises, currently mechanisms and institutional infrastructure are not in place in the UK to replace functions undertaken at present by European bodies and courts. This 'governance gap' will be particularly significant for the environment; as identified in paragraph 76 of the consultation document, the majority of EU infringement proceedings against Member States have related to environmental law. As such, we support the proposal to establish a new, independent UK body for environmental governance.

However, the proposals currently put forward are not sufficient to address the missing mechanisms identified above. In particular, proposals regarding the enforcement mechanisms available to the new body must be strengthened to replicate the powers available to EU courts and institutions.



Although EU environmental protections have led to important environmental improvements in the UK (and other Member States) during the period of the UK's membership, it should be recognised that the current system is not perfect. Many environmental assets are in severe decline (State of Nature Report, 2016¹). Given the Government's ambitions under the 25 Year Environment Plan to leave the environment in a better state than we found it, and to establish a world-leading new governance body, there is a strong argument to go further than merely replicating existing mechanisms. This is an opportunity to design an ambitious new overarching governance system which genuinely enables the Government to achieve its environmental goals and the wider sustainable development agenda.

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

With several specific exceptions, detailed below, we support these objectives, which are each of great significance to ensuring the new body can do its job effectively. In some areas more detail is required about how these objectives will be facilitated, for instance, how the body will be funded to ensure it is both sufficiently resourced to fulfil its remit and fully independent of government.

- Concerning the fourth objective, we agree that the new body should avoid duplication of functions with other bodies where possible. However, there will be cases where overlap in terms of subject matter will be appropriate and beneficial, where alternative perspectives and complementary powers and remits could combine constructively to develop better outcomes. For instance, the new body could work constructively with the Committee on Climate Change, which produced world leading assessments and analysis, but has no enforcement functions or powers.
- Concerning the sixth objective, it is essential that the new body operates in a clear, proportionate and transparent way. However, we are concerned that the final part of this objective ("recognising that it is necessary to balance environmental protection against other priorities") reinforces a narrow interpretation of the proportionality principle, whereby we must balance the environment against other priorities. Recent cases – for instance ClientEarth's second case against the Secretary of State for the Environment Food and Rural Affairs, in which it was made clear that the Government was disproportionately prioritising the avoidance of cost over its legal requirements to meet air quality limit values and protect public health (ClientEarth (no.2) v Secretary of State for the Environment, Food and Rural Affairs [2016] EWHC 2740, para 50²) – highlight the dangers of this approach.

The most significant role of this new body should be to enforce UK environment law, and ensure government and public bodies are acting in accordance with the environmental principles. In this task the new body must be strategic, but must not accept or promote trade-offs in enforcing the law. As the Landscape Institute highlight in their response to this

¹ <https://www.rspb.org.uk/globalassets/downloads/documents/conservation-projects/state-of-nature/state-of-nature-uk-report-2016.pdf>

² <http://www.bailii.org/ew/cases/EWHC/Admin/2016/2740.html>



consultation: “The National Audit Office (for example) does not balance fraud against other priorities.” The same must be true here. The governments of the UK must set clear and firm laws for environmental protection and enhancement, and this watchdog must ensure they are being upheld.

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

Yes. The body is likely to be more effective if it can proactively investigate and intervene where it identifies failures or opportunities for improvement, so it seems sensible that the body should be able to scrutinise extant legislation in this way. However, in this work the new body must recognise that this function is already undertaken in part and to varying extents by a range of other bodies (such as, in England, the Environment Agency and Natural England on specific elements of their respective policy areas). As such, work of this type must be undertaken in partnership with other participants in the scrutiny and advice community, collaborating to co-produce scrutiny and advice outputs. There is an opportunity for the new body to perform a useful integrating function in this area.

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, this would be a useful function for the new body to undertake. As in our response to question 6, however, it will be very important for the new body to work in partnership with bodies that have existing duties in this area (for example Natural England and the Environment Agency in England, which have specific legal duties to advise government). In its scrutiny role, it would be valuable for the new body to assess the capabilities of Non-Departmental Public Bodies to undertake these tasks, however, and where further expertise or resources may be required to enable this.

Although this would be a useful function, it is extremely important that the advisory and enforcement functions of the new body are not confused. This must be considered when designing the new body, and this work must be fully transparent to maintain the trust of government, stakeholders and the public.

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. To maintain current levels of protection and enforcement, this will be an essential role for the new body.

It will be essential that the new body is adequately resourced to conduct such investigations. Paragraph 91 of the consultation document states that the new body “*would need to have powers to conduct investigations and require the provision of information*”. The new body must have sufficient powers and sanctions at its disposal to ensure compliance of bodies from whom information is requested,



and must have (or have access to) sufficient expertise in house to make sense of such information. Furthermore, bodies from whom information or data is requested must be sufficiently resourced to facilitate such requests, and where this is not the case, this is an issue which the new body should be able to investigate.

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?

This will be the most important function of the new body, and should take precedence over other functions identified in the consultation paper. The paper notes that it is expected the majority of issues will “*be resolved as a result of the advice issued and remedial action taken as a result of those processes*” (paragraph 99). Whilst it is probably correct and sensible that many issues should be resolved before formal infraction-type proceedings are required, it must be the right of the new, independent body to determine its own approach. There should be no prior constraints put on the body in this regard.

A suite of escalating enforcement mechanisms including, but not limited to, advisory notices, will be necessary to give the new body ‘teeth’ and maintain or enhance current levels of protection and enforcement.

- **Powers to issue advisory notices** will be a useful tool, but it is essential that the Bill includes an obligation on government to provide a response back to such notices within a set timeframe and clearly sets out the consequences for not doing so.
- The new body must be granted the power to issue **binding notices**, either to require corrective action, or the cessation of damaging actions. These notices must include set timeframes for action. Such a mechanism will be essential to truly hold the Government to account if a discursive and advice-based approach fails. Again, the Bill must clearly set out the consequences of non-compliance.
- Agreeing **environmental undertakings** could be a useful additional mechanism for the new body. However, the body would need to be assured that the undertakings were both sufficient, and likely to be implemented. Again, timeframes and sanctions for non-compliance must be defined.
- In the event that other mechanisms fail, the new body should be **given powers to levy fines on government for non-compliance** as a last resort. In this case, the resulting funds would need to be ring-fenced for environmental projects in some way. This power would play an important role in motivating action as the ultimate sanction in an escalating framework of enforcement mechanisms, for use as a last resort in the case of failure to take forward any or all the new body’s requirements at earlier stages (as set out above).

The new body should have the power to intervene in legal proceedings, either by invitation or by statute. It should also have the power to initiate legal proceedings itself. Such a process would need to be transparent, and the new body would have to be accountable to the relevant Parliaments and/or Assemblies to ensure such action is in the public interest.



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?

The new body should oversee and have the power to scrutinise the activities of all public bodies where they are directly responsible for the implementation and enforcement of environmental law, and in delivering their duties and powers under other legislation. However, the body should engage with central government first in matters relating to public bodies for which central government has clear and direct accountability (for instance where a body's ability to fulfil its duties may be impacted by resource constraints or other factors influenced by central government).

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 a party?

First, it is important to carefully consider how 'the environment' is defined in setting the new body's scope and remit. The consultation document proposes that the definition included in the Environmental Information Regulations 2004 could be used. This definition is a useful starting point, but should not be considered complete or sufficient. Thinking has progressed since these regulations were introduced, and a much greater degree of interconnectivity and indivisibility between the concepts of environment, society and economy are now widely recognised (for instance through the United Nations Sustainable Development Goals, to which the UK has signed up). As such, the new body, whilst having a predominantly environment focus, should not define this too narrowly, instead adopting a systems approach, considering aspects of law arising from other policy areas which affect and/or are affected by the environment.

Taking the above points into account, we agree that the body should include oversight of all domestic environmental law, including that retained under the EU (Withdrawal) Act. However, we disagree that international agreements should be excluded from the body's remit. In order to fulfil the Government's ambitions for the body to be world-leading, the body should be able to consider these agreements, particularly as they play such an important role in the protection and management of our highly interconnected environmental systems.

The new body should have a remit and powers to consider the extent to which the UK has implemented international environmental agreements, and provide advice to government and to the enforcement regimes for the relevant multilateral environmental agreements as appropriate. It should also have powers to enforce action on behalf of these regimes if the UK is found lacking in regard to its international obligations, and where there is no suitable domestic legislation to facilitate this.

For instance, under the Ramsar Convention, Contracting Parties (states) are required to designate protected areas (Art 2[1]; generally given effect in the UK through SSSIs and ASSIs) and promote the conservation and wise use of wetlands in their territory (Art 3[1]), but also (for example) to contribute to the budget of the Conference of Parties (Art 6[6]), and to promote "the training of personnel competent in the fields of wetland research, management and wardening" (Art 4[5]). If



the UK failed to do this, it would be in contravention of its obligations under the Convention. However, as an example of 'soft' international law, enforcement options are limited, and treaty success is based on transparency, participation and trust; "No sanctions exist for violating Convention standards and there are no mandates to hold countries accountable" (Griffin, 2012³). The new body should have scrutiny and enforcement functions in such a case.

Where they do exist, we are not advocating the duplication or replication of international enforcement mechanisms unnecessarily, so this work must be undertaken strategically, but there should not be prior restrictions placed on the body in this regard.

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

Climate change

We disagree with the proposals of the consultation paper in relation to climate change. Climate change should be included in the new body's remit; to isolate climate change from other environmental outcomes in this way would be misguided and unhelpful, as it affects and is affected by so many other issues.

Although the Committee on Climate Change (CCC) is a world-leading advisory body, and should retain its existing responsibilities in relation to risk-assessment and policy advice to meet the UK's climate change targets, it has no enforcement powers. The new environment watchdog should be able to complement the work of the CCC by ensuring that the implementation of climate legislation is enforced, using the CCC's analysis. As such, the role of the CCC should be no barrier to the inclusion of climate change in the new body's remit.

The fact that climate change is currently considered a BEIS policy area is irrelevant and should also not be a barrier to inclusion in the new body's remit. The new body must provide scrutiny across government, recognising the interconnected nature of environment issues. Its scope must not be restricted to Defra's areas of legislative responsibility.

Agriculture

It is appropriate that retained EU environment law applying to agricultural activities should fall within the body's remit. A positive next step would be to consider how the body's responsibilities could extend into other areas of food policy, using a systems approach. We would welcome further analysis and consultation on this possibility.

Fisheries and the marine environment

As above, it is appropriate that relevant retained EU law should fall within the new body's remit. Fisheries should also be considered using a systems approach which recognises the systemic links with wider agriculture and food policy, and management of both the terrestrial and marine

³ Griffin, P. (2012) 'The Ramsar Convention: A new window for environmental diplomacy?' Research Series: A1-2012-1, Institute for Environmental Diplomacy and Security.

environments. If the new body's scope is suitably defined it would be well placed to provide advice to government on this matter.

The consultation document notes that these proposals do not prejudice ongoing framework discussions with the devolved administrations. Our strong preference is for the development of a UK-wide governance body, co-created by the four nations of the UK. Such a body would be ideally placed to scrutinise and advise on UK-wide framework approaches to environmental protection and management, including on fisheries.

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

We support the statement in paragraph 135 of the consultation document, that the new should body should focus on "*ensuring the correct application of relevant environmental law within the planning system*". However, its scope should also include scrutinising the planning system holistically to assess whether it is conducive to the attainment of and compliance with environmental goals and principles.

As such, the new body's remit should include providing advice to government on the development and implementation of national planning and infrastructure policy. It should also include scrutinising decision-making concerning Nationally Significant Infrastructure Projects to ensure environmental law and principles are upheld in this process.

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

A UK-wide body

To be most effective, the new body should have a cross-UK remit, and be co-created and co-designed by each of the four nations. The body should be jointly and directly accountable to the four Parliaments and Assemblies.

We welcome the Government's recognition, in paragraph 13 of the consultation document, that that the environment does not respect political boundaries and that a joined-up approach would be beneficial. However, if such an approach is to be successful, the new body must be genuinely co-designed, and so collaborative efforts must be urgently stepped up.

Within the UK, there is variation in the regulatory regimes and objectives of the different nations. Although a common baseline of minimum standards which could be uniformly enforced would be beneficial, some variation is inevitable and, in fact, welcome. Much of our most pioneering environmental legislation has recently been developed in the devolved nations (for instance the Wellbeing of Future Generations Bill in Wales), and this freedom to innovate and raise standards above a minimum baseline must be maintained. As such, a UK-wide body should be required to recognise this and take account of these differences in its enforcement actions. In its advisory function however, it could play an important role in learning lessons from these differences and advising the four constituent Parliaments and Assemblies of these lessons.