WWT Wetlands for life

Environmental Principles and Governance after the United Kingdom leaves the European Union: Consultation on environmental principles and accountability for the environment

A response by the Wildfowl & Wetlands Trust

August 2018

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

The environmental principles should include all those listed in the European Union (Withdrawal) Act 2018. These are:

(a) the precautionary principle so far as relating to the environment,

(b) the principle of preventative action to avert environmental damage,

(c) the principle that environmental damage should as a priority be rectified at source,

(d) the polluter pays principle,

(e) the principle of sustainable development,

(f) the principle that environmental protection requirements must be integrated into the definition and implementation of policies and activities,

(g) public access to environmental information,

(h) public participation in environmental decision-making, and

(i) access to justice in relation to environmental matters.

It is important that these principles reflect their aim and scope within European law and existing case law in order to ensure that there is no weakening of environmental legislation post EU exit.

Along with environmental principles the forthcoming Bill should set out in statute a high level goal and broad long-term objectives putting the principles in context. The Bill should place a duty on the Secretary of State to draw up a set of legally binding environmental SMART targets and a requirement to report progress to Parliament. The watchdog's remit should cover scrutiny and enforcement of Government and public bodies' delivery of the goal, objectives and SMART targets (see Q14).

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

A statutory policy statement on environmental principles is insufficient. The principles set out in our answer to Q1 are as fundamental in nature as (for example) the European Convention on Human Rights and must be embodied in statute. They can then be elaborated in statutory policy statements issued in the light of changing circumstances (such a technological

change, improvement or degradation of specific environments and so on). Government will then be legally and constitutionally obliged to uphold the stated principles, such that material breaches may be the subject of legal challenge, either by a relevant regulatory body or an affected party by way of judicial review.

Further, there should be a statutory requirement that, so far as it is possible to do so, any relevant legislation and other relevant functions exercised by government must be read and given effect in a way that is compatible with the environmental principles. The statute should make it clear that the principles will guide policy and decision-making in the UK with the aim of ensuring a high level of protection for the environment. Embodying the principles in statute will ensure that they will shape and permeate the development of policy in all areas. These arrangements are essential if the government is to fulfil its stated ambition to be the first government to "leave the environment in a better state than [that in which] we inherited it".

In contrast, the current proposal that Government will “have regard to” the policy statement lacks legal enforceability and fails to reflect the scope of environmental principles in the EU. For example the Lords Select Committee (2018) concluded that the duty in the Natural Environment and Rural Communities (NERC) Act 2006 to “have regard to biodiversity” was “weak, unenforceable and lacks clear meaning”. The wording of the duty must be strengthened and the fiscal consideration exception removed. Other political priorities, such as the imperative to achieve economic growth or the requirements of new trade agreements will otherwise take precedence over and will lead to frequent derogations from the principles set out in our answer to Q1. We propose a duty along the lines of the Human Rights Act s.6(1) making it unlawful for a public authority to act in a way which is incompatible with an environmental principle.

The definition of sustainable development is economic development that is in harmony with, and not at the expense of, the natural world. There is widespread support among academic authorities, in both economic and environmental sectors, that environmental degradation and destruction of natural capital is, ultimately, profoundly counter-productive and harmful to humanity, as well as the natural world. Ensuring a strong and enforceable legal duty means that decision makers must consider the risk of adverse environmental impacts at every stage of policy development and implementation and must ensure their avoidance or at least mitigation, rather than considering the risks only to dismiss them.

It is important that the Bill places a duty for all public authorities and bodies performing public functions including regulators, agencies, courts and Government departments to comply with the environmental principles in carrying out their functions. This is in-line with Access to Justice principles that everyone is subject to the law unless there is over-riding reason otherwise. All public bodies should take separate responsibility for following the principles and be liable where appropriate. If the duty only applies to central Government then it allows loopholes to be exploited and opens up avenues to avoid responsibility. The environmental principles should be applied by local authorities, risk management authorities, Government agencies and other arms length bodies. As long as the roles and responsibilities of all the public bodies are clear this should avoid confusion or mis-allocation of liability.

We propose public authorities have two clear legal duties with respect to the principles: one that applies directly to following the principles and one relating to adhering to the policy

statement. This will help ensure that the environmental principles play a central role in environmental law and management.

The policy statement should give policy-makers and decision-makers sufficient guidance and direction as to the meaning and intended application and interpretation in practice. A policy statement alone without statutory footing requiring it to be prepared and followed will not provide a sufficiently firm basis for the principles to have a strong and lasting legal effect.

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)?

To clarify which EU environmental principles are to be adhered to post Brexit and ensure accountability and enforceability they must be listed in statute. This provisions section 16(1)(a) of the EU Withdrawal Act requiring the Secretary of State to publish a draft Bill consisting of a set of environmental principles. However, legislation should allow for new principles to be added if desired now or by future Governments. If the principles are not listed in statute they will lack the current existing permanence they hold within EU treaties necessary to ensure long term planning accords with the principles.

We support the proposal that the policy statement should be developed following consultation as well as presented to Parliament for scrutiny, approval and review.

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

Yes, the proposals will still result in a governance gap after leaving the EU.

The proposals do not fully replicate the roles and responsibilities and applicability of the European Commission and the Court of Justice of the European Union (CJEU). The proposed new environmental body must have a stronger remit to hold Government to account than proposed in order to fill existing gaps. In addition the remit of the new body should include enforcing future as well as European and existing UK environmental legislation.

Many issues are described throughout the consultation response, for example under Q9 on enforcement. However, reliance on current existing measures is not adequate as explained below and should be addressed within the remit of the new body:

1) Committee scrutiny - Although we fully support the role of committee scrutiny we argue that Government can nevertheless ignore recommendations with no recourse for action. For example Committees have reported the need to enact Schedule 3 of the Flood and Water Management Act (2010); to clarify responsibility of SuDS

adoption and to deliver more SuDS. However, Government has continuously failed to do so.[1,2]

Another example is when the Environment Audit Committee's report, Sustainability and HM Treasury, (2016) concluded that the Treasury put short term priorities over long-term sustainability and recommended a number of ways to tackle this problem. However, the Committee was disappointed with the Treasury's response which did not address its individual recommendations or some of its key overarching points. It was not clear how the Treasury would do anything different in future as a result of the Committee's inquiry.[3]

Reliance on Government bodies such as Environment Agency and Natural England to monitor and enforce environmental law is increasingly difficult as a result of continued cuts.

2) Access to Justice - In many instances appeals to decisions made by public bodies are not able to be made by third parties, so although a third party may complain, little is done. The consultation proposes that the current judicial review process offers an adequate alternative to the CJEU. However, we disagree. It is not an adequate mechanism to enable citizens to bring complaints concerning breaches of environmental law. Judicial review is expensive, not dissuasive and has been made difficult to initiate. Judicial review can normally assess only the legality of a decision rather than engage in the technical merits of one. This results in only considering matters of procedural impropriety or manifest irrationality when statutory duties place discretion on decision-makers. In particular, this relates back to the issue of only having "regard to" the environmental principles.

   Government has, over recent years, made access to environmental justice more and more difficult resulting in Decision VI/8k of the Meeting of the Parties to the Aarhus Convention in 2017 regarding non-compliance with Article 9(4) of the Aarhus Convention. The consultation proposals do nothing to improve the situation.

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

We broadly support the objectives proposed with the following recommendations:

The new body should be clear in its remit and we welcome Government's proposal for a world leading watchdog. As such the watchdog should act with environmental protection and enhancement at its core. Therefore within objective (a) "voice" should be changed to

[1] Environment Food and Rural Affairs Committee (2017) Post-legislative scrutiny: Flood and Water Management Act 2010, Parliament.uk

[2] Climate Change Committee (2014/15) Lord Krebs' letters to Rt Hon Elizabeth Truss MP https://www.theccc.org.uk/wp-content/uploads/2014/10/2014-10-24-Lord-Krebs-to-Elizabeth-Truss-SuDS4.pdf, https://www.theccc.org.uk/publication/letter-further-measures-needed-to-promote-sustainable-drainage-in-new-development/

[3] Environment Audit Committee (2017) MPs unsatisfied with Government's response to Sustainability and Treasury Report, Parliament.uk

"champion" to read "*act as a strong, objective, impartial and well-evidenced* champion *for environmental protection and enhancement"*.

To include "*engaging with experts and stakeholders as appropriate*" in objective (f) and remove "*recognising that it is necessary to balance environmental protection against other priorities*". Breaches of law, including environmental law, should not be assessed against domestic policy interests. It is important that proportionality is applied appropriately, balancing values not prioritising them. Objective (f) should then read "*Operate in a clear, proportionate and transparent way in the public interest, engaging with experts and stakeholders as appropriate*".

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

Yes. The Government's aim is to leave the environment in a better state, not just to leaving the EU. The consultation proposes a "world-leading" watchdog. As such, we should not be aiming to solely replicate the European system for previous EU law but to establish a body that will uphold ALL environmental law. Many national pieces of legislation are woven with EU legislation making differentiation difficult. If extant environmental law is not included this could lead to confusion and misappropriation.

The new body should also have functions to scrutinise and advise the Government in relation to upholding future environmental legislation. Legislation is often looked at, amended, amalgamated and altered. To hold the new body to one legislative point in time seems short sited. The new body must be able to safeguard environmental improvement regardless of changes of Government and law.

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. Plans, policies and strategies are key delivery of environmental improvement. It is vital that the new body can scrutinise and advise Government to help deliver these, and in particular the 25 Year Environment Plan. The new body must be able to take a cross-Government view of this plan to ensure that delivery is not just left to Defra.

We support the role of the new body to provide sound, independent information on the environment including producing and publishing independent assessments of progress on policy, strategies and action plans.

We propose that the new body should also play a role in identifying and resolving policy conflict between parts of government relating to the environment.

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 maintains a service through its website whereby individuals and organisations can lodge complaints, free of charge, about alleged breaches of EU law. The Commission can take action if it considers that EU law is not being properly implemented in a Member State. If necessary it can refer the case to the CJEU. It can also ask the CJEU to order interim measures before judgment is given. This should be reflected in the new body.

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?

Yes, relying on advisory notices with no ability to follow up on failure to comply will not deliver the incentives or dissuasion necessary to ensure compliance with environmental law.

Although we agree that advisory notices are the first form of enforcement, they will not be taken seriously unless there is the ability to follow them up.

When breaches of the law are repeated or serious, courts must be able to back up the words of the new body with effective and dissuasive solutions.

It is fines from the European Commission which are the biggest dissuasive factor. They are significant and continuous until compliance is achieved. It is the risk of these fines which has resulted in the greatest investment.

For example the Thames Tunnel is the proposed solution to the UK breaching the requirements of the Urban Waste Water Treatment Directive owing to the frequency of spills from Combined Sewer Overflows along the River Thames. This £4.2 billion investment to ensure capacity within the Thames sewer network to deal with current demand would not have occurred without the threat and implementation of serious fines to the UK[4].

Although in most cases further action will not be necessary we propose an escalation procedure as follows:

1. **Informal advice** – not published but subject to FOI and with a deadline for response.

   If no satisfactory response is received:

2. **Formal advice** – this would be published, with a deadline for a response which would also be published by the body. If sufficient cooperation is received, further contact would return to the informal advice stage. If not:

3. **Binding enforcement notice** – this would be published, with deadlines for action to be completed. It would require the defendant to take remedial action along with additional positive actions for the environment, to act as a deterrent to letting the issue reach this far. Such notices should include conditions and detail steps to be

[4] National Audit Office (2017) Review of the Thames Tideway Tunnel, Defra

taken to remedy breaches of environmental law or failure to apply environmental principles. Again if sufficient cooperation is received, the issue can de-escalate back to formal or informal advice. If not:

4. **Notice of legal action** due to failure to comply with the enforcement notice.
5. **Legal action** through the Administrative Court, to execute the enforcement notice.

   The Administrative Court would be asked to determine whether or not sufficient action had been taken in response to the enforcement notice. Courts should then have a full range of remedies available to them such as Specific Mandatory Orders.

   The Court should also be able to impose further costs which can accrue over time as well as civil sanctions including fines.

   A civil fine would present a highly unlikely eventuality (i.e. due to a public body refusing to take remedial action for a breach of environmental principles or standards, or ultimately HM Treasury refusing to underwrite the remediation). A civil fine would constitute a conceptual damage to society above the cost of remediating that damage which would already be covered by the enforcement notice (and disregarding any additional action that notice required). The calculation of this sort of fine could either fall from current work on natural capital and net gains and/or from infraction fine levels in the EU.

   The court should allocate an executor to ensure that fines are spent on supplementary environmental measures such as large scale habitat creation and should not be used to meet statutory compliance.

6. **Right of appeal** in a similar standing to Judicial Review.

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?

Yes, the body should be able to hold all public bodies and bodies performing public functions directly to account on their statutory duties, advising on how best to comply with the law. Many public bodies have important environmental duties and functions that are at arm's length to central government for example the licensing functions of Natural England and the Environment Agency. Therefore such organisations should be liable for individual operational decisions. However, strategically and procedurally it is more likely that any investigation by the new body will lead to the relevant central Government department being ultimately responsible for the framework in which the public body makes decisions. Responsibilities must be clearly laid out so that accountability is not mis-allocated. Each Government Department should be financially responsible and liable for the adherence of its associated bodies to the environmental principles and responsibilities. In addition HM Treasury should be responsible for underwriting public authorities ensuring their ability to comply with any enforcement notices. Following advisory and enforcement notices, legal action should be taken against such bodies if they are not in compliance or failing to achieve their duties

What subject matter should the new environmental body cover?

The body should be able to hold Government to account regarding existing law, EU law, future legislation and international law. The remit should cover environmental law and any other legislation impacting on the environment, for example chemicals legislation such as REACH and the Industrial Emissions Directive, waste legislation, agriculture and planning. It should ensure that the environmental principles are being adequately adhered to and also the delivery of the environmental goal, objectives and SMART targets we propose are included within the forthcoming Bill.

The new body should conduct thematic inquiries that assess systemic problems behind poor compliance with environmental law by Government and public bodies. Based on these inquiries, the new body should be able to produce guidance and recommendations to be followed and then reviewed.

The European Commission reviews Member State progress reports. The new body should fill this role. Reviews should then be sent to and debated in parliaments and responded to by governments in a timely fashion. Existing reporting obligations on governments should be retained.

The new body should provide a proactive advisory service to any public body at any time in relation to the application of environmental principles and law; and also provide a reactive advisory service where those bodies seek advice. This would be a wide-ranging and largely informal role, similar to justice system bodies' current relationships with central Government departments.

This informal advisory service would extend to policy formulation for all Departments. Advising on compliance with environmental principles, law and delivering the 25 Year Environment Plan will help avoid politicisation and ultimately the need for the watchdog to apply an enforcement role.

The Act should apply a statutory responsibility for Defra to give the new body sight of all Cabinet Office write-rounds for new regulation and to include any comments from the new body in its response. This would be subject to national security exceptions. By including comments in Defra's response, this would avoid the new body becoming a separate stage of clearance.

During the passage of a new Bill, the new body should be able to respond to consultations or appear before Committees as any other body can. To avoid any perception of politicisation, its advice would be restricted to comments on the application of environmental principles and law and delivery of the 25 Year Environment Plan. Post Royal Assent, the body should be free to scrutinise the legislation and monitor its efficacy.

The above system puts the emphasis on front-end application of principles and environmental protection and enhancement as early in the regulatory process as possible, with successive checks along the way. This will help avoid the need for later remedial action or enforcement.

A specific aspect of the European Commission's role is to consider details of "derogations" from the normal standards of EU environmental law that are submitted by Member States.

Measures like the Industrial Emissions Directive (2010/75/EU) and the Habitats Directive (92/43/EEC) allow such derogations in certain cases as listed in the Directives. Where they are applied, the Member State in question has to inform the European Commission. We propose that the new body would be able to consider whether proposed derogations are applicable.

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?

No, we support the new body having oversight of binding international agreements. The role of international conventions and agreements will become more important as we leave the EU. Advice and guidance on implementing these agreements would help further the UK in ensuring it is a world leader in environmental protection. For example, the body could review the resolutions agreed at the forthcoming Ramsar COP and advise Government on implementation, such as through designating key small wetlands for inclusion in the List of Wetlands of International Importance. This role is often carried out at the EU level which could be taken on by the new body. With an independent remit and access to expertise, this body would be better able to identify current gaps in implementation and opportunities and measures to fill them than existing mechanisms and agencies.

The body should be able to take enforcement measures where failure to apply international agreements results in a failure to adhere to the environmental principles.

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

No, the watchdog should be able to scrutinise, advise and enforce all environmental law and all law potentially impacting the environment, including those regarding chemicals and waste ensuring environmental principles are applied. In particular with reference to the consultation:

Climate change

The Committee on Climate Change advises the government on the levels carbon budgets should be set at, but it has no ability to hold Government to account or any enforcement powers. The new watchdog should not replicate but complement the role of the Committee on Climate Change and be able to ensure actions are undertaken to meet carbon budgets. As such the new watchdog remit should include climate change and enforcing the Climate Change Act, but not provide advice as this is the role of the Climate Change Committee. As such we do not see a good reason why climate change should be excluded from the remit of the new watchdog. In fact it could lead to confusion and problems in the body undertaking its remit. The natural environment will influence and be influenced by climate change and our adaptation and mitigation to climate change. In addition climate change is an integral component of the 25 Year Environment Plan and cannot be separated from the wider assessment of the natural environment.

Agriculture

We support the proposals that EU-derived environmental legislation that apply to agricultural activities are within the remit of the new body. We also support the scrutiny of agricultural measures and impact on the delivery of the 25 Year Environment Plan.

However, it is vital that the new body is able to scrutinise and advise on the impact of agricultural policy on the environment. Agriculture has a significant impact on our environment contributing to around a third of reasons for not achieving good status in our water bodies. As such agricultural policy must be assessed with respect to its impact on the environment. It is expected that a future agricultural policy will aim to deliver public benefits for public goods. A lot of these will be environmental. In addition a strong regulatory baseline will be needed and to be enforced. Many of these baseline measures will affect the environment such as measures to prevent soil erosion. As such the future agriculture bill and linked policy should come under the body's investigative and legal supervision functions.

Fisheries and the marine environment

In addition to the proposals in the consultation the Marine and Coastal Access Act (2010) should also be covered by the new body's investigative and legal supervision functions.

The body should be able to scrutinise and advise on the impact of marine plans, marine development and the effect of fisheries on the environment.

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

Yes

The body should be able to hold Government and public bodies to account regarding nationally important infrastructure projects and national policy statements including ensuring sufficient application by Government of Habitat Regulation Assessment, Environmental Impact Assessment and Strategic Environmental Assessment. It should be able to consider both whether local plans follow environmental legislation as well as significantly damaging individual planning proposals which have been given consent.

The body would have to establish and follow a transparent and published prioritisation framework as to which planning issues to choose to take up given resourcing constraints.

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 opportunity to set out environmental goals, objectives and targets is missed**

The consultation mentions leaving the environment in a better state for the next generation, but does not propose to put this, or other broad long term objectives for nature's recovery and a healthy environment, in the forthcoming Environmental Principles and Governance Bill. It is vital that a high level goal and long term objectives regarding environmental quality and enhancement are placed on the face of the Bill.

Article 191 of the Treaty on the Functioning of the European Union includes objectives relating to the environment. This does not currently exist in UK law and should be addressed. The Bill should reflect Article 191 and include tying the application of environmental principles to an aim for a high level of environmental protection as an objective of environmental law and policy. This will help legitimise activities taken to achieve the objective and help determine the proportionate application of the principles.

It is important that the environmental principles are put into this context. Without a general objective there is a risk that the principles will be viewed in isolation leading to misinterpretation and misapplication. Taken to the extreme it could result in the polluter pays principle to mean that causing pollution is acceptable so long as the polluter is willing to pay for doing so.

We propose an overarching duty on Government and all public bodies to secure the recovery, restoration and enhancement of the natural environment so that the environment is healthy, resilient and sustainable for the benefit of people and wildlife.

Putting a high level goal and long term objectives onto the face of the Bill will not only put the principles in context but apply to the new body. This will establish a strong legal mechanism to ensure that Government delivers on its promise to leave the environment in a better state. They also create quantifiable obligations that can be passed on to businesses to drive investment.

Along with setting out a high level goal and long-term objectives the Bill should place a duty on the Secretary of State to draw up a set of legally binding environmental SMART targets and a requirement to report progress to Parliament. EU law has established more than 130 environmental targets for the period up to 2050. As we leave the EU, it will be necessary to replace these targets with new objectives and milestones tailored for the UK and a process for setting ambitious objectives for the future. To avoid duplication we propose these targets compliment the 25 Year Environment Plan. If the metrics being currently drawn up by Defra are suitable, they could be used to determine SMART 5 year targets. These targets should be set by the new watchdog in consultation with relevant experts in a similar vein to the Climate Change Committee setting climate budgets and delivery should be scrutinised and enforced by the watchdog. A new environmental “wealth” budget could be produced.

- **Enshrine the 25 Year Environment Plan in legislation**

We have currently failed to deliver on our Biodiversity 2020 targets without any recourse for action, the same could happen to the 25 Year Environment Plan. The new environmental watchdog only has enforcement powers relating to environmental law. Unless there is a requirement to meet the objectives of the 25 Year Environment Plan laid out in legislation there is no mechanism to ensure it is delivered. This will affirm Government’s commitment to the Plan, facilitate the upholding of environmental standards post Brexit and ensure its applicability across Government. It will also enable the watchdog to hold Government to account to delivering the objectives of the 25 Year Environment Plan rather than simply monitor and report on delivery.

- **Support for independence and funding**

The new body should be independent of Government and properly resourced with guaranteed funding. We propose that the body is established by Royal Charter. This ensures that it remains independent of any other body or influence and that it is also very difficult to dissolve. The Press Recognition Body (PRP) was established by Royal Charter and gives the Board Members security of tenure. It can only be amended by a two thirds majority of each of the House of Commons, the House of Lords and the Scottish Parliament, and with the unanimous agreement of the Board itself. We recommend the new body is established in a similarly robust manner.

- **Geographic scope**

We propose that the new body should act cross-UK, established by four distinct but interlocking pieces of legislation. However, to be successful it must be co-designed by all of the different countries of the UK; accountable to legislatures, rather than governments; resourced appropriately; and there must be appropriate mechanisms to resolve disputes.

Benefits of a UK approach:

- recognition that environmental issues do not respect national borders
- any common frameworks can be supported within the remit of the body
- fosters cross-UK collaboration, improved buy in and shared expertise
- greater independence from the politics of individual governments;
- efficiency saving through joint working

Name of the new body

ERGO - Environmental Regulation and Governance Office

OEG - Office for Environmental Governance

EGG – Environmental Governance Guardian

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