Environmental Principles and Governance after EU Exit

Consultation Paper

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

DEFRA's consultation document (hereinafter 'the Document') highlights sustainable development, the precautionary principle, the prevention principle, the polluter pays principle, the rectification at source principle and the integration principle as examples of environmental principles that could underpin future policy making (DEFRA, 2018). Section 16(2) of the European Union (Withdrawal) Act 2018 reiterates each of these principles and adds a commitment to public participation. This recognises the commitments towards access to environmental information, participation in environmental decision making and access to justice in environmental matters the United Kingdom (UK) gave on becoming a signatory to the 1998 Aarhus Convention. In particular, the costs of access to justice in environmental cases should not increase (and preferably decrease) as highlighted by the Aarhus Compliance Committee. Each of these is an important environmental principle within both European Union (EU) and International environmental law and should underpin future UK environmental policy.

It is notable that no mention is made of any commitment to maintain a high level of environmental protection in the development of future policies. In contrast, Article 191 of the Treaty on the Functioning of the European Union, in setting out the principles that underpin EU environmental policy provides that 'Union policy on the environment shall aim for a high level of protection taking into account the diversity of situations in the various regions of the Union.' A similar commitment should be made in relation to future national environmental law, in order to align with DEFRA's vision of creating a legal framework that is a world leader in environmental protection and to avoid a race to the bottom in environmental standards.

In addition to the principles referred to above, the Government's white paper commits the government to a principle of non-regression in relation to the existing environmental law framework (HM Government, 2018). This should go further, so that the eventual legislation incorporates a principle of non -regression in relation to both the legal framework and also the environmental and animal welfare standards that have been achieved under that framework. Finally, the environmental principles should also recognise the obligation to avoid transboundary environmental damage, which is widely recognised as a principle of international environmental law (Bratspies and Miller, 2006).

Further, the principle of subsidiarity is concerned with the complex issues of allocation of competence between the EU Member States and the EU institutions. According to the principle, decisions should, as far as reasonably possible, be made by the lowest level of government. In environmental matters, subsidiarity has ensured that actions are taken as close to citizens as possible, including in relation to the regulation of GM crops. Subsidiarity should be maintained within the UK after EU exit as a principle of good governance enabling different levels of government (including the devolved administrations) to act within the decision-making process (Brennan et al., 2018; Dobbs, 2017; Engel and Petetin, 2018).

As noted in Annex A of the Document, the definitions of the environmental principles are weak and not forward looking (unlike the current definitions and interpretations under EU law). They reflect more minimal and older versions of the principles. This could result in a reduction in the overall level

of environmental protection in the UK. For example, there is no acknowledgement of the United Nations Sustainable Development Goals. Additionally, and in particular, the definition of the precautionary principle is limited to 'serious or irreversible damage' when there is 'full scientific uncertainty' rather than when environmental protection is threatened' in cases of '*some* scientific uncertainty' as is currently the case under EU law. Such a stringent definition would increase the threshold to trigger the principle and reduce the role played by the precautionary principle in the decision making process for risk regulation. In contrast, it is now argued that non-scientific factors should also play a role in triggering the precautionary principle (Petetin, 2017).

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

As set out in answer to question three, we believe it is important that the environmental principles should be set out in statutory form as primary legislation, to provide certainty and consistency in relation to their role. Equally, we believe that providing a policy statement on the interpretation and application of the principles is an important development that will enhance understanding both within government and in industry. Hitherto, with the exception of the European Commission's Communication on the precautionary principle (European Commission, 2000), it has been necessary to examine Court judgments, often from the Court of Justice of the EU, to understand their interpretation.

That said, however, we would argue that it is insufficient to simply place an obligation on government to 'have regard to' the statutory policy statement. We would again point to Article 191(2) of the Treaty on the Functioning of the EU as a comparator. Article 192(2) provides for EU environmental policy to be based upon the environmental principles identified within that article. This creates a more substantial obligation than an obligation to simply have regard to a policy statement. If England or the

UK as a whole is to become a world leader in environmental protection it will be important for environmental principles to have sufficient weight within decision making processes. Indeed the principles must be binding. Section 6 of the European Union (Withdrawal) Act 2018 provides that, following withdrawal, subsequent decisions of the European Court of Justice will only have persuasive effect in UK courts. The fact that the European Court of Justice upholds a higher standard of environmental governance could provide grounds for future UK courts to refrain from following their judgments. This could lead to the development of differing environmental standards in the EU and in England. This could have implications for future trade relationships.

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)?

As outlined in the answer to question 2, we believe it would be important that the Act sets out the environmental principles that the statement should cover. This provides greater clarity for government policy makers and those affected by the measures based on the principles. Enshrining the principles in legislation provides more durability than simply including them within a policy statement that may be subject to more frequent change.

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

Unfortunately, it seems clear from table one within the Document that withdrawal from the EU will leave significant weaknesses within environmental governance and open up governance gaps. We would highlight these as follows:

(a) **The requirement for systematic government reporting on the application of environmental laws:** As the Document notes, DEFRA's actions in publishing reports on the implementation of environmental laws in England are not the same as the requirements imposed by EU law for the delivery to the European Commission of systematic reports on the implementation and application of EU environmental laws. A requirement for the Secretary of State to publish implementation reports and data on environmental protection would only partially fill this vacuum. It should be accompanied by a systematic obligation for the Secretary of State to regularly report to the proposed environment body concerning each sector of the environment and the implementation of environmental legislation. This would enable the environment body to monitor environmental governance and the state of the environment within each sector and would augment the publication of these reports.

(b) **Official assessments of government compliance** with environmental law and progress towards environmental objectives. As noted by the Document, the role played by parliamentary committees, the National Audit Office, the Natural Capital Committee and NGOs are not equivalent to the role currently played by the European Commission in analysing these issues. Each relies upon the power of publicity, whilst lacking the stronger enforcement powers held by the European Commission and the European Court of Justice.

(c) **Citizens' rights:** Mechanisms for individuals or organisations to complain about alleged failings in relation to environmental law and governance. The ability for individuals or organisations to make an official complaint, free of charge, to the European Commission is a key component of European environmental governance. The fact that individuals can write to their MP, to DEFRA, to parliamentary committees or to either the Parliamentary and Health Service Ombudsman or the Local Government and Social Care Ombudsman is not an adequate substitute. None combine the expertise in environmental law, the independence and the powers of the European Commission.

(d) **Oversight role:** Formal and informal mechanisms by which an independent, official body can investigate concerns about government's implementation of environmental law. As noted in point (b) above, none of the existing mechanisms adequately replicate the powers and functions exercised by

the European Commission in investigating government compliance in relation to environmental law. In practice, cases of 'bad application'- the failure to properly apply environmental laws that have been accurately implemented in national law - form an important part of the Commission's investigative and enforcement role (Craig and De Burca, 2011, 427).

(e) **Legal mechanisms:** Powers to refer a government to court for alleged failings in implementing environmental law. Again it is clear that withdrawal from the EU will create a lacuna in this area. As the Document acknowledges, no public authority has power to bring proceedings against government in relation to environmental issues. It identifies third party judicial review proceedings as a potential alternative mechanism. However, it should be understood that this is not an adequate substitute for the European Commission's current powers (UKELA, 2018). In the first place, judicial review is generally concerned with the process through which particular decisions were taken, rather than the merits of the decision. It is often poorly suited to act as an arbiter of environmental governance. Secondly, notwithstanding the efforts of the Aarhus Compliance Committee, the potential costs involved in bringing a judicial review and the strict time limits within which a case must be launched act as a disincentive to litigation. Thirdly, litigants in judicial review are often drawn to particular causes within environmental law, such as nature conservation. This again leaves a vacuum in which publically less popular, but in practice no less deserving, aspects of environmental law tend to be overlooked. Ultimately, we would share the sentiments expressed in the Document, that NGO should not be expected to provide an official and systemic supervisory role.

(f) **Compliance:** Under EU law, where the court finds that a government has failed to implement environmental law compliance is monitored and the case can be referred back to court, with the potential of imposing a fine. None of the governance measures in place replicates the power of the European Court of Justice, under Article 260(2) of the Treaty on the Functioning of the EU, to impose fines upon Member States who fail to fully comply with its judgments in a timely fashion. One would fully expect government to comply with judgments entered against it. As noted in paragraph (e), judicial review is a poor tool for securing improved environmental governance. Equally, the fact that

an NGO could launch further proceedings is not an answer in itself. It is acknowledged that Parliament has a role in providing scrutiny of government compliance. However, this should not be an end in itself and should supplement a power for the proposed environment body itself to refer cases back to national courts where government bodies prove reticent in complying with judgments against them.

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

Yes we would agree with the proposed objectives and also with DEFRA's goal that we should be the first generation to leave the environment in a better state than that in which we inherited it. We would stress in particular that this will only be achieved if the proposed environment body is given sufficient powers, functions and adequate resources to enable it to fulfil these objectives and achieve this goal. The new body should be independent from the government and accountable to Parliament, and more specifically, to the House of Commons Environmental Audit Committee.

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

We believe that it is fundamentally important that the proposed body should exercise this role. It is vital that the new body should exercise scrutiny functions in order to identify weaknesses and potential improvements within the present legislative framework. Its role as an independent advisor should enable it to highlight issues of its own volition, as well as responding to proposals for legislative change.

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 believe that this should also be an important role for the proposed body. It is essential the public receives regular, authoritative and independent reports on progress towards the government's environmental policy goals. As noted in answer to question 4, the new body should receive regular reports from government on environmental governance and the state of the environment in each environmental policy sector. These reports would provide a key information source from which the proposed body could report on the delivery of the government's overarching environmental policy goals. However, it would compromise the independence of the proposed body if government were to commission such reports. Instead, we would suggest that the legislation establishing the new body should provide it with a statutory duty to report regularly on government progress towards achieving its environmental policy goals.

As a matter of transparency, each report should be made publically available.

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?

Withdrawal from the EU will leave an important gap in environmental governance, by removing the ability of individuals and NGOs to make complaints to the European Commission. It is therefore very important that the proposed new environmental body should have the specific function of receiving and investigating public complaints concerning the implementation and application of environmental law by competent authorities, free of charge. Maintaining citizens' rights and upstream engagement within the decision-making process is crucial to good environmental governance.

Like the Commission, the new body should have discretion to decide whether to accept individual complaints. Where complaints are accepted the new body must have effective powers to investigate them, to require competent authorities to co-operate with those investigations and to compel timely compliance where governance failings are identified.

9. Do you think that any other mechanisms should be included in the framework for the new body to enforce government delivery of environmental law beyond advisory notices?

The proposed new body should be given the function and powers to supervise government's delivery of environmental law and be empowered to secure compliance where necessary. This should focus on the implementation and application of environmental law by competent authorities and not on the enforcement of environmental law against individual third parties. As with the Document we would hope that the majority of cases would be resolved through initial discussion and timely remediation by the competent authority in question. This could include the ability to accept environmental undertakings from the competent authority. However, as the consultation document observes, further enforcement measures may prove necessary where the case is not resolved at this initial stage or the competent authority fails to comply with its undertaking.

The key to achieving the goal of timely enforcement is to reduce the number of steps involved in the process. From that viewpoint, the proposal to issue an advisory notice seems to duplicate much of the initial discussion stage, without there being any clear sense of how a competent authority would be obliged to respond to it. It would seem more effective to end the informal discussion phase through the issue of a binding notice requiring the competent authority to take specific action within a particular timeframe. This would more closely resemble the reasoned opinion issued by the European Commission under Article 258 of the Treaty on the Functioning of the EU. Again, however, there is a

lack of clarity as to how the binding notice would be binding on competent authorities. This should be achieved by giving the proposed environment body the ability to bring those authorities before a court if it is not satisfied that compliance has been achieved within the specified timeframe- and a corresponding right for the competent authority to appeal to a court against the binding notice. Equally, we would agree that the proposed environment body should have the power to intervene in judicial review applications concerning the implementation and application of environmental law by competent authorities. However, it would seem anomalous for such a power to exist in the absence of an ability to bring proceedings to enforce its own enforcement actions.

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 Document expresses the goal of designing enforcement arrangements that are more responsive and lead to swifter resolution than the EU model. Yet this is unlikely to be achieved within a model that focuses its attention on central government and requires action by central government against competent authorities under their supervision. The proposed environmental body should therefore have jurisdiction over all competent authorities exercising functions in relation to the environment and be able to address those that fail to adequately consider environmental protection when exercising these functions. As highlighted previously, the focus should on the implementation of environmental law by competent authorities and not on the enforcement of environmental law against individual third parties.

The consultation document focuses solely on public authorities exercising functions directly concerning the environment. In practice, the integration principle should mean that the proposed body oversees the actions of all competent authorities whose decision making functions impact on the environment. It should be able to act across sectors and authorities in its oversight role. The

proposed body should only exercise oversight when a body is acting as a competent authority. For example, this would exclude utility companies operating within SSSIs, whose conduct is regulated by Natural England. It would include local authorities when acting in a regulatory capacity, for example in relation to statutory nuisance, but would exclude cases involving damage caused to SSSIs by local authority workmen, (which would again fall to Natural England).

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?

Enforcement mechanisms in international environmental law are varied but universally weaker than those available in EU environmental law. If environmental principles such as sustainable development and the prevention principle are to have practical meaning, the proposed environment body should be able to call the government to account for failing to meet international environmental obligations. Furthermore, differentiating between the different levels of law-making is extremely complex, considering that domestic law often derives from international obligations. Therefore the new body should have oversight over all environmental obligations.

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

The proposed environment body should exercise enforcement and advisory functions in relation to agriculture and fisheries. The Committee on Climate Change and the Adaptation Sub-Committee bring specific expertise to their advisory functions on climate change. If they remain separate from the proposed environment body there must be an expectation that they will collaborate closely with it, so

that the threats posed by climate change and steps required to mitigate and adapt are adequately integrated within environmental governance. Such functions would promote holistic approaches, collaboration and joined up thinking when formulating future environmental policies to achieve sustainability (Petetin and Dobbs, 2018b).

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

To ensure a 'joined-up' approach, the new body should be a statutory consultee in relation to planning matters. Since new policies should be underpinned by co-design and co-development, the body should be a consultee.

14. Other Comments:

(i) Devolution Matters

The Document overlooks the multi-speed environmental policy that has evolved across the UK since the establishment of the devolution in 1998. In the intervening period Scotland and Wales have forged ahead, whilst more limited progress has been made in England and Northern Ireland. Withdrawal from the EU has potential to further exacerbate this situation. The Cabinet Office framework analysis suggests a mixed picture for environmental governance, with no legislative frameworks envisaged in some areas, non-legislative frameworks in others and legislative frameworks being considered in yet others (Cabinet Office, 2018). The prospect of no legislative frameworks to co-ordinate policy in areas such as water quality and sustainable water use creates the potential for a further divergence of environmental governance standards in these areas. This has the potential to undermine the UK internal market, by conferring commercial advantage upon industries within areas with lower environmental standards. It may also have implications for future trade relations with the EU, given the European Council's view that any free trade

agreement must provide safeguards against unfair competitive advantages in environmental measures and practices (European Council, 2017). Collectively, these considerations point to a need to establish a framework of minimum environmental standards across the United Kingdom, with an option for devolved governments to exceed those standards where this was considered appropriate.

In Wales, recent legislation sets out an innovative legal framework for a holistic and value-driven approach to environmental protection, notably the Well-being of Future Generations (Wales) Act 2015 and the Environment (Wales) Act 2016 (Petetin an Dobs, 2018a). The latter drives the formulation of Welsh policy and law towards the 'sustainable management of natural resources' whilst the former is of a framework nature, setting out principles for planning and managing the natural environment in a more proactive and sustainable way, involving joined up thinking across the range of the Welsh Government's policy concerns. These acts rather reflect environmental principles as interpreted by the EU, whilst the consultation refers to the international definition of the principles. This difference could lead, first to different interpretations between Wales and England/DEFRA acting central government, second, international definitions tend to be underpinned by older and lower standards than in the EU. Such discrepancies could lead to a reduction in environmental protection and to disputes.

Further, the legislation which will be produced under the European Union (Withdrawal) Act 2018 on environmental principles may violate the terms of Intergovernmental Agreement between the UK Government and Wales (HM Government and Welsh Government, 2018) since the UK government cannot bring legislation forward, even if just for England, if it affects a policy area, here environmental protection, which will be subject to Section 12 regulations of the European Union (Withdrawal) Act 2018.

(ii) Enforcement Powers

The removal of the enforcement powers of the European Commission and Court of Justice may also have important consequences for environmental governance. Much critical commentary has been written on standards of environmental governance in Northern Ireland (Morrow and Turner, 1998, UKELA, 2004; Turner, 2006; Turner and Brennan, 2012; Jack, 2017). The introduction of the Court of Justice's power to impose financial penalties previously played a central role in coercing Northern Ireland into actually implementing a range of EU environmental directives (Turner, 2006). Today, in the absence of mechanisms such as an independent environmental regulator or an environmental audit committee within the Northern Ireland Assembly, it continues to have a weak environmental governance framework.

These considerations highlight the importance of having environmental oversight mechanisms across the UK as a whole, not just in relation to England alone. Such mechanisms would help to provide assurance that minimum environmental standards, at least, are being met and that effective environmental governance being practiced right across the UK.

(iii) Geographical Scope of the New Body

A holistic approach towards the environment across the UK would be preferable from an environmental perspective to ensure that the four nations of the UK adopt aligned environmental and sustainable development goals. DEFRA and the devolved administrations must keep communicating and co-operating in relation to whether the new body should be for England only or have a UK wide focus. The UK nations should also explore whether the new body should be competent to assess cross-border environmental problems within the UK as well as at an international level, in particular with the EU.

Dispute resolution mechanisms that define the applicable law(s), whether international (inclusive of the EU) or national, should be established to minimise future issues.

(iv) Evidence Gathering

The UK should remain a member of the European Environment Agency (EEA). The EEA provides EU Member States with scientific information and expertise on environmental matters and informs the public about the state of the environment. The EEA does not undertake any regulatory, legislative or adjudicative role. Currently all EU Member States are members of the EEA, along with all four members of the European Free Trade Association and Turkey. Maintaining membership would enable the UK to access a larger pool of scientific expertise in environmental matters and co-operate with regional states, as well as enabling greater environmental capacity within government that could support relevant committees when producing new policies and legislation.

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August 2018.