

Consultation response: Environmental principles and governance after EU exit

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August 2018

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Consultation response: Environmental principles and governance after EU exit

This submission was made on 2 August 2018 to Defra's consultation on environmental principles and governance after the United Kingdom leaves the European Union. It has been written by Alyssa Gilbert, Director of Policy and Translation at the Grantham Institute – Climate and the Environment, Imperial College London, and Dr Maria Carvalho, Policy Analyst, at the Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science. Additional contributors include: Professor Helen ApSimon, Dr Alina Averchenkova, Mila Cherneva, Dr Alex Collins, Professor Sam Fankhauser, Karen Makuch, Dr Audrey de Nazelle and Professor Nick Voulvoulis.

The authors have focussed their responses where they have the relevant expertise and knowledge to add value.

Q1: Which environmental principles do you consider as the most important to underpin future policy making?¹

a) Sustainable Development

Option indicating level of importance: High importance

The principles underlying sustainable development present a holistic approach to economic growth. They recognise that long-term economic growth can only be sustained if the integrity of the environment, human health and issues around poverty and inequality are addressed. The UK is signed up to the Sustainable Development Goals and should ensure the principles underlying those goals are incorporated into the UK's domestic policies and international development programmes.

In considering which principles are the most important, it is essential to make a distinction between ethical principles and operational tools. Sustainable development addresses ethical issues around risk and fairness, and therefore is a highly important principle that should underpin environmental governance.

b) Precautionary Principle

Option indicating level of importance: High importance

This principle is an ethical principle that addresses issues around managing risk and is important for managing the risk of environmental harm. It is one of the most important principles that should underpin environmental governance.

c) Prevention Principle

Option indicating level of importance: High importance

This is another ethical principle that addresses issues around risk and is also important for managing the risk of environmental harm. It is one of the most important principles that should underpin environmental governance.

¹ Note that for each response there was a 250 word limit

d) Polluter Pays Principle

Option indicating level of importance: High importance

This is a further ethical principle, which addresses issues of fairness and is important for attributing the burden of responsibility for a harmful action towards others. It is one of the most important principles that should underpin environmental governance.

e) Rectification at Source Principle

Option indicating level of importance: Medium importance

This principle helps in operationalising the 'polluter pays principle'.

f) Integration Principle

Option indicating level of importance: Medium importance

This principle operationalises how to effectively incorporate ethical principles into policy actions at the national and local levels.

g) Other Principle 1

Option indicating level of importance: High Importance

Managing environmental harm

In addition to codifying measures to protect the natural environment, we propose an additional principle related to managing environmental harm, in particular related to climate variability and climate change (e.g. resilience to flood, drought and the impacts of climate change).

h) Other Principle 2

Option indicating level of importance: High Importance

Evidence-based decision-making

It is vital that the ethical principles are operationalised on the basis of evidence. Sometimes the use of data and an understanding of the context can have a significant bearing on how to apply the ethical principles most appropriately.

i) Other Principle 3

Option indicating level of importance: Medium

Sound decision-making, based on effectiveness

Decisions about environmental strategy, policy and individual actions should consider effectiveness in preventing or reducing environmental harm, particularly according to targets set in policy. It is important that effectiveness is well defined, and that it is clear how it would be measured.

There has been an evolution in the role of principles in environmental governance since they were first included in EU legislation. These principles are an important basis for decision-making to protect the environment, but the EU experience has shown that once they are embedded in further legislation, strict adherence to the principles can sometimes lead to decision-making that is not optimal in environmental terms. For this reason, it is important to include some mechanism for adjustment or reinterpretation where there is a case for doing so in the interest of better environmental outcomes (and not, for example, due to cost or other pressures).

The use of sound-decision making is vital. Guidance is needed on how to coordinate ethical principles with the cost-benefit analysis approach, as outlined in the Government Green Book, including an understanding of the effectiveness of the activities under consideration. In these

assessments, the benefits should include the full set of wider co-benefits, such as the benefits of environmentally-sound behaviour for human health. Please see answer to question 14 on additional discussion of cost-benefit analysis.

Q2: Do you agree with these proposals for a statutory policy statement on environmental principles (this applies to both Options 1 and 2)? (two options are given)

Answer: Yes

While the creation of a statutory policy statement is a good idea, the current text proposes 'a requirement for government to have regard to the statutory policy statement....' This does not articulate a strong enough requirement for government to take the advice of this new body seriously when making policy. It is essential that the legislation sends a strong mandate to government by making such environmental principles binding in law.

The language of the proposal emphasises trade-offs, speaking of the need 'to balance environmental priorities alongside other national priorities, such as economic competitiveness, prosperity and job creation to provide sustainable development overall.' However, often environmental protection brings short- and long-term benefits to these same national priorities, including national security (see exclusions below), public health, education, infrastructure protection, communities and regeneration. The policy statement should reflect the need to identify and grasp these opportunities and emphasise that protection of the environment underpins numerous national priorities.

The proposal excludes certain policy areas. It is essential that the financial community have due regard to this policy statement too, a sentiment already reflected at corporate level by the Financial Stability Board's (FSB) work on climate disclosures (through the Task Force on Climate-related Financial Disclosures – TCFD).

The proposal needs to outline more formally what powers this body would have to hold the Government to account. In particular, the Bill should give the body the right to take legal action. This is important for the legitimacy of the body and the work of the Government.

Q4: Do you think there will be any environmental governance mechanisms missing as a result of leaving the EU?

Option chosen: "I think the governance gap will be greater in some areas than that described in the consultation document."

There clearly will be a lack of sanctions and enforcement of environmental regulation once the UK leaves the EU, and while these proposals are designed to address this gap, we are concerned that these proposals do not go far enough. It is notable that the threat of fines can be a driving force for the UK government to act when in breach of environmental legislation. The fine itself is used in the balance of cost-benefit analyses when making decisions about, for example, air pollution action. It is important that the Government now finds a way to include benefits fully in these calculations, in the absence of the threat of a fine. Such calculations may yield some beneficial insights about targeted actions e.g. for activities aimed at improving environmental and human health. The Government will also need to find alternative ways to hold inaction on environmental issues to account.

Environmental monitoring needs to be maintained, despite being expensive. Continuous monitoring helps us understand our interaction with the environment and to assess if policies are working.

The UK's new environmental governance regime should be designed in a way that continues to influence the EU's policies, as it has in the past. Our unique institutions e.g. COMEAP (Committee on Medical Aspects of Air Pollution) can contribute. The UK needs shared approaches to issues like setting emission standards for vehicle exhausts, and responsibilities for enforcement.

Environmental considerations are made by a wider group than that acknowledged in the consultation e.g. the Transport Committee regarding the expansion of Heathrow Airport.

Q5: Do you agree with the proposed objectives for the establishment of the new environmental body?

- a) Act as a strong, objective, impartial and well-evidenced voice for environmental protection and enhancement.**

Answer: Yes

We can draw on findings from recent studies by Fankhauser et al. (2018) and Averchenkova et al. (2018) on the importance of the Committee on Climate Change (CCC) as an independent advisory body, in meeting the objectives of the Climate Change Act. The CCC has been critical for the success of the Act, serving as an authoritative source of information and keeping the Government accountable for delivery of its legislated targets. The CCC combines rigorous, impartial analysis with extensive stakeholder engagement to ensure its analytical results are corroborated with on-the-ground assessments of actions. Its expertise ensures its analysis and advice are credible and well respected, both within government and the public debate.

The studies cited above found that a key factor in the success of the CCC was the high calibre of its experts and its resourcing: the Committee has a credible, high-profile chair, a well-resourced and competent secretariat and sufficient budget to meet its statutory obligations.

- b) Be independent of government and capable of holding it to account.**

Answer: Yes

The findings from the Averchenkova et al. (2018) and Fankhauser et al. (2018) studies demonstrate how the Committee on Climate Change serves as a good model for strengthening climate governance in the UK. The independent and expert nature of the CCC ensures that its advice is not subject to electoral cycles or election results, ensuring that the Government is kept on track to meet its responsibility to meet the legislated carbon budgets.

- c) Be established on a durable, statutory basis.**

Answer: Yes

There are two key lessons drawn from Averchenkova et al. (2018) and Fankhauser et al. (2018) on strengthening the durability and statutory nature of an environmental body.

First, the capacity for the CCC to execute its responsibilities is dependent on the budgets set by government, which could compromise the financial independence of this body. Therefore the new environmental body should have a financial budget that is independent of government, adhering to international good practice for the funding of independent bodies.

Second, there should be clear statutory obligations ('timetables') on how Parliament, the Government and the independent Committee interact. The Climate Change Act introduced a useful 'routine' into the climate change debate, requiring the Government, Parliament and the CCC to produce certain set pieces at statutory times. The introduction of a statutory response time would

close a loophole that allows the Government to delay the formulation of its plan, as recently has been the case with the plans to implement the carbon budgets.

d) Have a clear remit, avoiding overlap with other bodies.

Answer: Yes

The role of the new body needs to be considered carefully to avoid numerous potential overlaps. The statement of the body's remit should specify whether it would mainly assess government proposals and related implementation, or if it would also have the mandate to provide advice on policy gaps.

Examples of overlap might occur in relation to:

- **The scope of existing bodies.** For example, it is not possible to simply exclude climate change from the remit of an environmental committee. This overlap needs to be carefully explored. The new body's mandate should delineate areas of responsibility between itself and the Committee on Climate Change, particularly around adaptation.
- **The Environment Agency.** It has enforcement responsibilities at the individual level that will not overlap, but there might be overlap on strategic issues, where evidence from the operational experience of the Environment Agency is vital.
- **Expert groups.** These can be supported by Defra and provide an important expert voice focussed on the strategic approach to key issues. These expert groups might be more useful on individual issues than an overarching body.
- **Parliamentary scrutiny bodies.** Although the body has the advantage that it can be significantly stronger on technical detail, and can set out a comprehensive programme of activity, it must not supersede the democratic accountability of Parliament.
- **The Natural Capital Committee.** In this case, the way to manage the overlap could be to abolish the Natural Capital Committee and enfold its functions and responsibilities within the new environmental body.

e) Have the powers, functions and resources required to deliver that remit.

Answer: Yes

It is vital that any new body has sufficient force, powers and resources to truly hold the Government to account and enforce action. Without enforcement capability, there is a risk that the Government simply pays lip service to the body, by listening to but ignoring advice, claiming it is too expensive, or citing other national considerations. Such an approach could damage the legitimacy of the new body and also the credibility of government action.

Another way to ensure there is power to hold the Government to account is by having a statutory time in which the Government needs to provide a plan for meeting targets once they are passed into law. The introduction of a statutory response time would close a loophole that allows the Government to delay the formulation of its plan, as Fankhauser et al. (2018) shows is the case for the Committee on Climate Change (CCC).

To ensure that the body has independence from government and therefore the freedom to fully hold the Government to account, funding should be allocated independently and at a level that is sufficient for the body's remit to be fully met.

Importantly, the level of success of this new body will reflect the quality of the people recruited to staff it. The criteria for both the leaders and staff need to be rigorous to ensure that the staffing is strong, independent and free from any conflicts of interest.

- f) Operate in a clear, proportionate and transparent way in the public interest, recognising that it is necessary to balance environmental protection against other priorities.**

Answer: Yes

A key insight drawn from the Fankhauser et al. (2018) study on the Committee on Climate Change demonstrates the importance of ensuring that the new environmental body is expert and independent, giving authority, clarity and transparency to its recommendations, and enabling it to balance environmental protection against other priorities.

In terms of determining a proportional response to managing these trade-offs, the technocratic nature of this body can ensure proposed policies adhere to the environmental principles that are set in the legislated environmental bill to determine what can be considered a proportional response. To ensure a 'baseline' level of environmental protection, it can draw on expertise to develop 'environmental thresholds' that cannot be passed in the name of other priorities.

It is also important to note that often environmental protection brings short- and long-term benefits to many national priorities, including national security, public health, education, infrastructure protection, communities and regeneration. This authoritative body should take this holistic approach to considering the public interest for both today's citizens and those of the future.

Q7: 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?

- a) Annual assessment of national progress against the goals and actions of the 25-year environment plan.**

Answer: Yes

The body should have a role in scrutinising, advising and holding the Government to account in relation to both extant environmental law and key environmental policies such as the 25-year plan. Like the CCC model, the body could also include regular progress reports on meeting targets in the 25-year plan, and actively propose strategies or policies where there is a gap between achievement and ambition. The body should be responsible for devising and reporting on key metrics and indicators on a regular basis and make recommendations about the type of new laws or regulations that may be required.

- b) Provide advice when commissioned by government on policies set out in government strategies and other published documents and how they are being implemented.**

Answer: Yes

This would be a very good idea, analogous to the value the Committee on Climate Change provides in looking at analysis on how to align the carbon budgets to the devolved administrations, or the climate implications of hydraulic fracking in the UK. However, the Government should ensure that it provides additional funding to the independent environmental body to execute commissioned analysis.

- c) Respond to government consultations on potential future policy.**

Answer: Yes

The independent environmental body can respond to government consultations by submitting a formal response, but also through informal channels such as in-person meetings. This response should be optional, rather than a statutory obligation of the new environmental body.

Q8: 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?

Answer: Yes and no

We recognise that giving the new body the remit and power to respond to complaints from members of the public could require substantial resources. However, when leaving the EU the UK needs to ensure that this power is not lost. Therefore, the body should have powers to act as an ombudsman and to initiate its own investigations if these are raised either internally or via members of the public. This specific power could be given to an ombudsman, separate from this main body.

It is also important to note that in some areas, such as the 25-year environment plan, the overarching structure has not yet been converted into legislation, and so the legislative route is not yet available to complainants that maintain that government is not taking enough action. Therefore, the new environmental body should generate its own metrics (as detailed above) to ensure that progress on these strategies is monitored and reported on.

Q9: 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?

Answer: Yes and no

This body needs to have significant enforcement capabilities if it is to be taken seriously. Otherwise, there is a risk that advisory notices could just be ignored. The current hierarchical structure from the EU could be considered as a starting point for this Bill.

There should be guaranteed mechanisms whereby these notifications can achieve high-profile attention e.g. through compulsory sharing on social media and government websites, and through departmental press releases that highlight inadequate performance to the Government. Enforcement notifications could also prompt further Parliamentary scrutiny or a public enquiry. There may also be a role for direct interaction with government departments, including published responses from Ministers. Further sanctions could include direct accountability of the Minister or a certain team, or implications for the budgets of certain departments, focussing on those that are the cause of the environmental problem.

Q10: 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? What subject matter should the new environmental body cover?

a) Non-Ministerial Departments (NMDs) and Non-Departmental Public Bodies (NDPBs)

Answer: No

A non-political body could help to bring national and local policies in line, maximising and sharing expertise and information. In its scrutiny role, the new body could consider problems such as how the lack of enabling legislation at the national level can block action at the local level, or how sub-optimal allocation of funding is hampering the delivery of national policies.

Therefore, the body must have the scope to speak to and investigate matters across decision-making in government – which will include issues relevant to, or led by NMDs and NDPBs. This coverage is vital to ensure that the body gains a complete understanding of how national government is carrying out its responsibilities. The new body's views need to be reported publicly,

stimulating action at all levels and enabling constructive dialogue between the different institutions of government.

Overall, while the body could provide advice and information to other agencies, it should not be tasked with holding them to account.

b) Local authorities

Answer: No

Regional and local authorities are a vitally important part of the delivery network for environmental policy. In some cases, such as the Greater London Authority, we already see leadership and expertise on environmental challenges, such as air quality, while in other areas the increasing Mayoral responsibility is a significant opportunity in the environmental sphere.

Therefore, the body must have the scope to speak to and investigate matters at national and local levels to ensure a complete understanding of concerns, constraints and solutions related to environmental challenges. The new body's views need to be reported publicly, stimulating action at all levels and enabling constructive two-way dialogue between the different levels of government.

Overall, while the body could provide advice and information to other agencies, it should not be tasked with holding them to account.

We believe that it is vitally important that this body is aligned with similar activities in the devolved authorities. Ideally, one body should cover these issues for England, Northern Ireland, Scotland and Wales.

Q11: 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?

a) EU environmental law retained under the EU (Withdrawal) Bill.

Answer: Include all

b) Domestic environmental law not based on EU legislation.

Answer: Include some

The new environmental body is set up to have oversight of the delivery of environmental laws that were originally part of EU law. It does not need to provide oversight to domestic environmental laws that already have domestic bodies that provide such oversight.

However, it would be important for the new body to identify any gaps in environmental policy that will impede the implementation of the principles highlighted in the Bill that are in neither the EU nor our domestic laws. In so doing, the new environmental body should have oversight on the delivery of such environmental laws.

Furthermore, this body should be designed in a way that makes it an effective institution not just for the UK's transition period out of the EU, but also for the future. If this principle is followed, the distinction between 'transferred EU' laws and other legislation will become meaningless. Therefore, a broader understanding of the laws covered is needed.

c) International environmental law

Answer: Include all

It is important to include international agreements too. For example, the National Emissions Ceilings Directive is an EC extension of the UNECE Gothenburg protocol, and we should include responsibilities with respect to reducing trans-boundary air pollution and contributions from the UK.

Our participation in UN bodies such as the UNECE will be more important when the UK is no longer in the EU. It is also important to recognise other international bodies such as the International Maritime Organisation in order to reduce pollution problems from shipping.

Therefore it would be important for the UK to transpose into domestic environmental law any obligations to international environmental agreements that it has ratified. In so doing, the new environmental body should have oversight of the delivery of such environmental laws.

Q12: Do you agree with our assessment of the nature of the body's role in the areas outlined above (as in the main doc)?

a) Climate change

Answer: Agree

It would be important to address overlaps between its remit with the Committee on Climate Change on climate change issues. Therefore the scope of the new body needs to be considered carefully in that context. For example, in the case of climate change, a total exclusion may not help the new body play a role in resolving decisions where the optimal actions for different environmental priorities are actually in conflict. A good example of such a challenge is the current issue of wood burning stoves, which are a major problem for meeting the Clean Air Strategy's targets. It is also important that government departments work together – something that a new body could help to address.

There could be cases in which the advice given by the CCC could be in conflict with the principles of environmental protection that the new environmental body needs to uphold. A good example would be onshore wind, which the CCC would promote to mitigate climate change. However, there could be sites where the local environment could be threatened by turbines, which the new environmental body would therefore consider inappropriate locations for onshore wind. In these kinds of scenarios, it would be important for both the Committee on Climate Change and the new environmental body to submit independent advice to the Government, to deliberate between these environmental priorities.

b) Agriculture

Answer: Agree

It would be very important for the new environmental body to be able to advise on how to reconcile agricultural policy with environmental principles, for example on biodiversity, animal welfare and the effects of pesticides. It can also seek the formal advice of the Committee on Climate Change on the climate change effects on agriculture, enabling it to coordinate policy responses on overlaps of climate change and agricultural policy.

Q13: Should the body be able to advise on planning policy?

Answer: Yes

In general, the body should consider environmental issues across all sectors and policy areas. Planning policy is part of a central, structural solution to many environmental challenges. Therefore the body should have a role across departments and government levels. It is important that planners do take account of environmental factors and that these guidelines are followed properly at a local level, e.g. not permitting house building on flood plains. It is also important that planning consent is specified in a way that achieves the intended aim of ensuring environmental protection. The new body could help in that respect.

We anticipate new planning challenges related to environmental issues, such as the increasingly high-rise nature of cities and how air pollutants circulate in these new urban environments. Environmental issues, including their confluence with health issues, might need to be addressed in an integrated way from within the planning process as well as through this environmental body.

Other important environmental issues related to planning include, for example, climate resilience and the future of the green belt. A good analogous example of an environment–planning overlap is the essential role played by the Committee on Climate Change in ensuring climate considerations were included in the Infrastructure Act.

Q14: Do you have any other comments or wish to provide any further information?

Principles to underpin environmental governance

A list of core environmental principles has now been included in the EU Withdrawal Bill, due to a House of Lords amendment now accepted by the Houses of Parliament. As a result, all of the principles proposed in the consultation will be included directly in the Bill. We support this approach, as environmental principles are a vital way to guide long-term strategy that supports the environment.

However, there has been an evolution in the EU in the role of principles in environmental governance since they were first included in EU legislation. These principles are an important basis for decision-making to protect the environment.

In considering these environmental principles, it is essential to make a distinction between ethical principles and operational tools. The precautionary principle, the polluter pays principle, and sustainable development principles address ethical issues around risk and fairness, and are therefore the foundation principles that should underpin environmental governance. Operational principles, such as ‘rectification at the source’ and the ‘integration principle’, guide how to implement these ethical principles into environmental governance.

Given that environmental decision-making operates under conditions of uncertainty, it is important to ensure that integrating environmental principles into legislation has some flexibility as more information enables more optimal decision-making in the future. For this reason, it is important to consider and include some mechanism for adjustment/reinterpretation where there is a case for doing so in the interest of better environmental outcomes (and not, for example, due to cost or other pressures).

Principles for ensuring the effectiveness of the new environmental body

The appointment of appropriate members for this body will be central to its independence and success. The new body will need a range of skills and expertise, some legal and some technical. The strength, knowledge and expertise of the chair, cross-party political support, a clear open appointment process, attractive job specifications, and a limited vetting role for Number 10 on members of the body are all important factors in ensuring that the body is made up of the right people, independent of government.

Independence both in terms of finance and remit will be essential for the success and credibility of the body and to ensure that current functions to the hold the Government to account on environmental issues are not lost when leaving the EU. The source of funding can be important. If funding comes through a government department, there can be a strong desire for that department to own the committee and there can be a continual struggle to maintain independence and resources.

To give the body sufficient strength, the new Act must clearly state its role and confer legal status.

The body should also consider where there are current gaps in knowledge in other bodies, such as Defra, the EA, Natural England and delivery departments outside of Defra (e.g. MHCLG, DfT), and propose how these gaps can be filled. A relationship with research councils is also desirable.

Finally, it is important that any new environmental body does not preclude the integration of environmental considerations into existing bodies in a wide range of areas.

Cost–benefit analysis

Clear guidance on the cost versus benefits of different approaches can ensure, for example, that there is a distinction made between the use of Best Available Technology (BAT) and Best Available Techniques Not Excessive Economic Costs (BATNEEC). This is only one example where a sound decision-making process can help avoid otherwise overly-restrictive provisions.

References

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