

Environmental principles and governance after Brexit

Response from the Landscape Institute

For: Department for Environment, Food and Rural Affairs (Defra)

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1 Summary

We welcome the government's ambition in setting out key environmental principles in law. In order to ensure that Brexit does not lead to a watering-down of environmental standards, we must ensure that these principles are the right ones, and that they are able to take root. This means that the principles must be enshrined in law through primary legislation, accompanied by a policy statement to guide future policymaking.

Most important is ensuring that the principles are embedded in practice. This begins with oversight and enforcement, through the creation of a body to replace the role currently delivered by the European Union. This body must well-resourced, robust, and interact appropriately with the existing bodies and policies in this area. Practically, this means:

- The new body should be able to issue escalating, binding legal notices: including the ability to require the cessation of activity or implementation of restorative works
- The new body should be able to issue financial penalties to the UK government for the contravention of environmental law, just as currently exists through the European system
- This new body should not divert resources from the existing environmental public bodies, either in its creation or in the delivery of its responsibilities
- The new body should have the same responsibilities for climate change as it does for other environmental outcomes
- The new body should have an enforcement remit across all domestic law, balanced where appropriate with the mechanisms that exist for governing the obligations contained in international treaties

- The new body should advise on national planning policy and NSIP processes, and – crucially – on the application and interpretation of the obligations under the Strategic Environmental Assessment Directive and Environmental Impact Assessment Directive within planning
- The new body should be accountable directly to parliament, and its advice/scrutiny functions ought not to extend solely to Defra policy
- The new body should be accessible and transparent, and able to receive and action complaints from the public
- The new body should have a UK-wide remit, in terms of its oversight and enforcement

2 Response to specific questions

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

We support all the principles listed in Annex A of the consultation document, as well as the additional principles now mandated by the EU (Withdrawal) Act 2018.

We believe the list of principles should be expanded to include the following:

- **The principle of making use of the best available scientific and technical expertise**
- **The principle of innovation:** to ensure that regulations do not unduly impede the development of new processes and technology that may be beneficial for the environment
- **The principle of environmental net gain**, in its broadest sense of “progressive improvement”: to ensure that the net stocks and quality of natural capital does not decrease from this point onwards, in line with the 25 Year Environment Plan. In practice this includes a non-regression principle applied to the targets and obligations contained in EU environmental directives, which should be written into the policy statement.
- **The principle of “interconnectedness”** (or similar wording): to ensure that landscapes and ecosystems are understood *holistically*, and that green and blue spaces are appropriately connected, in line with the recommendations of the 2010 Lawton Review.

In addition to these, there are a number of more specific environmental principles contained in treaties and other international documents to which the UK is a signatory. These principles must continue to carry weight, regardless of the UK’s future status within the European Union, and should be promoted by the new enforcement body.

For instance, the UK is a signatory to the European Landscape Convention (signed 2006), a convention of the Council of Europe. The status of this convention is not affected by Brexit. The recommendations for implementation of this convention contains a list of useful principles: for instance on public transparency, and on the integration of landscape strategies into spatial planning policies. (The full list can be seen here: <https://www.coe.int/en/web/landscape/about-the-convention>.) The new enforcement body should advise on how these principles can be embedded into new policy.

Q2. Do you agree with these proposals for a statutory policy statement on environmental principles?

Yes. This has now been mandated by the EU Withdrawal Act, and we consider this an important step.

Q3. Should the Environmental Principles and Governance Bill list the environmental principles that the statement must cover [...]?

Yes. This has now been mandated by the EU Withdrawal Act, and we consider this an important step.

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

Yes. As acknowledged in the consultation paper, there are functions currently delivered by European bodies and courts that do not yet exist independently in the UK. The most important of these is a body with the remit and expertise to take environment-specific complaints from third parties, including members of the public, and issue binding orders or monetary fines.

This necessitates the creation of a new independent body for environmental governance.

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

Yes, broadly. All six objectives are vitally important. However, we disagree on the following points:

- The fourth bullet (“avoiding overlap with other bodies”) is important, but should be extended. Specifically, this new body should not divert resources from the existing environmental public bodies, either in its creation or in the delivery of its responsibilities. Moreover, bodies tasked with the collection of environmental monitoring data (such as the Environment Agency or Natural England) must have the resources to ensure that this does not impact upon the delivery of their other responsibilities.
- We do not agree with the second-half of the final objective: “recognising that it is necessary to balance environmental protection against other priorities”. If there is a balance to be struck, it is UK law and government policy that will strike it, not this proposed watchdog. The National Audit Office (for example) does not balance fraud against other priorities. The same is true here. The UK must set clear and firm laws for environmental protection and enhancement, and this watchdog must ensure they are being upheld.

Q6. Should the new body have functions to scrutinise and advise the government in relation to extant environmental law?

Yes. This is a helpful role for the new body to undertake.

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?

Partly, yes. The new body should have the ability to hold government to account on its delivery of long-term environmental policies and targets, including those within the 25 Year Environment Plan. It would be particularly useful for the body to advise on both the application and future development of environmental legislation.

However, it is important that this new body does not:

- Confuse any advisory role to government with its enforcement role,
- Unnecessarily replicate the work done by other environmental advisory bodies, such as currently provided by the JNCC and NCC, or
- Encourage unnecessary duplication of work provided by the professional and third sectors, in providing advice to government using on-the-ground experience.

It may be useful for this body to respond to government consultations, for instance, but it does not make sense for government to mandate that it does so. Advising the government on policy must never become a distraction from its vital enforcement role.

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?

Yes. This is an essential role for the new body to perform.

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?

Whilst advisory notices are a useful mechanism for day-to-day environmental accountability, and we hope that the majority of cases would be resolved through this means, the new body must have more robust tools at its disposal if it is to be successful.

We support all options given in the consultation. Binding legal notices, and the ability to intervene in legal cases, are two important mechanisms. However, the most vital is the ability to enforce the cessation of activity and mandating restoration works. In line with the principle of net environmental gain, it is not enough to simply identify when a body has failed in its legal environmental duties. The new body must be able to ensure that any damage to the UK's natural capital is reversed.

Furthermore, it is essential that the new body has some mechanism to financially disincentivise the non-delivery of environmental targets in law. This means that the body must have the power to levy fines on national government, as currently exists within the European Union.

This money must obviously not be passed simply from one pocket of government to another, and it is essential that the fines are not levied upon the budget of a single authority or government

department (e.g. Defra). One way to achieve this is may be to notionally place funds raised through this mechanism in a pot that can be used for environmental impact investment, controlled by an independent financial institution – comparable to the funds established under Big Society Capital, through the Dormant Bank and Building Society Accounts Act 2008.

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?

All public bodies should be *indirectly* in the scope of the new body.

It is important to define what is meant by ‘scope’ here. Two broad powers should exist:

- **Investigative oversight.** For instance, the ability to collect and demand data. The new body must have this power, and its scope must extend to all public bodies with environmental responsibilities, including ALBs and local authorities.
- **Enforcement and holding to account.** For instance, the ability to issue fines and binding legal notices. The new body must have this power, and its scope should extend to national government alone.

There is no merit in shortcutting the existing structure of public sector accountability, including the work of bodies like the LGSCO and PHSO; parliamentary oversight, and indeed government ministers themselves. However, the new body must have the ability to police the delivery of environmental law at all levels, and all public bodies should therefore be in its purview – even if national government is ultimately held to account for failings.

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?

Yes, insofar as the new body should have oversight of all domestic environmental law.

However, the risk of duplication should not be a barrier to the new body having appropriate powers of oversight and enforcement in the UK. This is particularly true where existing laws are duplicated or overlap at national and international level.

For instance: the designation of areas under the Bern Convention (sites forming the so-called “Emerald Network”) are delivered in European Union by the Natura 2000 sites. These in turn are delivered in the UK by SPAs or SACs, which usually overlap with UK SSSIs (and often other landscape designations like National Parks or AONBs). The fact that an enforcement mechanism may exist under the Bern Convention for the Emerald Network must not preclude the UK from having its own robust enforcement mechanisms for the protection of SSSIs (for instance). Given that these sites are in effect one-and-the-same, there will naturally be some duplication in investigation and enforcement.

This is best resolved by ensuring that the new body has explicitly-stated responsibilities in regard to international treaty obligations. These may vary in application. For instance, the new body may be able to take a relatively light-touch approach to the international trade in endangered species, and not duplicate any investigatory mechanisms; whilst a more sensitive approach is likely to be needed for the Espoo Convention (particularly once the EU EIA Directive no longer applies).

It would also be useful for the new body to comment upon the enforcement, application, and development of international environmental treaties, including the European Landscape Convention.

Q12. Do you agree with our assessments of the nature of the body's role in the areas outlined above?

No, insofar as it relates to the exclusion of climate change. The new body should have the same responsibilities for climate change as it does for other environmental outcomes. The existence of the currently well-functioning Committee on Climate Change should not be a barrier to this, nor should the fact that climate change is currently the responsibility of BEIS rather than Defra.

We also believe that the new body should not have overlapping responsibilities with the proposed Shale Environmental Regulator (SER). The proposed SER was announced in the Written Ministerial Statement of 17 May 2018 by the Secretary of State for MHCLG, and is not discussed in the consultation. We believe that the case for the creation of SER is not yet made. The new environmental watchdog will need to investigate the activities covered by SER (e.g. Environment Agency, the Oil and Gas Authority) and there is the potential for the creation of SER to create public confusion in this area.

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

Yes. The new body should be able to advise on national planning policy, for instance by commenting upon the NPPF and changes to planning policy processes.

The new body should also have a role in advising on planning policy for Nationally Significant Infrastructure Projects (NSIPs), for instance by providing input to National Policy Statements, or by collaborating on the reports of the National Infrastructure Commission.

The most essential role of the new body in relation to planning will be through its regular enforcement role: ensuring we meet the obligations of the Strategic Environmental Assessment Directive (2001) and the Environmental Impact Assessment Directive (2011), as these are transcribed into UK law. The new body should be able to advise upon the implementation of these two directives (and others) as they pertain to the planning system, and on the development of future UK law in this area.

Planning policy is also guided by a number of environmental laws which should come under the auspices of this new body. For instance, planning policy in relationship to designated landscapes (National Parks and AONBS) is guided by diverse legislation, including the National Parks and Access to the Countryside Act 1949 and the Countryside and Rights of Way Act 2000. Ensuring that the new body uses the correct definition of "environment" in its scope is essential, and both of these acts must be included.

Q14. Do you have any other comments or wish to provide any further information relating to the issue addressed in this consultation document?

We believe that the new body should have a remit extending beyond England. All the environmental laws brought over from EU Directives will continue to apply equally across the four nations of the UK, and therefore the enforcement of those laws should be equal.

In the future, we hope that the standard of environmental laws from Europe will be maintained across the UK (which would be supported by a net gain/non-regression principle). Having shared measurement and enforcement structures may help achieve this. This is particularly essential in dealing with cross-border issues, and any new governance mechanisms should aim to cover Great Britain as a single biogeographical unit.

In some cases, the devolved nations have sought to go further in environment protections than England. The new body must not act as a ceiling to these ambitions.

Finally, we believe the new body should be directly accountable to parliament, rather than as an NDPB of Defra. We believe there is merit in a formal relationship between the Environmental Audit Committee of the Commons, and this new body (for instance the EAC selecting the chair/CEO of the new organisation). It will need to establish relationships across government, not just with Defra.

3 Who we are

The Landscape Institute (LI) is the royal chartered body for the landscape profession. We represent over 5000 landscape architects, planners, designers, managers and scientists.

As a professional organisation and educational charity, we provide training, accreditation, technical advice, and standards to maintain the high quality of the landscape profession in the UK. We protect and enhance the built and natural environment for the public benefit.