

CONSULTATION

Response Document



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**Environmental Principles and Governance after EU Exit
(Department for Environment, Food and Rural Affairs)**

2 August 2018

Introduction to CIEEM

The Chartered Institute of Ecology and Environmental Management (CIEEM), as the leading membership organisation supporting professional ecologists and environmental managers in the United Kingdom and Ireland, welcomes the opportunity to comment on this consultation.

CIEEM was established in 1991 and has over 5,000 members drawn from local authorities, government agencies, industry, environmental consultancy, teaching/research, and voluntary environmental organisations. The Chartered Institute has led the way in defining and raising the standards of ecological and environmental management practice with regard to biodiversity protection and enhancement. It promotes knowledge sharing through events and publications, skills development through its comprehensive training and development programme and best practice through the dissemination of technical guidance for the profession and related disciplines.

CIEEM is a member of:

- Environmental Policy Forum
- IUCN – The World Conservation Union
- Professional Associations Research Network
- Society for the Environment
- United Nations Decade on Biodiversity 2011-2020 Network

Comments from CIEEM

Introduction

1. CIEEM welcomes the Government's consultation on Environmental Principles and Governance after EU Exit, which was published by Defra on 10 May 2018. The issues covered by this consultation are critically important to the Government's ambition for the UK to be a "world leader" on environmental protection, as stated by the Prime Minister¹ and the Secretary of State for the Environment². The importance of getting this right cannot be overstated and we particularly welcome the Government's willingness to commit to new legislation to take this forward.
2. The above consultation sets out possible options for a new scrutiny body, noting that after the UK leaves the EU we will no longer be subject to the powers of the European Commission (EC) and the Court of Justice of the European Union (CJEU). We strongly believe that a new body must not only replace the current powers of the EU and CJEU but, if we are to achieve that "world leader" status, must go beyond them. Accordingly, whilst we are pleased with the overall commitments in the consultation – on independence, some accountability and resourcing – we are very concerned that the proposals fall short in two particular areas:
 - i. The proposed new body has only an advisory role in respect of potential Government failings to comply with environmental legislation. It is essential that the body has meaningful enforcement powers in relation to all public bodies. Without enforcement powers the new body will have no way to hold Government to account, which is one of the objectives set out in paragraph 79.
 - ii. The UK Government must be far more proactive than appears to be the case in engaging the devolved administrations in order to secure 'buy-in'. A UK-wide approach to environmental scrutiny and enforcement, owned and operated by all of the four nations, is the most effective way to ensure consistent high standards of environmental protection.
3. At a time of huge uncertainty, a powerful expression of the commitment of the UK Government to protecting the environment would go a long way in reassuring stakeholders. The lack of conviction within these proposals is therefore disappointing and is also contrary to the Prime Minister's stated aspiration for "*a new, world-leading, independent, statutory body to hold government to account and give the environment a voice*"³.
4. In the run up to the UK's exit from the EU in March 2019 and beyond, there will be a need to build trust between government, NGOs and the public. Effective arrangements for genuine accountability and independent scrutiny are essential components to achieving this. Consequently, the decisions taken by Government now in respect of these proposals are hugely significant and powerful.

¹ <https://www.gov.uk/government/speeches/prime-ministers-speech-on-the-environment-11-january-2017>

² https://consult.defra.gov.uk/eu/environmental-principles-and-governance/supporting_documents/Environmental%20Principles%20and%20Governance%20after%20EU%20Exit%20%20Consultation%20Document.pdf

³ <https://www.gov.uk/government/news/new-environment-law-to-deliver-a-green-brexite>

Consultation Questions

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

5. CIEEM is pleased to see that eight environment-related principles are now included in the requirements of the EU Withdrawal Act 2018 (Article 16)⁴. CIEEM strongly welcomes the inclusion of these principles in primary legislation.
6. We also advocate the inclusion of two further principles:
 - a. Non-regression principle
 - i. There must be no rollback of environmental legislation and commitment to international agreements. On principles and standards, there must be no rollback on what the UK accepts as best practice and minimum standards for the environment.
 - ii. This principle fits with the government White Paper on the future relationship between the UK and EU⁵, which proposes that the UK and the EU should commit to the non-regression of environmental standards with a reciprocal commitment to ongoing environmental co-operation to solve shared global environmental challenges.
 - b. Environmental net gain principle
 - i. In the 25-Year Environment Plan, the Government sets out its intention to embed a 'net environmental gain' principle for development. CIEEM welcomes this ambition but feels that the concept is currently poorly defined (although we note that the Government is intending to consult on some aspects of environmental net gain shortly). This Bill represents an opportunity to embed the principle in legislation, but also to develop its definition to ensure it delivers genuine environmental equivalence and improvement at appropriate spatial and temporal scales, and is evidence-based.
 - ii. The 'environmental net gain' principle must explicitly include 'biodiversity net gain'. This will include the enhancement of natural capital and ecosystem services, and the restoration of biodiversity. Although the metrics are still to be determined, CIEEM (with IEMA and CIRIA) has produced principles on biodiversity net gain for development⁶ and will be publishing guidance on delivering biodiversity net gain in the early autumn.
7. The above two additional principles work together. It is not adequate to simply have non-regression of environmental legislation – this will only allow us to stand still. We also need to restore our natural environment in order to provide the full benefits of a healthy, functioning natural environment for the benefit of society.

⁴ <http://www.legislation.gov.uk/ukpga/2018/16/section/16/enacted>

⁵ <https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union>

⁶ <https://www.cieem.net/biodiversity-net-gain-principles-and-guidance-for-uk-construction-and-developments>

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

8. Any policy statement that is used to set out the Government's position on how the above principles should be interpreted and applied must be clear and explicit.
9. The policy statement and any potential future changes to it must be fully and transparently consulted upon, and properly scrutinised by Parliament.

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)?

10. As noted in our answer to Question 1, CIEEM is pleased to see that eight environment-related principles are now, due to the requirements of the EU Withdrawal Act 2018, to be included in primary legislation.
11. Whilst the consultation is asking about the application and establishment of an England-only body, CIEEM advocates that the body would be better placed as a co-designed and co-owned UK-wide body (see Question 14 for further information). As such, we believe that the principles should help to inform the basis of a common framework across the UK that will help to maintain common high environmental standards and certainty for business.
12. CIEEM has developed a framework of common principles that we would be pleased to discuss further with Defra and the devolved administrations:
 - i. Actively participate in international treaties and conventions obligations
 - ii. Actively promote collaboration and knowledge-sharing
 - iii. Enshrine environmental principles in law
 - iv. Deliver biodiversity net gain across all policy areas
 - v. Ensure sustainable funding mechanisms
 - vi. Deliver a coherent network of more, bigger, better and joined up protected sites
 - vii. Maintain healthy species populations
 - viii. Implement robust biosecurity measures
 - ix. Reconnect people with nature
 - x. Agree shared and co-designed environmental standards
 - xi. Implement effective scrutiny and enforcement
 - xii. Invest in raising standards

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

13. The consultation as set out fails to deliver on a new body that must, as a minimum, replace the current powers of the European Commission (EC) and Court of Justice of the European Union (CJEU). The consultation proposes a body that can make recommendations to government but does not have any enforcement powers. In this state, the body will be inadequate to maintain and uphold environmental standards. If the UK is to be a "world leader" on the environment it must go beyond this.

14. The new body must have the ability and authority to carry out its functions as set out below (see Question 5). It must also have a range of effective enforcement mechanisms to use at its discretion, though in a transparent and proportionate manner.
15. Where resolution cannot be reached through a conciliatory approach, the body should be given automatic standing to initiate judicial review proceedings. However, given that judicial review only examines the process and legality of decisions rather than technical merit, it should also be able to initiate direct legal proceedings based on merit, including powers to issue quashing orders (which quashes a decision), prohibiting orders (which will prevent a public body from acting outside the law again), mandatory orders (which will impose an obligation upon a public body to perform its legal obligations) and compensation orders (where injury, loss or damage has resulted).
16. Sanctions for non-compliance should include financial penalties where appropriate, the funds from which should be ring-fenced for environmental restoration, remediation and enhancement.
17. The new body should also be able to intervene in third party legal proceedings relevant to its remit.

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

18. The objectives for the new body as set out in paragraph 79 of the consultation document are laudable, yet they are still vague and need detail to show how they will be delivered in practice.
19. The role of the new body must be four-fold: reporting, advising, investigating, and enforcing. It is imperative that the new body fits the below descriptors:
 - a. The new body must be genuinely and wholly independent from government, in terms of its leadership, resourcing and role. It cannot and must not be a Defra body.
 - b. It must be a UK-wide body, directly accountable to the four Parliaments/Assemblies;
 - c. It must be adequately and efficiently resourced to enable it to deliver its objectives. It must also be able to comment on the resourcing of those public bodies that it scrutinises and/or receives evidence from.
 - d. The new body must have adequate access to in-house environmental expertise.
 - e. The new body must be created such that it can only be dissolved by Acts of the relevant Assemblies/Parliaments.
 - f. The environment is not the sole responsibility of one department or agency in each government of the UK. A healthy and resilient environment is critical to all human activity and prosperity. As such it is vital that the new body is adequately recognised and respected across all of government in all of the UK nations.
20. The environment is not a niche political issue that should sit exclusively with Defra. The influence of environmental legislation and policy is felt across governments and public bodies, and therefore the new body must be independent of governments and government departments.
21. The new body must be independent of government to prevent undue influence from governments and ministers in directing or steering the work of the body. The body must however have a statutory footing and be enshrined in primary legislation.

22. It must be adequately resourced so that it can perform its required functions, as set out below. Critical to this resourcing is not just financial but also adequate internal expertise and competence. We are pleased to see the Government's acknowledgement of this in the consultation.
23. CIEEM is concerned at how senior staff will be appointed to the new body in a way that is apolitical and would like this set out in the Bill. One option might be to have a Select Committee, with appropriate representation across the UK nations and political spectrum, appoint the head of the organisation.
24. Models for the new body already exist but the UK-specific situation will require a body fit for purpose. Examples that could be used include the New Zealand Environment Commissioner, and similar bodies in India and Ontario, Canada. There are functions of some existing UK bodies that could also be usefully reproduced for the new body. For example, the National Audit Office is independent of government and able to scrutinise its performance, and the Committee on Climate Change reports directly to all of the UK governments as it has a UK-wide remit. However, it should be noted that these examples do not cover all of the functions required of the new body being consulted on.
25. CIEEM supports the recommendation of the Environmental Audit Committee⁷ that a new and novel body is needed (with the suggested name of the 'Environmental Enforcement and Audit Office').
26. We are uncertain of the suggested collaborative working with NGOs set out in paragraph 86 of the consultation. The new body should not be 'supporting' the work of NGOs, it should be independently scrutinising governments and relevant public bodies. NGOs may be able to provide evidence but will also likely be bringing cases forward for the new body to investigate. The relationship as it seems to be suggested here between the two would be inappropriate.

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

27. The consultation effectively recognises that neither Parliament nor Ministers will not be able to hold public bodies, including the UK Government, to account on environmental matters, and notes the critically important role that has been performed by the CJEU in relation to the enforcement of environmental legislation.
28. The proposed new body must as a minimum replicate the role and powers of the bodies that it will be replacing. Ideally however, and in line with the aspirations of the Prime Minister and Secretary of State for the Environment, the UK must go further in order to establish itself as a world leader in environmental standards and protections. Legislation that has no enforcement mechanism is weak and unaccountable and will have little impact on environmental standards and protections. The new body must have the ability to truly hold governments to account and have robust enforcement powers pertaining to existing domestic environmental legislation, as well as the EU legislation that will be brought over onto the UK statute book by the EU Withdrawal Act 2018.
29. It is essential that the new body has, as a minimum, the same scope and depth of enforcement powers as those currently held by the EC, including the ability to require

⁷ <https://publications.parliament.uk/pa/cm201719/cmselect/cmenvaud/803/803.pdf>

remedial action and to impose fines and sanctions. The new body will need to work in collaboration with the UK courts system for the judicial aspect of the process. CIEEM is calling for an environmental division of the Supreme Court (and the High Court of Justiciary in Scotland for criminal proceedings) to be created.

30. Although the new body's primary function must be enforcement, it must also have an advisory role. This should include advising governments and relevant public bodies on creating, amending and repealing plans, policies and legislation, and also on the ability (including resourcing and access to expertise) of governments and relevant public bodies to deliver existing environmental plans, policies and legislation.

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?

31. The new body should monitor and report on the state of the environment in a consistent and comparable fashion, and assess performance against environmental policy objectives, milestones and targets. In England, these objectives, milestones and targets should be those currently being developed for the 25-Year Environment Plan.
32. The new body should use existing data for this monitoring and assessment function. Data should be reported to it by the relevant body/bodies. The new body should have the authority to command such data if these are not forthcoming. This must not represent a major resource imposition on existing bodies, either in terms of data collection or otherwise. Where data is not available, the new body should have powers to undertake or commission such research or assessments.
33. The new body should determine or make recommendations on milestones, standards and targets for environmental domains such as freshwater and air quality based on the best available scientific information. It must be able to advise on changes to environmental law and policy as necessary to achieve and fully implement domestic or international targets or obligations, and also to make recommendations on the resources required by regulatory bodies to properly carry out their functions and duties.
34. The new body must have a duty set out in legislation to report on the state of the UK environment at regular set intervals. In addition, there must also be a requirement to produce a regular report on the UK's global environmental footprint in order to measure whether or not the UK is exporting its environmental impacts. This reporting needs to be consistent, and set against agreed targets, so as to allow comparison and the identification of trends over time. As an example, this will mean that for England, the 25-Year Environment Plan will need to have milestones and targets set.

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?

35. The new body should enforce environmental law, whether by initiating its own investigations and taking forward complaints from citizens and civil society organisations in line with the UK's obligation under the Aarhus Convention and/or by establishing or taking cases to an independent court or tribunal.

36. The new body must have the power to initiate investigations independently. This will include investigating governments, their agencies and other relevant public bodies possibly breaching the law, failing to implement appropriate plans, policies and legislation, and scrutinising their decision- and policy-making.
37. The new body must also be able to follow up citizen (including NGO) complaints against the UK governments and relevant public bodies, in accordance with the Aarhus Convention. It must be able to offer affordable access to justice for citizens, which is currently guaranteed under the EU complaints process.
38. It is not acceptable that others are relied upon to bring legal proceedings against the governments and relevant public bodies as proposed in paragraph 106 of the consultation. This is simply unrealistic, and prohibitively expensive, for many citizens, NGOs and others. The new body must have the power to fulfill this role.

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?

39. The new body must have the ability and authority to carry out its functions as set out above. It must also have a range of effective enforcement mechanisms to use at its discretion, in a transparent and proportionate manner.
40. Where resolution cannot be reached through a conciliatory approach, the body should be given automatic standing to initiate judicial review proceedings. However, given that judicial review only examines the process and legality of decisions rather than technical merit, it should also be able to initiate direct legal proceedings based on merit, including powers to issue quashing orders (which quashes a decision), prohibiting orders (which will prevent a public body from acting outside the law again), mandatory orders (which will impose an obligation upon a public body to perform its legal obligations) and restoration/compensation orders (where injury, loss or damage has resulted).
41. The enforcement of EU law with the threat of legal sanctions and financial penalties has been shown to be fundamental to improving, for example, air quality plans in the UK and elsewhere in the EU. Therefore, sanctions for non-compliance should include financial penalties where appropriate, the funds from which should be ring-fenced for environmental restoration, remediation and enhancement.
42. The new body should also be able to intervene in third party legal proceedings relevant to its remit.

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?

43. The new body's remit should cover all public bodies with decision-making authority over environmental matters; however, the body should engage with central government first in matters relating to public bodies for which central government has clear and direct accountability.
44. The new body should complement the work of bodies such as the Climate Change Committee and the Joint Nature Conservation Committee, which should retain their abilities

to provide advice and report on targets; the new body should ensure that advice is properly considered and agreed targets are met by the relevant body/bodies. This extends to future bodies, such as the Shale Environmental Regulator.

45. The new body's remit should include providing advice to government on the development and implementation of national planning and infrastructure policy, and scrutinising decision-making concerning Nationally Significant Infrastructure Projects to ensure environmental law and principles are upheld.
46. We strongly advocate for the new body's remit to extend over all four countries of the United Kingdom. It should be co-created with the devolved administrations, enabling environmental protections and standards to be set jointly. These should be considered the minimum, baseline framework, which should not hinder any government in setting and enforcing higher standards if they wish to do so. The new body should be accountable to all four Parliaments/Assemblies.

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?

47. Most environmental issues are of a transboundary nature and many have a global scope – they can only be addressed effectively through regional and international cooperation. The remit of the new body should include the international agreements to which the UK is party and the obligations to which the UK has committed. The new body should advise the government on current and future international agreements, as well as monitor and assess the government's compliance with these and delivery against concomitant milestones, standards and targets.
48. The European Environment Agency (EEA) is mentioned in the consultation document, but without setting out the option of the UK remaining a member – which is possible. CIEEM strongly recommends that the UK remains a member of the EEA in order to share information and expertise relevant to the UK's wider obligations to the environment.
49. In relation to international agreements, the new body must work closely with all relevant UK-wide agencies, such as the Joint Nature Conservation Committee (JNCC). Additionally, given that the vast majority of the UK's biodiversity is located in the UK's Overseas Territories (UKOTs), the new body must also work collaboratively and have a close association with the governments of the UKOTs.

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

50. Climate Change
 - a. Climate change must be within the scope of the new body. The Climate Change Committee can continue to report to and advise governments, but it crucially has no enforcement powers. The new body must have both scrutiny and enforcement powers in relation to climate change.

- b. Evidence submitted to the Environmental Audit Committee⁸ has also suggested that it would be practically difficult to exclude climate change from the scope of the new body as it interacts with other areas of environmental law.
- c. In this instance it is irrelevant that “*responsibility for most climate change policy and legislation falls under the responsibility of the Department for Business, Energy and Industrial Strategy*” as the new body will not sit within one particular government department, but rather be independent (see Question 5).

51. Agriculture

- a. CIEEM advocates that domestic and EU-derived environmental legislation that applies to agricultural activities should be subject to the new body’s scrutiny functions. However, in addition, the same enforcement powers as stated previously in our response (see Question 4) must hold true for agricultural policy and legislation.
- b. As the consultation paper states, this would then include the new body independently assessing progress on agricultural and landscape elements (which in the case of England is in relation to the 25-Year Environment Plan).

52. Fisheries and the Marine Environment

- a. As with agriculture, CIEEM advocates that the new body’s remit includes wider policy scrutiny and enforcement of fisheries and marine environment policy and legislation. In the case of England, this would be linked to the 25-Year Environment Plan.

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

- 53. CIEEM believes that the new body should be able to comment on the legal process as it relates to planning policy and legislation, for example in relation to future reviews of the National Planning Policy Framework (NPPF).
- 54. Related to planning, CIEEM would like to see the new body having included in its remit the ability to advise and intervene on ‘nationally significant infrastructure’ projects, which currently sit outside the local planning process.
- 55. However, the new body must not become a vehicle for objecting to minor planning permissions.

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

- 56. Whilst we welcome Defra’s aspiration that the body should be UK-wide, it must be far more proactive in achieving this. The current consultation is for England only with a vague suggestion that the devolved administrations can be involved if they want to be. Defra and the UK government needs to set out a strong and persuasive case as to how much better and

⁸ <https://publications.parliament.uk/pa/cm201719/cmselect/cmenvaud/803/803.pdf>

stronger the body can be if it is UK-wide and how the devolved administrations can be equal partners, actively involved in its creation and delivery. The Institute for Government's publication *Devolution after Brexit: Managing the environment, agriculture and fisheries*⁹ sets out a compelling argument for the strength of a single UK-wide body.

57. The Environmental Audit Committee¹⁰ has also highlighted the fact that *“European Union law has provided a common framework within which domestic institutions have operated”, “common frameworks are vitally important to prevent any undermining of environmental protections to gain a competitive advantage”, “there are also benefits of co-operation between administrations such as the exchange of skills and knowledge”* and that *“dialogue between the four administrations has the potential to improve environmental policy in areas where one or more of the four nations is currently leading the way”*.
58. The establishment of a UK-wide scrutiny and enforcement body must be co-designed by consensus between the four UK governments. It must not subsequently become a UK body reporting to Westminster but must instead remain a jointly operated body with reporting obligations to all four Parliaments/Assemblies. The new body must hold all UK governments and relevant public bodies to account with the means to challenge those which are not delivering high standards of environmental protection, or worse, damaging the environment.
59. A co-designed body will have more influence over the overall UK environmental agenda, the UK's joint international obligations, maintain some alignment of environmental standards across UK borders and contribute in a more holistic approach to the protection of the global environment and the biogeographic region of which the British Isles are a part.
60. CIEEM would be pleased to provide further information and evidence to Defra and the UK and devolved governments on the development of environmental principles and governance as we prepare to leave the EU. CIEEM is committed to working with all stakeholders – including governments – to ensure that the environment is protected and enhanced for the public benefit. We would welcome the opportunity to discuss our position with you further and to explore how we can best work with you to inform this important transition.

⁹ <https://www.instituteforgovernment.org.uk/sites/default/files/publications/IFGJ6070-Devolution-After-Brexit-180413-FINAL-WEB.pdf>

¹⁰ <https://publications.parliament.uk/pa/cm201719/cmselect/cmenvaud/803/803.pdf>