

CONSULTATION

Response Document



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Consultation on Environmental Principles and Governance in Scotland

(Scottish Government)

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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 leads 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

We welcome the opportunity to participate in the consultation on Environmental Principles and Governance in Scotland. We would be happy to provide further information on this topic. Please contact Jason Reeves (CIEEM Head of Policy and Communications) at JasonReeves@cieem.net with any queries.

Overview

- All public bodies should have a duty to act in accordance with the four European Union (EU) environmental principles in addition to the environmental principles set out by international conventions and agreements.
- A new, truly independent, environment body is required to replace the role of the European Commission. The role of the new body must be four-fold: reporting, advising, investigating, and enforcing. The human right to environmental justice and access to environmental information must be protected.
- A comprehensive Scottish Environment Bill is needed to establish the new body and enshrine the environmental principles in law.

Answers to Consultation Questions

- 1. Do you agree with the introduction of a duty to have regard to the four EU environmental principles in the formation of policy, including proposals for legislation, by Scottish Ministers?**

Yes, but we would question the wording as 'have regard to' is not strong enough and does not reflect the existing treaty commitments or meet the current legislative background. We would like to see this changed to 'act in accordance with' rather than to 'have regard to'. All four principles *must* be applied when developing policies, strategies and action programmes, including proposals for legislation.

While we support the four principles outlined in the consultation, we would also like to see additional principles added (see response to Question 3).

- 2. Do you agree that the duty should not extend to other functions exercised by Scottish Ministers and public authorities in Scotland?**

No. The duty should be applied to all public bodies, including all government departments, government agencies, non-departmental public bodies and local authorities that exercise authority in environmental matters. This is in line with the existing biodiversity duty under the Nature Conservation (Scotland) Act 2004¹, whereby "*it is the duty of every public body and office-holder, in exercising any functions, to further the conservation of biodiversity so far as is consistent with the proper exercise of those functions.*"

¹ <http://www.legislation.gov.uk/asp/2004/6/contents>

3. Do you agree that a new duty should be focused on the four EU environmental principles? If not, which other principles should be included and why?

CIEEM supports the four principles outlined in the consultation document:

- Precautionary principle
- Polluter Pays principle
- Prevention principle
- Rectification at Source principle

We would like to see non-regression (IUCN definition²) included as a principle. Non-regression is increasingly acknowledged as a key parameter in environmental decision-making, as reflected by its inclusion in the proposed United Nations (UN) Global Pact for the Environment³, and in sustainable development, use and integration, the ecosystem approach and access to environmental information under the Aarhus Convention⁴.

There must be regression of environmental legislation and commitment to international agreements, particularly regarding the human right of access to justice for the environment, which is a fundamental component of the role of the European Commission.

On principles and standards, there must be no regression on what Scotland accepts as best practice and minimum standards for the environment. There must not only be no regression, but a net environmental gain is also needed to meet many of the Aichi targets in 2020⁵.

The new duty should also include the environmental principles enshrined in international conventions and agreements, including:

- the principle of sustainable development
- public access to environmental information
- public participation in environmental decision-making
- access to justice in relation to environmental matters
- the principle that environmental protection requirements must be integrated into the definition and implementation of policies and activities

This is important for the development of common frameworks within the UK, as the draft Environment (Principles and Governance) Bill introduced by DEFRA includes all nine environmental principles.

The new duty should allow the inclusion of new principles as appropriate to enable Scotland to not only keep pace with EU developments so that re-entry to the EU is allowed as covered by the Continuity Bill, but also to incorporate international environmental principles to improve the existing biodiversity duty.

² The Principle of Non-Regression is an International Law Principle known by Human Rights specialists requiring that norms which have already been adopted by States not be revised, if this implies going backwards on the subject of standards of protection of collective and individual rights. <https://www.iucn.org/content/non-regression-principle-knowledge-forum>

³ <https://globalpactenvironment.org/uploads/EN.pdf>

⁴ <http://ec.europa.eu/environment/aarhus/index.htm>

⁵ SNH (2017) Scotland's Biodiversity Progress to 2020 Aichi Targets. Available at: <https://www.cbd.int/doc/world/gb/gb-nr-oth-p2-en.pdf>

The application of these principles is essential in meeting the UN's Sustainable Development Goals.

4. Do you agree there should be an associated requirement for a policy statement which would guide the interpretation and application of a duty, were one to be created?

Yes, a policy statement is required. It should include a clear explanation of what the four (and if appropriate, additional) principles mean and include best practice examples, as their implementation to date has been variable within and between organisations.

The policy statement should build on the existing interpretations that we currently have to implement EU principles where relevant but should reflect the Scottish context more. Clear delivery mechanisms should be outlined, which will help in the implementation of the principles in Scotland.

The policy statement should also include an explanation of case law. This should include how the courts have interpreted the principles, and what they mean in practice for those implementing them.

In the development of a policy statement we would like to see proactive engagement with stakeholders and not just formal consultation and parliamentary approval.

5. What do you think will be the impact of the loss of engagement with the EU on monitoring, measuring and reporting?

There is the potential to lose clarity on what should be reported on at different levels (e.g. international level including the Bern convention, UK-level reporting, and how Scottish national reporting will fit into this). There is also the potential for the loss of uniformity of standards and comparability. The existing institutional and individual capabilities for monitoring and reporting must be maintained.

There will need to be a mechanism for reporting at these various levels. However, it does not necessarily have to be new if we already have something that works effectively. CIEEM is highly supportive of the ongoing role of the Joint Nature Conservation Committee (JNCC), along with the Scottish Government's own agencies, to gather and report on UK-level nature conservation data for European and international obligations.

We are also highly supportive of ongoing membership of the European Environment Agency.

6. What key issues would you wish a review of reporting and monitoring requirements to cover?

Firstly, we support a review to take stock of the existing reporting arrangements and the gaps/priorities. The Scottish Biodiversity Information Forum (SBIF) review was recently published – we should implement and build on this.

We would like to see more integrated, co-ordinated and transparent monitoring. Monitoring is carried out by many different organisations but often this is not widely reported on, which must be improved. Large amounts of data are trapped in Environmental Impact Assessment Reports (EIARs) and never reach the public domain, sometimes because of client data

confidentiality. Mechanisms should be put in place to promote the greater transparency of monitoring, with the results shared and widely published. A greater emphasis should be placed on monitoring the effectiveness of decisions and actions both for developments and environmental actions.

A review should identify gaps in the existing monitoring. We suggest that long-term monitoring has suffered as a result of short-term funding cycles. Whilst some bodies such as Scottish Environment Protection Agency (SEPA) already fund long-term monitoring, consideration should be made on how to pay for all relevant long-term monitoring. This could be as part of the polluter pays principle, through licence holders, developers, etc.

In terms of reporting, Scotland will need to decide if it will continue to align with EU reporting frameworks, and/or work in collaboration with the European Environment Agency. CIEEM is supportive of both. There should also be effective data sharing between equivalent bodies within the UK.

7. Do you think any significant governance issues will arise as a result of the loss of EU scrutiny and assessment of performance?

Yes. On the assumption that the UK exits the EU, the UK and Scotland will no longer be subject to the powers of the European Commission and the Court of Justice of the European Union (CJEU). This will leave a governance gap. A new body will need to fill this function to hold Scottish Government to account on its environmental performance.

Wherever possible, we believe that the UK nations should work together on a framework for environmental performance and governance. This will have benefits for cross-border business and future UK trade agreements, as well as enabling better UK-level environmental reporting.

8. How should we meet the requirements for effective scrutiny of government performance in environmental policy and delivery in Scotland?

An independent governance body needs to be established. The role of the new body must be four-fold: reporting, advising, investigating, and enforcing.

The independent body needs to have the power to refer any non-compliance to the courts and the courts need to be empowered to act on these referrals. The body must give citizens access to environmental justice, as currently provided by the CJEU. Scrutiny needs to be undertaken with Audit Scotland-type accountability, but with the addition of enforcement powers.

The independent body must be adequately resourced in finance and skills to undertake the tasks given to it. It should have the ability to collect, analyse and scrutinise information trends and their causes, formulate procedures for complaints, deal with complaints, refer unresolved matters to the courts, horizon scan to identify best practice and future trends to inform its work, and comment on the resources of other bodies.

An independent body would avoid potential conflicts of interest arising between different government departments and public bodies.

9. Which policy areas should be included within the scope of any scrutiny arrangements?

CIEEM is supportive of the Scottish Government's proposed scope, which includes:

- nature conservation and biodiversity
- air pollution emissions and transboundary pollution issues
- environmental impact, access to environmental information and environmental justice
- marine environment
- radioactive substances
- waste and circular economy
- water environment and flooding
- chemicals, biocides and pesticides
- climate change mitigation and adaptation obligations
- soils and contaminated land

In addition, we recommend that the following are also included in the scope of any scrutiny arrangements:

- Genetically modified organisms
- Biosecurity, including animal and plant diseases
- Sustainable development

10. What do you think will be the impact in Scotland of the loss of EU complaint mechanisms?

The loss of the EU complaint mechanism would lead to another layer of scrutiny which needs to be replicated in accordance with the Aarhus Convention and public access to environmental justice.

11. Will a new function be required to replace the current role of the European Commission in receiving complaints from individuals and organisations about compliance with environmental law?

Yes. A new independent body will be required to receive complaints from the public regarding the failure of public bodies to implement environmental policy and legislation.

12. What do you think the impact will be in Scotland of the loss of EU enforcement powers?

The impact would be significant, hence the need for a truly independent body with powers to remedy and refer issues to the courts. This process must be accessible to all. Protection of human rights and access to environmental justice are essential and must be emphasised in the plans for replacing the role of the EU.

13. What do you think should be done to address the loss of EU enforcement powers? Please explain why you think any changes are needed?

CIEEM would like to see the environmental principles enshrined in law, and a new fully independent environmental body created to hold the Scottish Government and all public bodies accountable for implementing environmental policy and legislation. These actions will need to be captured in a comprehensive Scottish Environment Bill.

CIEEM recommends that the body reports to the Scottish Parliament and has the power to take independent action in dealing with complaints and in the enforcement of standards. This will include drafting its own strategy and budget, which should be approved by the Scottish Parliament. In addition, the body's Chair, Board and senior staff should all be appointed by the Scottish Parliament. Combined, these elements will ensure that the body remains independent of Government and yet still accountable.