

CIWM is the professional body for the resource and waste management sector. It represents around 5,500 waste and resource management professionals, predominantly in the UK but also overseas. CIWM sets the professional standards for individuals working in the sector and has various grades of membership determined by education, qualification and experience.

Defra's Environmental Principles and Governance after EU Exit

CIWM welcomes the opportunity to respond to this consultation and consulted a number of its members to obtain their professional feedback, which has formed the basis of this submission.

Part 1: Environmental Principles

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

CIWM agrees with the core list of environmental principles have now been included in Section 16(2) of the European Union (Withdrawal) Act 2018 and puts forward the following additions and considerations.

Existing principles:

- the polluter pays principle
- the rectification at source principle
- the precautionary principle
- the prevention principle
- the integration principle
- sustainable development *
- principles relating to public access to environmental information, public participation in environmental decision-making and access to justice in relation to environmental matters **

* There were some differing views across our membership regarding the inclusion of sustainable development as a principle, with some regarding it as a guiding framework rather than a specific principle. This is broadly in line with its articulation and application in EU policies and legislation and in current domestic law. If not a principle, however, the Bill should make the promotion of sustainable development a statutory duty for all public authorities, as is already the case in Wales and Northern Ireland.

** Here and in its joint response with the Environmental Policy Forum (insert link), CIWM supports these principles as being necessary to enshrine the



requirements of the Aarhus Convention, particularly since the UK has been censured twice in the last 12 months by the convention's compliance committee for changes to domestic law that have limited access to environmental justice and for failure to consult on the Withdrawal Bill despite the clear impact Brexit could have on environment and environmental legal protections.

New principles to be added: the non-regression principle.

CIWM believes this is necessary to make binding the Government's commitment to leave the environment in a better state than that in which we found it and to prevent environmental standards from being weakened in order to secure future trading agreements post-Brexit. The inclusion of this principle is also in line with the recent White Paper 'The future relationship between the United Kingdom and the European Union', which proposes that the UK and the EU should commit to the non-regression of environmental standards.

New principles to be considered: principle relating to environmental net gain.

This principle is already included in the 25 Year Environment Plan, but CIWM believes it has not been sufficiently clearly defined and articulated to be included as a principle in the Environment Bill at this stage. This does not preclude its future inclusion as the concept is developed.

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

Yes, CIWM agrees with the proposal for a statutory policy statement that elaborates the environmental principles listed in statute on the face of the Environment Bill. However, the proposal does not explain what the associated, resulting regulatory powers will be and more detail on this is required to fully answer this question.

The statement must be:

- Sufficiently detailed and provide clear guidance and direction on the meaning and interpretation on the principles, with adequate direction to support the effective application of these principles in a legal context.
- Laid before Parliament(s) for scrutiny.
- Reviewed periodically, with a provision to this effect in the Environment Bill, and laid before Parliament(s) for scrutiny if amended.
- Given sufficient weight - CIWM believes that the wording in the consultation that the government should 'have regard to' the policy statement is not sufficiently strong and should be substituted with 'have special regard to' and that this duty should also be explicitly extended to public bodies. The statutory duties associated with the environmental principles need to be explicitly stated and CIWM agrees with the



Environmental Audit Committee recommendation that the Environment Bill must include “provisions for “all public bodies to act in accordance with the principles””

(<https://publications.parliament.uk/pa/cm201719/cmselect/cmenvaud/803/80302.htm>). In its June 2018 briefing on the environmental principles (<https://www.clientearth.org/feed-items/environmental-principles-in-uk-law-after-brexite/>) Client Earth suggest the inclusion of a qualifier of ‘so far as it is possible to do so’ to address situations “where it is impossible to interpret a particular piece of legislation compatibly”. CIWM agrees with this suggestion.

A draft of the Statement of Policy now referred to in Section 16 should be available with the draft Bill.

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)?

CIWM notes that this question has been superseded by the European Union (Withdrawal) Act 2018, which now requires the draft Environment Bill to include the principles set out in Section 16(2) of the Act. CIWM supports this requirement for the reasons set out below.

- *Option 1 - Environmental principles listed on the bill*

CIWM believes that for the Government’s stated environmental ambitions to be met and to ensure that the principles are adequately safeguarded, the principles must be set out in primary legislation as per Option 1 in the consultation. This would provide a statutory basis to the listed principles with an agreed definition, which does not currently exist on the statute book.

In response to the question of ensuring there is flexibility to respond to the latest scientific and legal knowledge, CIWM would make two points. One is that the principles have been developed to act as a fundamental and underpinning framework for environmental law and policy making and are not articulated in such a way as to be subject to change as a result of new or updated scientific or legal thinking, except in exceptional circumstances. Secondly, the example of how the Climate Change Act handles the need to update things for significant scientific developments shows this can be done in primary legislation if deemed appropriate.

In the Climate Change Act 2008 (Chapter 27, Part 1, Section 2), there is provision for the Secretary of State to be able to amend the 2050 target or the baseline year if there have been significant developments in scientific knowledge about climate change, or in European or international law or policy.



The principle of proportionality (consultation paragraph 41) should also be defined in the Bill to make it clear how this principle is to be applied relative to the environmental principles.

Part 2: Accountability for the environment

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

- *Yes, I agree with the assessment in the consultation document*
- *I think the governance gap will be greater in some areas than that described in the consultation document*

CIWM believes that the consultation proposals as they stand will not deliver the same level of governance fulfilled by the EU and the CJEU or deliver the ambition expressed in the Defra 25-year Environment Plan (25YEP). In addition to powers to monitor, scrutinise and advise, the new body must have sufficient legal recourse in terms of holding government to account where it is failing in its responsibility to implement environmental law, with clear and robust sanctions. Without this, an essential role fulfilled by the EU will be lost. Not only does the consultation fail to adequately cover how the new governance framework will replicate the CJEU role, it also proposes that advisory notices be the main enforcement mechanism for the new body. CIWM believes that additional mechanisms, including but not limited to judicial review, must be made available to the body. See Question 9 response.

In addition, there is a gap or at least a question mark over how the UK legal system will apply the law in relation to the UK environmental principles, with judges having limited experience of and willingness to apply general environmental principles according to a 2011 UKELA and Kings College London report

(<https://www.ukela.org/content/page/2957/Aim%205%20Interim%20report.pdf>). The impact of this uncertainty is captured in an article on environmental principles and Brexit by Professor Eloise Scotford, University College London (<https://www.brexitenvironment.co.uk/2018/07/30/environmental-principles-legal-foundations-uk-environmental-policy-bedrocks-minefields/>):

"At this stage, we can say with some confidence that environmental principles will have an influential role on regulatory practice in areas relating to environmental issues... However, the new UK legislative incarnation of environmental principles will likely raise difficult questions of legal doctrine and potentially catalyse new paths of legal reasoning by UK courts."

Question 5. 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.*
- b. *Be independent of government and capable of holding it to account*
- c. *Be established on a durable, statutory basis*
- d. *Have a clear remit, avoiding overlap with other bodies*
- e. *Have the powers, functions and resources required to deliver that remit*
- 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*

CIWM agrees with the objectives set out with one exception. In the final objective, the caveat “recognising that it is necessary to balance environmental protection against other priorities” is too open to interpretation and potentially compromises the role of the body, as expressed in the first objective, to protect and enhance the environment. It is not the role of the new body to balance environmental protection against other priorities and in the context of resource productivity and waste, CIWM would challenge the presumption that this trade-off is required. There is plenty of evidence (e.g. the WRAP/Green Alliance report at <http://www.wrap.org.uk/content/employment-and-circular-economy>) that moving to a more circular economy can be good for jobs, growth and the economy.

In addition, CIWM believes that the current EU governance framework will only truly be effectively replicated if the new body is UK-wide and directly accountable to the relevant Parliaments/Assemblies and cannot be dissolved without Acts of the relevant Assemblies/Parliaments.

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

Yes, CIWM agrees with the general scrutiny and advice function as outlined in the consultation paragraphs 81 and 82. However, the new body’s ability to advise government should be framed to ensure that there is no conflict of interest with its role in holding the government and public bodies to account – the Climate Change Committee offers a potential example of how this could be achieved.

Question 7. Should the new body be able to scrutinise, advise and report on delivery of key environmental policies, such as the 25-year Environment Plan?

- a) *Annual assessment of the national progress against the delivery of the ambition, goals and actions of the 25 Year Environment Plan Y/N*

Yes

This should include a requirement to present a report of this assessment to Parliament and on the Government to respond.



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

Yes

The new body's advisory role should not solely be at the government's discretion. The new body should have the ability, if it deems it necessary, to undertake its own assessment of policies that have a bearing on environmental protection and enhancement.

- c) *Respond to government consultations on potential future policy Y/N*

Yes

The body should be a statutory consultee on future policy, at a national level, that has a bearing on environmental protection and enhancement e.g. national planning policy.

In addition, CIWM's view is that the 25-year Environment Plan also needs to be enshrined in legislation in the new Environment Bill to ensure that the Government can be held to account for its delivery in the future. The current lack of legal underpinning of the Plan, which puts forward very few commitments to new legislation, is a fundamental flaw, particularly in the current climate of wider political uncertainty as the UK leaves the EU.

As already noted above, however, the new body's ability to advise government should be framed to ensure that there is no conflict of interest with its role in holding the government and public bodies to account – the Climate Change Committee offers a potential example of how this could be achieved.

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?

Yes. Current arrangements under EU law allow for individuals and organisations to lodge a complaint and this right must be replicated in new domestic arrangements. The body should have discretion to prioritise complaints to ensure that it can focus on matters of strategic importance. This is important to ensure its effectiveness and a realistically achievable remit.

This should not preclude a standing to NGOs to challenge the Government in matters of environmental law through judicial review.

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?



CIWM welcomes the fact that legal proceedings are now agreed as part of the new powers for the body in Section 16 in Section 16 of the European Union (Withdrawal) Act 2018, however it refers to breaches of environmental laws but also needs to be able to address cases where government is acting against its own declared environmental policies.

The new body must have a range of compliance enforcement and remediation notices as part of its armoury as well as JR and injunctions with disputes going to an independent tribunal or court. These should include powers to issue advisory notices that require a government response and to pursue a resolution process that should include binding notices/environmental undertakings requiring remedial action where necessary.

In the event of continued and serious failure, 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). Government should have the powers to Appeal against Notices served upon it.

CIWM accepts the argument that financial sanctions would operate differently within a domestic context to the current EU enforcement system. However, CIWM believes that the sanctions for non-compliance as a result of legal proceedings should include financial penalties where appropriate and as a last resort, the funds from which should be ring-fenced for environmental restoration, remediation and enhancement.

The new body should also have the powers to intervene in third party legal proceedings relevant to its remit.

Question 10: The body will hold national government directly to account. Should any other authorities be directly or indirectly in the scope of the body?

CIWM agrees with paragraph 117a of the consultation that the body's focus should be national government but that public bodies including ALBs and others with responsibility to act in accordance with and/or implement environmental law are indirectly included within its scope. This would ensure that the



environmental principles are applied systemically, and it would also limit the government's ability to deflect criticism to other authorities.

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?

CIWM agrees that the new body should include oversight of domestic environmental law, but that this oversight should include the interaction with fiscal policy. The important relationship between the delivery of environmental protection and enhancement and public spending and taxation policy suggests that a degree of oversight is required, particularly as HMT's record was not found to be adequate by the Environmental Audit Committee. In its November 2016 report 'Sustainability and HM Treasury'

(<https://publications.parliament.uk/pa/cm201617/cmselect/cmenvaud/181/181.pdf>) it stated:

"We heard multiple examples of where the Treasury has ridden roughshod over other departments' objectives, changing and cancelling long-established environmental policies and projects at short notice with little or no consultation with relevant businesses and industries...We found that the technical and political frameworks the Treasury uses to support these choices consistently favour short-term priorities over long-term sustainability, and comparatively expensive, glamorous low carbon technologies (e.g. offshore wind, wave, tidal and nuclear) have received more attention than cheaper alternatives (e.g. onshore wind and energy efficiency) which might represent better value for money. In part, this is because the frameworks do not take adequate account of future environmental costs and benefits."

On international environmental agreements, the consultation acknowledges the need for "a new statutory statement of the environmental principles which will guide us, drawing on the current international and EU environmental principles" but then expressly excludes international agreements and principles from the remit of the new body where they have not been incorporated into domestic law, noting that they also have their own separate compliance mechanisms and that "the Commission and CJEU similarly have no such role in relation to multilateral environmental agreements". CIWM believes this question requires more consideration for a number of reasons, not least because the separate compliance mechanisms for these agreements are variable in their robustness, and some may be pertinent to or impact on new trade deal negotiations. The summary exclusion of these from the remit of the new body does not, in CIWM's opinion, support the ambition to create a world leading body and a governance framework that improves upon the current status quo and delivers stronger environmental protection.

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



a) Climate change

No. The consultation proposes that the new body's remit does not cover matters related to climate change. However, climate change adaptation and mitigation and management of the environment are interrelated, in some cases very strongly, such as water and waste management and agriculture. Excluding climate change completely from the remit of the governance body could reduce the UK's ability to maximise the effectiveness of current and future climate change law and policy making. In addition, while the Climate Change Committee has significant power to hold Government to account, it has no recourse to legal action; the new governance body could, with the appropriate relationship established with the CCC, also provide for more robust governance on climate change. CIWM recommends that the Environmental Principles and Governance Bill sets out the basis for a formal relationship between the new governance body and the Committee on Climate Change that does not remove the areas of the latter from the remit of the former.

b) Agriculture

CIWM agrees that agriculture should be within the new body's remit. Agriculture is relevant to environmental protection and resource productivity as it creates and consumes resources, produces significant volumes of waste and also treats biowaste to recover value, and has significant potential both to pollute and to remediate land and improve soil health. In addition, the products of the agriculture sector (i.e. food) have major environmental impacts, especially in terms of food waste.

c) Fisheries and the Marine Environment

CIWM believes that Fisheries and the Marine environment should be within the new body's remit, and that the rationale for this should be expanded to include the issue of plastic pollution in the marine environment, given that new legislation designed to address aspects of this growing problem is currently being considered by the government. Future UK resource and waste policy and legislation has a role to play in reducing plastic packaging waste and pollution and CIWM has recently published a report on this subject, 'Eliminating avoidable plastic waste by 2042: a use-based approach to decision and policy making' (<https://ciwm-journal.co.uk/wordpress/wp-content/uploads/2018/06/Eliminating-avoidable-plastic-waste-by-2042-a-use-based-approach-to-decision-and-policy-making.pdf>)

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



Yes, the body should have both the roles outlined in paragraph 136 of the consultation. It should be a statutory consultee on national planning policy that has a bearing on environmental protection and enhancement and should have the remit to review and report to the government on both existing and future planning policy.

Part 3: Overall environmental governance

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

Environmental stewardship and protection is a cross-border issue and CIWM has already called for the new governance body to be UK-wide, co-designed with the Devolved Assemblies and should have regard to particular circumstances in Northern Ireland in terms of the border and relationship with the Republic of Ireland. At the very least, the underpinning environmental principles which the body will need to uphold should be agreed at a UK level to maintain a similar rigour to the current framework provided by the EU and ensure that the principles are not undermined by further policy divergence across the UK post-Brexit. While the consultation acknowledges the ongoing dialogue with the devolved administrations on these matters, the fact that no agreement has yet been reached weakens the role and remit of the body as currently set out in the consultation.

In exploring the role of the new body, the consultation does not acknowledge the importance of data gathering and analysis for accurate and robust governance and how the new body would partially or fully replicate the role of the European Environment Agency (EEA).

On the matter of funding, the consultation does set out the Government's intention to create an independent body that will be accountable to Parliament but stops short of discussing whether it should be funded by Parliament, confining itself to noting that it should be funded "in such a way that it is protected from accusations of being influenced by the funding organisation". Neither does it provide sufficient detail on the procedures for the appointment of senior staff, or the scope of the expertise that will be needed. These are critical factor in safeguarding the body's independence and to ensure it is adequately resourced now and in the future to be able to deliver on its remit.

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