

# IEMA Briefing and Initial Position on the DEFRA Environmental Principles and Governance consultation

*Version 2 – updated 14<sup>th</sup> June 2018 following the House of Commons Amendment to the European Union (Withdrawal) Bill*

## Summary

1. We are supportive of the Government’s intention to fix the environmental ‘governance gap’ which will be left when the UK leaves the EU, and we welcome the opportunity to respond to the Government’s proposals.
2. However, the proposals fall short of the Government’s commitment not to weaken environmental protection and will fail to deliver Government’s ambitions set out in the 25 Year Environment Plan.
3. As a minimum, to achieve equivalence, the proposed Act needs to:
  - i. Establish environmental principles in primary legislation
  - ii. Provide equivalent powers to the new environmental body, including the power to enforce environmental law
  - iii. Provide the basis to co-develop a UK framework to manage those aspects of the environment that cross national boundaries.

## Greater Ambition is Needed

4. The Government’s intention is to leave the environment in a better state over the next 25 years than it is currently; we support this overall goal and believe it is essential to restore and enhance the UK’s natural capital asset base.
5. We therefore believe that the ambition for an environmental governance framework must be set at a higher level than it is today; legislating to maintain the status quo won’t provide the underpinning legal framework we need to achieve long-term environmental goals.
6. The proposed Environmental Principles and Governance Bill needs to be broader in scope than simply replicating existing EU functions, important though they are.
7. As such, the forthcoming Bill needs to act as a framework for the following:
  - i. Legally binding goals supported by numerical targets, milestones and metrics for key environmental outcomes such as biodiversity, freshwater quality and soils

- ii. Five-yearly updates to the 25 Year Plan aimed at achieving the goals and targets, based on independent advice
- iii. A fully funded and resourced five-year programme of activity that will deliver actions to meet targets and milestones
- iv. Improved monitoring and reporting on the state of the environment using mapping and modelling that is more accessible and understandable to the public
- v. An overarching “duty of environmental responsibility” on public and private activity affecting the environment that changes the default so that e.g. government departments, public bodies, businesses and potentially others have a basic duty to act responsibly towards the environment, or to take account of the environment in making decisions
- vi. Cross-Whitehall regulation, incentives and taxation designed to protect the environment and stimulate genuinely sustainable development and economic growth
- vii. Effective, place-based governance to allow communities and local and regional bodies to work together to protect and enhance the environment at a meaningful scale

## Introduction

8. The Government is consulting on an Environmental Principles and Governance Bill that will create a new, independent environmental watchdog to hold government to account on its environmental ambitions and obligations once the UK has left the EU. The watchdog is proposed to replace the role currently played by the EU Commission and Courts.
9. The consultation also sets out how the Government intends to embed key environmental principles into UK policy and law.
10. The proposal document is split into three parts:
  - i. How should the environmental principles be embedded into law?
  - ii. How should the new body hold the government to account?
  - iii. Overall environmental governance
11. While the consultation relates only to environmental governance in England and on reserved matters, the Government commits to working closely with the devolved administrations on common frameworks and notes that this consultation does not pre-judge any of these discussions.
12. Following this consultation, a draft Environmental Principles and Governance Bill will be published in the autumn of 2018, with the introduction of a Bill early in the second session of this Parliament.

## Part 1: How should the environmental principles be embedded into law?

### What are environmental principles and why do they matter?

13. Environmental principles are a specific set of principles which have been used to guide and shape modern environmental law. They are reflected in international instruments such as the UN's action plan on sustainable development, the Convention on Biological Diversity and, crucially, in the EU Treaty on the Functioning of the EU as the basis for developing EU policy on the environment. There is no single, agreed definition of environmental principles, with some such as the Polluter Pays Principle and Precautionary Principle being more established in law and policymaking.
14. Brexit will not affect the application of environmental principles stemming from the UK's International commitments. However, many references to the environmental principles in International law are non-binding and unenforceable. Typically, legally binding international obligations only relate to specific Principles, issues or circumstances.
15. Brexit will also not immediately affect the Environmental Principles that are explicitly referred to in EU law that is intended to be retained by Government under the EU (Withdrawal) Bill, and that are already implemented in the UK. After leaving the EU, the UK will no longer be required to take into account the Environmental Principles when developing future UK policy and legislation. This means that the Principles will cease to guide policy-makers on a range of key policy areas such as planning law, farming, fisheries and the regulation of potentially harmful new substances.

### How is the Government proposing to embed environmental principles into law?

16. The Government proposes to create a new statutory statement of the environmental principles which will guide policy-makers, drawing on the current international and EU environmental principles. Two options are set out in the paper.
17. In Option 1, the environmental principles would be listed in the Environmental Principles and Governance Bill, with a statutory policy statement under that legislation to explain how they should be interpreted and applied. Under this option, the Principles would be applicable to policymaking and to the way that the Government carries out its functions.
18. In Option 2, the principles would be set out and explained in a statutory policy statement issued under primary legislation. Unlike, Option 1, the Environmental Principles and Governance Bill itself would not list the principles. The principles would also only be applicable to policymaking and not to the way that the Government carries out its functions.

19. The Government is also consulting on which environmental principles to include in the above options. The following examples of environmental principles are contained in the document:

- **Sustainable Development.** Development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs.
- **Precautionary Principle.** Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.
- **Prevention Principle.** Preventive action should be taken to avert environmental damage.
- **Polluter Pays Principle.** The costs of pollution control and remediation should be borne by those who cause pollution rather than the community at large.
- **Rectification at Source Principle.** Environmental damage should as a priority be rectified by targeting its original cause and taking preventive action at source.
- **Integration Principle.** Environmental protection requirements must be integrated into the definition and implementation of policies and activities.

20. Since the consultation document was published, the House of Commons has passed an amendment to the European Union (Withdrawal) Bill requiring that the nine existing EU legal principles - including all of the environmental principles set out above - continue to apply in the UK after Brexit and must be set out in primary legislation.

21. This amendment effectively rules out the Government's proposed Option 2. It also significantly reduces in scope the consultation on what principles to include, as the above principles must now be included.

### What is IEMA's initial view on the proposals?

22. IEMA set out its views on what environmental principles should be embedded into law in our Brexit and Beyond paper<sup>1</sup>. We are pleased to see that the example list of principles that the Government is consulting on mirrors closely our proposals. IEMA therefore supports the full range of environmental principles set out in the consultation document. We also welcome the House of Commons amendment that requires all of the proposed environmental principles to be placed in primary legislation.

23. However, we do not see the House of Commons amendment as setting a ceiling or restriction on what other principles could be included in the proposed Environmental Principles and Governance Bill. Rather, it sets out a minimum requirement. Two additional principles taken from our paper are also recommended for inclusion in the Bill by IEMA, as follows:

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<sup>1</sup> IEMA (2017) Brexit and Beyond: IEMA Core Principles for the Environment – [available here](#)

- **Innovation Principle.** Policy or regulatory decisions and controls should consider the role of innovation as a driver for jobs, growth, social and environmental improvement.
- **Transparency & Inclusivity.** Multi-level and multisector stakeholder engagement, accountability and empowerment should underpin environmental policy development. Local level buy-in and participation should guide the design of local solutions.

## Part 2: How should the new environmental body hold the government to account?

### What is the "Governance Gap" and why does it matter?

24. Currently, the European Commission monitors the implementation of EU environmental law and, where necessary, brings cases to enforce it in the Court of Justice of the European Union (CJEU). The CJEU provides rulings on the interpretation of EU environmental law to ensure it is applied correctly and consistently by Member States. Once the UK leaves the EU, and regardless of the nature of the future relationship we negotiate, the Government has stated that the UK will no longer be a party to the EU Treaties or under the direct jurisdiction of the CJEU.
25. The Government has acknowledged that this creates a "Governance Gap" and has set out its views on the size and nature of this gap as follows:
  - Existing domestic mechanisms lie mostly in the areas of general scrutiny and advice. In addition, they are divided among several different bodies with a mix of Parliamentary, statutory and non-statutory status. In some cases, their environmental focus is only a small part of a much larger remit.
  - Current domestic mechanisms do not have a comprehensive role in scrutinising and advising on the 25 Year Environment Plan.
  - While domestic complaint mechanisms do exist, these come with a number of constraints and limitations. There is no clear mechanism for dealing with complaints about government's implementation of environmental law and no specialist, independent body empowered to take action in this area.
  - There are only limited options in our domestic framework to ensure that the government remains fully held to account for the implementation of environmental law. Given that most EU infringement proceedings against all Member States have related to environmental law, there is a greater need for oversight in this area; and
  - The "environment" may be unowned and is unable to represent itself. We should not rely on non-governmental organisations to provide an official and systematic supervisory role, like that delivered by the European Commission for the EU.

## How is the Government proposing to fill the "Governance Gap"?

26. The Government proposes to create a new, independent, statutory environmental body to hold government to account on the environment and support the longer-term Government objective "to be the first generation to leave the environment in a better state than that in which we inherited it". The role which the new body fulfils is also proposed to take account of the future relationship the UK negotiates with the EU on environmental matters.
27. The consultation sets out the functions a new body could have to fulfil this role and poses a number of questions around its remit, scope and nature.
28. The objectives for the establishment of the new body are proposed as follows:
  - Act as a strong, objective, impartial and well-evidenced voice for environmental protection and enhancement
  - Be independent of government and capable of holding it to account
  - Be established on a durable, statutory basis
  - Have a clear remit, avoiding overlap with other bodies
  - Have the powers, functions and resources required to deliver that remit; and
  - Operate in a clear, proportionate and transparent way in the public interest, recognising that it is necessary to balance environmental protection against other priorities.
29. To meet the goal and objectives outlined above, and address the governance issues identified in the preceding section, three main, interrelated functions would be assigned to the new body:
  - Providing general scrutiny and advice. Undertaking functions in relation to the environment which would be advisory to government, similar to those performed by the Committee on Climate Change (CCC) in relation to climate change;
  - Responding to complaints. With powers sufficient to afford at least the same opportunities to submit environmental complaints and concerns as currently exist; and
  - Enforcing government implementation of environmental law, with powers to issue advisory notices setting out what corrective action is needed. Other enforcement mechanisms are being considered as part of the consultation process
30. Since the consultation document was published, the House of Commons has passed an amendment to the European Union (Withdrawal) Bill requiring the new body to have the power to take proportionate enforcement action - including legal proceedings if necessary.
31. This amendment strengthens significantly the minimum enforcement powers of the new body but does not specify the exact nature of those powers.
32. The Government is also consulting on questions around the scope of the new body. It has expressed a preference for a broad scope to scrutinise and advise but a somewhat narrow scope in terms of compliance and enforcement powers.

## What is IEMA's initial view on the proposals?

33. IEMA agrees with the Government's assessment of the Governance Gap that will be created once the UK exits the EU. IEMA also agrees with the proposed objectives for the establishment of the new body and agrees with the three key functions proposed. More specific initial views are set out below:

### ***Scrutiny and advice***

34. IEMA considers that the scrutiny and advice function should cover: existing (extant) environmental law; proposals to significantly change environmental law; and scrutinise, advise and report on the delivery of key environmental policies, such as the 25 Year Environment Plan.
35. IEMA agrees with the Government's proposal that the new body could be tasked with conducting and publishing an independent, annual assessment of national progress against the delivery of the ambition, goals and actions of the 25 Year Environment Plan, and that this could follow a government report on its implementation.
36. IEMA also agrees that the new body could provide advice and recommendations to government on the development of policy and legislation across Whitehall, in so far as they relate to the ambition, goals and actions referred to in the 25 Year Environment Plan.
37. We consider that there is significant benefit in providing the body with the function of advising and recommending on relevant policy and legislation across Whitehall. For example, the proposed Resources and Waste Strategy could be enhanced by receiving expert advice on the dependencies between the natural environmental and the economy, such as around resource security and resource effectiveness.
38. IEMA agrees that any recommendations to government could be required to be laid in Parliament for the government to respond to within a reasonable timeframe.
39. However, IEMA is concerned that there is still a narrative from Government, as expressed at times in this consultation document, that there is a need to trade-off the economy and environment and that a "proportionate approach" would lead to better economic outcomes at the expense of environmental outcomes. This assumption is outdated, unfounded and unhelpful. Long-term economic growth relies on good environmental stewardship.

### ***Responding to complaints***

40. IEMA considers that existing domestic arrangements will not be sufficient to provide the same opportunities to submit complaints and concerns as currently exists under EU governance arrangements. We therefore consider it essential that the proposed new body be given the remit and powers to respond to and investigate complaints from members of the public about the alleged failure of government to implement environmental law.
41. IEMA broadly agrees with the information set out in the consultation document around how this could work. For example, we agree that the new body would need to have powers to conduct investigations and require the provision of information. Like the current ombudsmen, it would

need to be able to give recommendations which would be expected to be strongly persuasive, and therefore (we hope) would be likely to be implemented in most cases, even if the new body chose not to exercise its potential legal powers to require compliance. We agree that the new body could make its recommendations to the government, publish them and report on findings and recommendations to Parliament.

42. IEMA also agrees that the new body would need to consider all valid complaints received but should have discretion to exercise its powers to act in appropriate cases, rather than have a duty to act in response to all complaints.
43. However, IEMA's support for such discretion is dependent on the body being sufficiently resourced, both financially and in terms of expertise, to be able to carry out all investigations that are necessary to effectively fulfil its duty to protect the environment. There is a danger that funding will be seen as more fluid or discretionary if there is no mechanism (to Parliament) to investigate complaints as appropriate.

***Enforcing government delivery of environmental law***

44. IEMA agrees that advisory notices will be an effective first step in enforcing environmental law. However, if they were to be the only enforcement power granted to the proposed new body, this would be wholly inadequate, and a significant weakening of environmental protection compared to the status quo. This would clearly not meet the Government's promise not to weaken environmental protection and would bring a lie to the notion of a world leading environmental body. The Emperor would have no clothes.
45. There are two reasons why stronger powers are needed. Firstly, while most environmental complaints taken on by the European Commission are resolved through an advisory notice, IEMA considers that a major reason why this is the case is because of the potential of stronger enforcement action, should no satisfactory resolution be proposed by a Member State.
46. Secondly, a number of serious environmental threats have only been averted once stronger action has been taken. In both cases, the very real threat of significant and ongoing fines is likely to have been the main driver.
47. IEMA therefore welcomes the House of Commons amendment requiring that the new body be given the power to take proportionate enforcement action that would allow for cases to be escalated and act as a stronger incentive for Government to comply when advisory notices are given.
48. The consultation paper proposes binding notices (subject to appeal). IEMA considers that this is one approach that may be effective.
49. The consultation proposal is, however, missing one vital tool that should be available to the new body. Namely, the power to issue fines to Government and public bodies for non-compliance when other avenues have been exhausted. Table 1 of the consultation document infers that this power is not necessary because Parliament provides scrutiny of government's compliance with court rulings and NGOs can apply pressure in Parliament and initiate further legal action if

needed. This is clearly not equivalent and is wholly inadequate. Once again, failure to provide such powers clearly breaks the Government's promise to not weaken environmental protection.

50. Finally, IEMA supports the proposal for the new body to be able to intervene in legal proceedings that have been brought by others. As noted, this mechanism is in place in Austria and Hungary. It is also a key power held by the New Zealand Department of Conservation. In many cases this can introduce a much stronger evidence base and more robust legal argument to an existing case.
51. Crucially, in the above International examples, those bodies also have powers to initiate legal proceedings. This is important as it does not rely on a third party to identify, initiate and fund a legal case.

***Scope of the new body***

52. The Government has a preference for the new body to oversee central government departments only, in a similar manner to the way that the European Commission operates. IEMA agrees that this is the closest equivalent power to the status quo.
53. However, there are clearly strong arguments to improve upon the current regime and allow for more timely and direct intervention with a wider range of regulators and actors. IEMA therefore recommends that the new body be able to exercise its functions directly over a much broader range of public bodies and authorities.
54. The Government has proposed that the new body be given broad remit to scrutinise and advise on environmental issues and that this scope should be relatively unconstrained. IEMA agrees with this approach and particularly supports the inclusion of important areas such as agriculture and fisheries.
55. However, the investigative and enforcement functions are proposed to be much narrower. For example, they will not cover climate change or the UK's obligations under international law that are not implemented through domestic legislation. IEMA does not agree with this narrow approach and is not convinced by the arguments put forward in the consultation.
56. Climate change is a key driver of environmental harm. Unless and until the Climate Change Commission is given equivalent compliance and enforcement powers, this will weaken existing environmental protection. Similarly, while IEMA agrees that the EU does not hold Member States to account for many of their international environment commitments, this is a political decision and should not constrain the UK Government from developing its own world leading environmental body that will support the delivery of its international environmental obligations.
57. On planning policy, IEMA agrees that the new body should broadly have an advisory role, with a focus on the functioning of the planning regime as a whole. This would include being consulted on national policy frameworks and strategic plans. However, there are strong arguments for the new body to be able to initiate or join legal proceedings where strategic plans appear to be in breach of environmental obligations or are unlikely to achieve the environmental objective of the planning regime.

***Moving beyond procedural inadequacies***

58. There is a strong logic that the proposed body should be able to investigate and hold to account public bodies for decisions, plans and strategies that, while lawful from a procedural point of view, are nonetheless likely to detrimentally affect the environment. This is very pertinent to both the planning regime and to broader schemes such as agricultural payments. IEMA therefore considers that some form of legal challenge based on merit, as well as procedural failure, should be considered. There is international precedent for this approach, as set out in Appendix E of the discussion document. It is also regarded as successful and beneficial as applied in New Zealand.
59. Such an approach would require a new legislative body or judicial process to be implemented, as currently the Courts are unable to make decisions based on merit.
60. One possible option to support this approach would be to create a legal duty of care to the environment that public bodies would be required to follow when making decisions. This would be particularly beneficial where decision-makers have a considerable amount of discretion over the extent to which environmental considerations need to be taken into account.

## Part 3: Overall environmental governance

### Why does it matter and what is the Government proposing to do?

61. As we leave the EU, we will be leaving behind decades of environmental law, policy and institutional governance. While much of this will be retained in one form or another, such as through the European Union (Withdrawal) Bill and through the proposed Environmental Principles and Governance Bill, it is no small task to replicate or improve upon what we will lose. It is therefore important to look at the overall picture of environmental governance for England and the UK to ensure that there are no significant gaps or duplication of roles and functions.
62. The consultation document does a good job of setting out the various public bodies that carry out environmental functions. It also highlights where changes will be made to the functions of existing public bodies, such as reporting on the implementation of environmental law, or progress towards the goals of the 25 Year Plan. It highlights where Ministers or regulatory bodies will now be responsible for roles previously held by EU institutions.
63. However, there are no significant proposals to change the environmental governance framework in England or the UK. Instead, the consultation asks for general comments or further information on this section of the proposal document.

## What is IEMA's initial view on the proposals and what else are we proposing?

64. IEMA considers that the consultation is a missed opportunity to create a better environmental governance framework for the UK. This is because, even with the strong protections afforded by the EU, our environment is in decline. Based on current trajectory we will continue to lose important biodiversity and habitats and further degrade a large number of our ecosystems. We consider that the 25 Year Plan has the potential to turn around these declines, but it will only be successful if it has a strong legislative underpinning.
65. We also recognise the consistent failure to spot longer-term environmental problems which result in large social and economic impacts, and have high cost to put right (e.g. air quality, climate change, plastics) – we need systematic and comprehensive ‘horizon-scanning’ to spot potential problems early and take appropriate action.
66. In broad terms, environmental policies have evolved based on a default that anyone can do anything as long as you can navigate and stay in compliance with the legal framework and other specific requirements (i.e. unless a regulation prevents you from doing something, you can do anything). This culture/approach is now beginning to be questioned. The duties to protect the health, safety and welfare of workers set out in the 1974 Health and Safety Act have helped bring about a culture change towards H&S responsibility; a similar approach should be considered for the environment.
67. IEMA is therefore advocating that the Environmental Principles and Governance Bill be much more ambitious and far-reaching than the Government is proposing. Our initial thinking is that the Bill should act as a framework for the following:
  - Legally binding goals supported by numerical targets, milestones and metrics for key environmental outcomes such as biodiversity, freshwater quality and soils
  - Five-yearly updates to the 25 Year Plan aimed at achieving the goals and targets, based on independent advice
  - A fully funded and resourced five-year programme of activity that will deliver actions to meet targets and milestones
  - Improved monitoring and reporting on the state of the environment using mapping and modelling that is more accessible and understandable to the public
  - An overarching “duty of environmental responsibility” on public and private activity affecting the environment that changes the default so that e.g. government departments, public bodies, businesses and potentially others have a basic duty to act responsibly towards the environment, or to take account of the environment in making decisions
  - Cross-Whitehall regulation, incentives and taxation designed to protect the environment and stimulate genuinely sustainable development and economic growth

- Effective, place-based governance to allow communities and local and regional bodies to work together to protect and enhance the environment at a meaningful scale

68. We will be developing these ideas over the coming months and will be submitting initial conclusions to Defra as part of this consultation response.

## About IEMA

IEMA is the professional body for those working in environment and sustainability.

IEMA's membership of over 14,500 sustainability professionals work at the interface between organisations, the environment and society to create long-term value and minimise risks. They guide and lead the changes that will be required for a sustainable future.

[www.iema.net](http://www.iema.net)

## How you can get involved and shape IEMA's response

IEMA will be holding a series of workshops with members to help shape our final response to Government. We will also be hosting a webinar setting out our likely response and giving you the opportunity to ask questions and comment. The schedule of events is currently as follows:

- Wednesday 4th July in the afternoon in Bristol
- Friday 6th July in the morning in Birmingham
- Tuesday 10th July in the afternoon in Newcastle
- Wednesday 25th July in the afternoon in London
- Webinar on 9th July

## Contact

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