

DEFRA CONSULTATION: ENVIRONMENTAL PRINCIPLES AND GOVERNANCE AFTER THE UNITED KINGDOM LEAVES THE EUROPEAN UNION

A response to by the Campaign to Protect Rural England

August 2018

Introduction

The Campaign to Protect Rural England (CPRE) campaigns for a beautiful and living countryside. We work to protect, promote and enhance our towns and countryside to make them better places to live, work and enjoy, and to ensure the countryside is protected for now and future generations.

CPRE is a member of Wildlife and Countryside Link and Greener UK and fully endorses their responses to this consultation. This response addresses the issues of most relevance to CPRE.

Environmental Principles

Q1: Which environmental principles do you consider as the most important to underpin future decision making?

CPRE supports the list of environmental principles and rights set out in Section 16(2) of the European Union (Withdrawal) Act 2018. This list should constitute a minimum set of principles to which additions could be made in the future if required, following appropriate parliamentary procedures.

The principles as set out in the Act are:

- (a) The precautionary principle so far as relating to the environment
- (b) The principle of preventative action to avert environmental damage
- (c) The principle that environmental damage should be rectified at source
- (d) The polluter pays principle
- (e) The principle of sustainable development
- (f) The principle that environmental protection requirements must be integrated into the definition and implementation of policies and activities
- (g) Public access to environmental information
- (h) Public participation in environmental decision making
- (i) Access to justice in relation to environmental matters

These principles form a suite of measures to protect the environment which are contextual in application and complement each other; as such no one principle should be given additional weighting above any other principle

The Environment Bill should also incorporate the following principles into UK law:

- **The non-regression principle** - that there should be no diminution of environmental protections after we leave the EU.
- **The progression principle** - that policy should seek to continually improve environmental standards. This could see the proposed new governance body advise the government to set targets, for example for the enhancement of landscapes, nature and biodiversity, perhaps by following the framework of the 25-year Environment Plan. This approach could emulate

the process of setting targets in carbon budgets by the Committee on Climate Change (CCC).

- **The principle that environmental management should take place at the appropriate spatial and temporal scale.** This has precedent in the Environment (Wales) Act 2016, in Section 4(b) where ‘consider the appropriate spatial scale for action’ is listed as one of the ‘principles of sustainable management of natural resources’. This principle would lead all public authorities to consider the competing and related uses of land. It would encourage integrated decision making through policies which identify multiple opportunities for improvement of the environment across landscapes, catchments or ecosystems. This could include improvements from carbon sequestration to improvements of water quality, natural flood management to tourism opportunities and enhancement of landscapes.

Application of principles

Q3. Should the Environmental Governance Bill list the environmental principles that the statement must cover (Option 1) or should the principles be set out in the policy statement (Option 2)?

CPRE has several suggestions about how the environmental principles should be applied:

- **Principles should be difficult to alter, and must not be subject to change at the whim of a Government if the governance body took a decision with which the Government disagreed.** Any changes to these principles must require the scrutiny of Parliament and correct parliamentary procedure to make alterations to statute. CPRE therefore strongly supports including the principles listed in our answer to question 1 in statute, as required by the European Union (Withdrawal) Act 2018, for reasons of certainty, permanence, accountability and enforceability.
- **We would expect the policy statement to include definitions of the principles and guidance on how they should be interpreted and applied.** CPRE welcomes the proposal in paragraph 36 of the consultation document that the Environment Bill would include requirements for public consultation on the draft policy statement and any future changes, as well as the statement being subject to parliamentary scrutiny. The policy statement should be subject to consultation, and review by Parliament, on a rolling cycle.
- **Consultation is absolutely necessary to ensure public understanding and support for the principles, as well as clarity of definition.** CPRE would particularly encourage using the policy statement to define and set objectives for the principle of sustainable development with direct reference to the relevant targets and indicators of the United Nations Sustainable Development Goals.

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

CPRE broadly agrees with the objectives for the establishment of the new environmental body as listed in paragraph 79. However we have serious concerns regarding the final part of objective six:

- **CPRE is concerned by the objective set out in paragraph 79 for the governance body to ‘Operate in a clear, proportionate and transparent way in the public interest recognising that it is necessary to balance environmental protection against other priorities’.** While the body should operate clearly, transparently and in the public interest, it is not for a governance body to determine how the Government and public authorities should balance objectives. Rather, the governance body should ensure all public bodies comply with environmental law, meet their legal obligations and correctly apply the principles outlined above.
- **Similarly, CPRE shares the concern of Wildlife and Countryside Link that the suggestion in paragraph 40 of the consultation document, of ‘the need to balance environmental priorities alongside other national priorities’, does not reflect the ‘proportionality**

principle' as currently understood in EU law. Such an approach risks undermining the legal weight of the principles, and a political commitment to development in terms of economic growth at the expense of environmental protection and sustainability.

Q10. The new body will hold national government directly to account. Should any other authorities be directly or indirectly in the scope of the new body?

- **The environmental principles should apply to all public bodies and bodies performing public functions.** A failure to act by a public body, or an incorrect application of existing law, risks causing damage to the environment even where central government policy is robust. The duties in relation to the principles therefore must apply to all public bodies. For example, local planning authorities must be required to apply the principles when developing local plans and policies. Planning Inspectors must also apply the principles as part of the decision making process. If those bodies responsible for delivering policy on the ground were not held accountable for a failure to apply the principles there would be a significant governance gap which simply could not be filled by recourse to judicial review alone.

Scrutiny and Advice

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

The body must have the relevant expertise, funding and staff to scrutinise, advise and report on the delivery of environmental policy. While it should not duplicate the work of the Environment Agency to gather data, the new body should be able to identify gaps in the data available, scrutinise the quality of data gathering, and encourage data collection where there are evidence gaps. This includes examining the UK's ability to meet international commitments, which are currently assessed by the European Commission, and is particularly important with regard to climate change as the CCC cannot insist on data being gathered, nor does it have any enforcement powers. Climate change is the greatest threat to the English countryside, It is therefore paramount that climate change is included in the remit of the new body, contrary to the proposals in paragraph 127.

Enforcement mechanisms

Q8. Should the new body have a remit and powers to respond to and investigate complaints from members of the public about the alleged failure of government to implement environmental law?

Q9. Do you think any other mechanisms should be included in the framework for the new body to enforce the delivery of environmental law beyond advisory notices?

The governance body must be able to initiate legal proceedings, and have an absolute right to intervene in relevant cases brought by others without having to demonstrate an interest in the case. Given its proposed advisory functions, and so its necessary expertise, the governance body would be able to add value to cases and assist the court on the details of any environmental matter being heard.

Legal powers are valuable *per se*, but would also enhance the weight of any advice or recommendations made by the governance body. As outlined by Greener UK and Wildlife and Countryside Link, a system of escalation would encourage rapid compliance with the law where there had been a breach, particularly where recourse to legal powers and fines are options.

To carry out its enforcement role effectively, the governance body must be able to truly investigate, at its discretion, any cases brought before it by individuals, civil society and public bodies. The body should be able to request any necessary information and data, and challenge the merit of any policy decision in and of itself, not simply examine the procedure by which a decision was reached. This would make the governance body an effective means through which to enforce

environmental legislation, replicating the powers of the European Commission and the Court of Justice of the European Union (CJEU), as well as providing meaningful access to justice in relation to environmental matters as required by Section 16(2.i) of the European Union (Withdrawal) Act 2018. The narrow remit of reliance on judicial review alone, where costs are often prohibitive and the courts can only challenge the process by which decisions were made, would not provide a level of access to justice comparable to that currently available through the EU.

These recommendations are in line with recommendations of Greener UK on the statutory duties to be included in the Environment Bill:

- A duty on all public authorities (not just Ministers of the Crown) to apply the principles in the exercising of relevant functions (not just the making and development of policies)
- A duty on all public authorities to (not just Ministers of the Crown) to act in accordance with the policy statement on environmental principles (this would ensure consistency with existing government policy and ensure they are taken into account by decision makers)
- All public bodies, including the courts, should be required to read and give effect to legislation in a way that is compatible with the relevant environmental principles.

Relationship to planning policy

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

The new body should be able to advise on national and local planning policy and enforce environmental law in this respect. Planning policy and decisions have a significant impact on our landscapes and environment, which is why we are concerned that under the proposals outlined in the consultation the new body would not be able to engage with individual planning decisions on a case-by-case basis.

The consultation document appears to contradict itself in suggesting that the body should focus on ‘the correct application of environmental law within the planning system’ but not have any role in ‘individual planning policy decisions’. Such an approach would limit future oversight of sections of extant European environmental law which will be transposed into UK statute, such as Environmental Impact Assessments, Strategic Environmental Assessments, and decisions taken in accordance with the Habitats Regulations and other relevant environmental law requirements. The body should fulfil the functions of the European Commission and the CJEU in the enforcement of these legal obligations, which are applications of EU directives.

Currently, the role of the UK courts in planning policy is either to examine the law and determine if it is not sufficiently clear, or to look at the application of the law and the process by which planning decisions were made. Including planning policy within the remit of the governance body would allow it, correctly, to look again at the merits of a decision on the grounds of a correct and sufficient application of environmental principles. This would mimic the role of the CJEU in clarifying the application of principles where there have been specific breaches of the law - these cases are few and far between, but are critically important in terms of the threat of enforcement they contain. UK courts would therefore be responsible for neutrally and independently assessing application of the principles.

The body should have a clear remit to engage with planning decisions which are of a significant or strategic nature. This should include policies proposed under the Nationally Significant Infrastructure Project regime. It should also include significant development proposals, such as the Oxford-Milton Keynes-Cambridge corridor or proposals for new garden towns and cities, where the scale of development, often on greenfield sites, would pose significant environmental challenges.

CPRE would encourage the watchdog to publish an annual report of cases where principles have been incorrectly applied. If the new body identified consistent failings, they would then be able to initiate a review of existing environmental law and national planning policy to establish if it was fit for purpose, and so advise on future potential changes to policy.

The body should focus on issues relating to the environmental principles, where action or inaction due to incorrect application of the principles has led to harm. It should not duplicate the role of Natural England or the Environment Agency in policing the actual impacts of activities ‘on the ground’. Similarly, there should be a positive relationship with the Planning Inspectorate, with the governance body providing advice and guidance on correct application of the environmental principles, while not duplicating the work of decision-making in individual cases. However, the body should be able to hold Government, public bodies and the Planning Inspectorate to account if and when there are failures.

We also particularly support the response of Greener UK to question 13 on whether the body should be able to advise on planning policy.

CPRE | 2 August 2018