

Scottish Government

Environmental principles and governance after Brexit

Background to CIWEM

CIWEM is the leading independent Chartered professional body for water and environmental professionals, promoting excellence within the sector. The Institution provides independent commentary on a wide range of issues related to water and environmental management, environmental resilience and sustainable development.

CIWEM welcomes the opportunity to respond to the Scottish Government's consultation on environmental principles and governance after Brexit. This response has been compiled with the assistance of our members.

Response 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

No

Don't know

Please explain your answer.

CIWEM is pleased that the Scottish Government is committed to transferring the environmental principles into Scottish law, and that they will continue to shape environmental policy after the UK leaves the European Union. We support the introduction of a duty for Ministers to refer to the environmental principles in the formation of policy and legislation. The environmental principles have underpinned and informed the development of our environmental legislation and are a fundamental reason behind improvements to our environment and natural habitats in recent decades. However, we believe that the duty 'to have regard to' is not strong enough to afford the principles the status that they currently benefit from under EU law. We would advocate that Ministers are compelled to 'act in accordance with' the principles, which would ensure their future protection.

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

Yes

No

Don't know

Please explain your answer.

We agree that the duty to have regard to, or as we would prefer, act in accordance with, should extend only to Ministers as detailed in the consultation paper, to the formation of policy and legislation. This would allow adequate replication of their current status under the EU framework.

The wording of the duty should be such that ministers of the Crown and all public bodies with the power to exercise authority in environmental management should be required to act in accordance with the principles listed.

3. Do you agree that a new duty should be focused on the four EU environmental principles?

Yes

No

Don't know

If not, which other principles should be included and why?

The duty should be extended to include more environmental principles than the four specified in the Treaty on Functioning of the European Union. We advocate that the duty should extend to the following principles, which are currently enshrined in EU law or international treaties, and have driven progress in the management and improvement of our environment in recent decades:

- (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 as a priority 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) the principle of public access to environmental information,
- (h) the principle of public participation in environmental decision-making, and
- (i) the principle of access to justice in relation to environmental matters

These are the principles which are included in the Draft Environment Bill for England, and comprehensively cover all of the environmental principles to which the UK is currently subject to. A duty which did not include every principle in this list would not provide adequate protection of our environment.

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

No

Don't know

Please explain your answer.

The principles must be enshrined in domestic Scottish law in order to avoid a significant weakening of their current status. A policy statement which clearly detailed how the principles should be implemented and interpreted would be appropriate.

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

The bodies of the European Union currently provide a vital system of oversight, access to justice, and enforcement on the UK Government's implementation of environmental law. But this system of scrutiny currently provided by the European Commission (EC) and the Court of Justice of the European Union (CJEU) will not be transferred across to the UK post-Brexit. It is this system which has repeatedly held the UK government to account on environmental compliance matters. Without it, the UK would not have been forced to tackle poor bathing water quality during the 1980s and 1990s, nor would it currently be the subject of a case before the CJEU over air quality, for example. European law and this third-party scrutiny has led to improved air and water quality, and increased environmental standards in the UK. The loss of this engagement could lead to significant risk of environmental harm or absence of further environmental quality improvements.

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

We support the Scottish government's approach to undertaking a review of monitoring and reporting requirements in order to rationalise current programmes. However, we would be concerned if any monitoring obligations were unjustifiably altered or stopped, as long-term, consistent monitoring is a key requirement for environmental protection.

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

Yes

No

Don't know

Please explain your answer.

There will be a significant governance issue as a result of the loss of the scrutiny and assessment of performance functions currently provided by the EU framework, as there will be no oversight from the European Commission or the CJEU of implementation of environmental law. This lack of independent scrutiny would also risk significant environmental harm, as this scrutiny has led to sustained environmental protection in recent decades, for example with regards to water quality.

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

Without the European Commission's oversight of environmental laws, an effective statutory watchdog to champion the environment in Scotland is essential. SEPA is not the appropriate body to meet the requirements for effective scrutiny of government performance of environmental policy in Scotland, and a new independent governance watchdog is required.

The Scottish government and public bodies charged with implementing Scottish environmental law should be subject to the monitoring, scrutiny and enforcement framework of a statutory watchdog for the environment, in order to adequately replicate and replace the functions of the EU.

CIWEM considers that a UK-wide approach is by far the most appropriate with regards to the environment. Environmental issues do not respect political boundaries and borders, and so efforts to protect it shouldn't either. The governance gap that will occur when the UK leaves the EU will also affect the whole of the UK. Any new oversight and enforcement procedures should cover the entire UK, and be co-designed and co-developed by all administrations. Whilst the detail of environmental law and policy should be determined by the individual administrations, the scrutiny and enforcement mechanisms should be the same, in a similar way that the Committee on Climate Change reports on the progress of the individual administrations on climate change adaptation.

We welcome a UK-wide approach which values the freedoms of the devolved administrations, which are often much more environmentally stringent than Westminster. They have often been more innovative and ambitious and CIWEM would not want to see the devolved assemblies' ambitions curbed and a UK-wide system which hindered this would be viewed as a weakness.

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

The scope of environmental policy is difficult to define as many areas impact and interact with the natural environment. We support the comprehensive list of areas as included in the consultation:

- 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.

We would also suggest the inclusion of protection of recognised Wild Land Areas.

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

The loss of EU complaint mechanisms in Scotland would lead to increased risk of significant environmental harm, as a result of losing a vital scrutiny function though the ability of members of the public and other interested parties to hold government to account of their implementation of environmental law.

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

No

Don't know

Please explain your answer.

The current EU system allows members of the public to submit a complaint about a failure of implementation of environmental law, which is then investigated by the EC and escalated to the CJEU as required. This framework must be replicated in Scotland, and any new complaint framework must retain the ability for members of the public to initiate complaints free of charge, the only existing alternative to this would be judicial review, which is financially and practically unavailable to many and not fit for purpose in this instance.

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

The loss of EU enforcement powers would risk significant long-term and widespread harm to the environment in Scotland and a worrying governance gap, as a result of removing the serious consequences associated with failure to comply with environmental laws. The EC and CJEU will have no role in enforcing compliance of environmental law, and without adequate

replacement arrangements in domestic law, is it possible that environmental protection and standards will be weakened.

**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?**

The preferred way to ensure address the loss of EU enforcement powers is to enshrine the environmental principles in law, and include Scottish law and policy within the remit of a new UK-wide environmental governance watchdog which is afforded the appropriate powers to hold government and other public bodies with authority over environmental management fully to account through a suite of escalating enforcement powers.

Yours faithfully,

A handwritten signature in black ink that reads "Terry Fuller". The signature is written in a cursive, slightly stylized font.

Terry Fuller
Chief Executive