

Environmental Audit Committee Environmental Governance Consultation Paper Inquiry

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 EAC on its inquiry on the Environmental Principles and Governance consultation. This response has been compiled with the assistance of our members.

Summary

- CIWEM strongly supports the Government's ambition to 'leave the environment in a better state than that in which we inherited it', and to protect our environment and improve biodiversity for future generations.
- However, CIWEM believes that the proposals in the consultation fall short of the Government's commitment not to weaken environmental protection.
- We would like to see the environmental principles enshrined into UK law as part of primary legislation rather than in a policy statement, to ensure strong environmental protection and replicate the existing level of protection.
- The proposals for a new environmental watchdog do not give enough power to safeguard our environment once we are outside the jurisdiction of the European Commission and Court of Justice of the European Union. It is vital that the watchdog be given the comparable powers to hold the government and public bodies to account, initiate court action and impose fines.

Response to inquiry questions

1. Do the proposals in the Government's consultation meet the ambition set out in the 25 Year Plan to consult on "a new, world-leading, independent, statutory body to give the environment a voice, championing and upholding environmental standards as we leave the European Union"? If not, what more needs to be done?

1.1. CIWEM welcomes the Government's ambition set out in the 25 Year Plan to create 'a new world-leading, independent, statutory body' and to uphold environmental standards after we leave the European Union. We welcome the conclusion that the new watchdog should be an independent body, accountable to and funded by Parliament, which is adequately funded and appropriately staffed by legal, technical, scientific and economic experts.

1.2. 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.

1.3. The new watchdog must have at least the same powers as the existing arrangements to meet the ambition for a 'world-leading body' and to ensure increased standards of environmental protection can be achieved. Unfortunately, the proposals in the consultation fall far short of the Government's commitment to not weaken environmental protections after Brexit.

1.4. Without the European Commission's oversight of environmental laws, the UK desperately needs a strong statutory body to champion our environment.

1.5. CIWEM considers that the new watchdog must:

1. Have the power to scrutinise/investigate all public bodies, not just the government.
2. Have the power to initiate court/legal action and issue fines to the Government and public bodies.
3. Allow the public and organisations to initiate complaints free of charge.

1.6. The government's consultation document puts forward a watchdog which is lacking in the above powers. The proposals for a body whose main enforcement tool is 'advisory notices' – which are non-binding and can be ignored – do not describe the 'world-leading' body that the Government has promised. CIWEM agrees that advisory notices would be an effective first step in enforcement action, but it is not adequate that they are the only step. This would be a significant weakening of environmental protection. Whilst it is true that the European Commission deals with most environmental issues through advisory notices, the effectiveness

of this approach is undoubtedly due to the potential for much stronger action and substantial fines to follow should the advisory notice be ignored.

1.7. The only existing system in the domestic framework for members of the public to hold the government to account is Judicial Review, which is financially and practically unavailable to many. The new watchdog must allow the public and other bodies to initiate complaints free of charge. We suggest that it would then be for the body to consider whether these complaints are reasonable, and whether they warrant further investigation and escalation.

1.8. The new body must be able to properly scrutinise the government as well as public bodies on their implementation of environmental law, and to hold them to account through the courts when they fail to protect our environment. It is vital that the new body has the same power to initiate court action as the EC currently has.

1.9. The description currently set out by the Government is one of a weak environmental watchdog, which will not provide the scrutiny required to achieve the Government's aim to 'leave the environment in a better state than we found it'. The existence of such a strong body should not be conflated with that of overly burdensome regulation. Following our exit from the European Union, the direction of legislative and regulatory travel will be determined by Government and by Parliament. The new watchdog will merely ensure that this is adhered to. It will exist to protect society and the environment from targets or obligations which are (intentionally or otherwise) missed or not complied with. There is therefore no morally justifiable reason to put in place a body of lesser power than that which currently protects the interests of the public. History has shown that such an instrument is necessary.

2. Will a Governance and Principles Bill make all of the legal changes necessary to achieve the ambition of improving the environment for future generations? Are other legal changes required to improve the environment and if so, what interaction will there be with the new governance and principles regime, and is it possible for them to be designed separately?

2.1. CIWEM believes that the Governance and Principles Bill as it is proposed will not make all of the legal changes necessary to achieve the ambition of improving the environment for future generations. In order to improve the environment, the environmental principles that are established in EU law, and have led to so much improvement of the UK environment, must be enshrined into UK law. Their implementation via a policy statement is wholly inadequate and risks their being discarded the moment they become challenging or perceived as any kind of limit to delivery of other objectives, such as economic growth.

2.2. As discussed in response to question 1, the new statutory body also needs the appropriate powers to hold both the government and all other public bodies to account through the legal system, which is not the case presented in the consultation document.

2.3. The gap in environmental legislation as is currently proposed would risk significant harm and damage to the environment as a result of removing the serious consequences associated with failure to comply with environmental laws. The only way to ensure continued adherence

with their requirements is to enshrine the environmental principles in law and afford the body the means to refer complaints to the courts.

3. What are the risks of ongoing uncertainty about governance and principles while other major decisions are being made, e.g. on the Withdrawal Agreement and the Trade Bill?

3.1. CIWEM believes that there must be regulatory certainty regarding environmental governance to aid the decision-making process for other major issues, which will be impacted by environmental regulatory scrutiny. For example, the Trade Bill will be impacted by any new environmental regulatory system and could impact tariffs, imports and exports, and production. During times of regulatory uncertainty, business is unable to forward-plan accordingly and economic growth is inhibited. Well-designed environmental regulations, and the clarity they provide, support and fuel economic growth, and there is no need to compromise long-term environmental protection for short-term, unsustainable economic growth. A healthy environment inevitably leads to a healthy society and economy.

3.2. Should the UK's environmental standards slip post-Brexit, the EU could impose higher tariffs on UK products, so it is important to clarify environmental safeguards in order to be in a strong negotiating position with regards trade. There are no risks to business in establishing the instruments for legal compliance early, as they already exist at a level which we are only seeking the Government to replicate. Doing so will provide the greatest level of continuity with the existing system, resulting in no need for adjustment by business.

3.3. The uncertainty around the amendments to the Withdrawal Bill also adds to the uncertainty around environmental governance. If the amendment tabled by Lord Krebs and approved by the House of Lords is approved by the House of Commons during CCLA, then the environmental principles will be protected, and the new statutory body will have the power to hold public bodies to account as well as the government. Such a scenario would afford the most guaranteed protection to the environment and the public of any currently on the table and is therefore one which CIWEM would advocate. Any other situation would mean the risk of lower standards of environmental scrutiny and enforcement until such time as a Governance and Principles Bill had been passed for Assent by Parliament.

4. Are the proposals in the Government's consultation adequate to meet the enforcement, governance and other gaps in environmental protection left by leaving the European Union? Are there any aspects in which they offer stronger environmental protection than existing arrangements? If not, what more needs to be done and by when?

4.1. The Government has stated that once the UK leaves the EU, the UK will no longer be a party to EU Treaties, nor will it be under the jurisdiction of the CJEU, leading to a significant governance gap. CIWEM believes that the proposals in the Government's consultation are not adequate to meet the enforcement, governance and other gaps in environmental protection

left by leaving the European Union, and there are currently no aspects in which they offer stronger environmental protection than existing arrangements.

4.2. Without the power to hold the Government fully to account, the new watchdog will fall short of EUs current faculties, and the Government will have failed to meet the minimum requirement for maintaining the current level of environmental protection.

4.3. Crucially, the new watchdog will only be able to consider complaints made about breaches of law, and not policy. This excludes the 25 Year Environment Plan, which is the keystone of the Government's environmental strategy and not underpinned by legislation.

4.4. Under the timescales proposed by the Government, the new watchdog will not be in place before exit day, leaving a raft of environmental legislation becoming so-called 'zombie legislation', which is not monitored or enforced. In order to avoid this scenario (which would not be in the public interest), legal commitments must be made to deliver environmental principles enshrined in law and a fully empowered body, as described above. It is not certain that the principles will be included in the Environmental Governance and Principles Bill, and it is unrealistic that the Bill will be passed for Assent by Parliament prior to exit day. Therefore, the only way to achieve this is for the relevant amendments to the EU Withdrawal Bill proposed in the House of Lords 3rd Reading to be agreed.

5. Do the proposals in the Government's consultation set the basis for an appropriate relationship between the proposed body and other statutory bodies (for example, the Environment Agency, Committee on Climate Change, National Audit Office, regulators like Ofwat etc), Parliament and the devolved institutions? If not, what needs to change?

5.1. CIWEM agrees that the new environmental statutory body must be independent and transparent. We believe its key ties must be with Parliament, which it must be funded by and accountable to, to ensure that its funding and role cannot be undermined easily by future governments.

5.2. CIWEM welcomes the commitment in the consultation that the Environment Agency and Natural England should retain responsibility for enforcement of environmental law against third parties. The Government must ensure that regulatory scrutiny and enforcement actions undertaken by these and other existing statutory bodies are not duplicated, but rather supported and if anything strengthened. For example, the current role of the Environment Agency in advising, investigating and enforcing environmental law must not be weakened or diminished.

5.3. The Committee on Climate Change (CCC) has a crucial and effective role in advising on climate change mitigation and adaptation. However, CIWEM believes that the new watchdog should enforce compliance with climate change law – this is not a function that is currently the remit of the CCC, which only has an advisory role.

6. Whether the proposals in the consultation on incorporating environmental principles into UK law are sufficient to replicate or provide a stronger level of environmental protection than the existing arrangements? If not, what needs to change?

6.1. During our membership of the EU, the policy and legislation that has driven so much progress in the management and improvement of our environment has been informed by several environmental principles. These include but are not limited to:

- The precautionary principle
- The principle of preventative action to avert environmental damage
- The rectification at source principle
- The polluter pays principle
- Sustainable development
- The prudent and rational utilisation of natural resources
- Public access to environmental decision making
- Access to justice in relation to environmental matters

6.2. As these environmental principles were created under the Lisbon Treaty, they will not be transferred to UK law after Brexit. These principles have underpinned and informed environmental legislation in the EU, and are a fundamental reason behind improvements to our environment and natural habitats in recent decades.

6.3. CIWEM welcomes the commitment from the Government to retain the environmental principles, but believes that the Government's clear preferred option of including them in a policy statement will not fill the gaps in governance created after leaving the EU. A policy statement which would sit underneath an Environment Bill as part of secondary legislation would be a significant weakening of their current status. It would not be sufficient to replicate or provide a stronger level of environmental protection than the existing arrangements. The principles would no longer have to be observed in the decision-making process, they would effectively become advisory only.

6.4. To replicate the level of environmental protection the environmental principles which are currently a part of EU law must be included in primary legislation. The government claims in its consultation document that not including the principles in primary legislation would "offer greater flexibility for Ministers to adopt different principles in their policy statement as scientific knowledge and understanding of the nature of the environmental challenges facing this country and the wider world evolves". However, it would also leave the protection of the environment to the whim of the current and any future government, who could discard them or weaken the commitment to them as soon as they were perceived to be challenging.

6.5. The environment is too important to leave open to Ministerial discretion when many of its protections have been developed and refined over decades in response to growing challenges. It is crucial that the environmental principles which have led to so many tangible

improvements to our environment are enshrined in law to ensure their ongoing protection for future generations.

6.6. This is a real opportunity to confirm the UK's ambition and commitment to make our environment a priority, to ensure that regulatory frameworks are fit to meet future challenges such as climate change, biodiversity loss or emerging pollutants, and to display leadership on the world stage. Any failure to provide an equivalent level of legal protection to that which currently exists for the UK's environment and society, would be a highly concerning display of indifference both to current and future generations.

7. Is there sound logic behind the decision to exclude climate change from the remit of the new body? Does this risk leaving the enforcement of climate change law weaker than the rest of environmental law?

7.1. CIWEM considers that the decision to exclude climate change from the remit is questionable. Climate change does already benefit from strong legal protection through the Climate Change Act 2008, and the Committee on Climate Change has a wide remit and 'teeth' as an advisory body to Parliament.

7.2. The consultation document states that 'responsibility for most climate change policy and legislation falls under the responsibility of the Department for Business, Energy and Industrial Strategy'. However, Defra has responsibility for climate change adaptation, which is a fundamental aspect of climate change policy. Regardless of departmental responsibility, explicitly writing climate change out of the remit of the new body is wholly unacceptable. Environmental policy and legislation must be implemented using a cross-governmental approach to be effective. The new body must have jurisdiction over any relevant government department and not only Defra, Government departments and their remits are subject to change. Including climate change law under the remit of the new body is also sound future-proofing for any future climate legislation.

7.3. Additionally, the Committee on Climate Change is an Advisory Committee which does not have enforcement powers to hold the government to account. Whilst it has a strong framework to address climate change mitigation and adaptation, it does not have the power to hold the Government to account on its actions. Therefore, not including climate change in the remit of the new body does risk leaving the enforcement of climate change law weaker than the rest of environmental law, unless the CCC were to be given equivalent enforcement powers, or the power to request that the new body take action where necessary on the basis of the CCC's scrutiny and evidence, which CIWEM would advocate.

7.4. Climate change is a key factor in environmental harm. Many environmental policies result in benefits to climate and vice versa, so to not include it in a ground-breaking and world-leading new environmental body is remiss. Including climate change law in the remit of the new statutory body would ensure its status as a vital part of an environmental protection programme and ensure it has the same level of protection as the rest of environmental law.

8. What would be the benefits and weaknesses of a UK-wide approach? Has there been sufficient collaboration between HMG and the devolved administrations on this matter, and are the right processes in place to agree the most environmentally rational settlement?

8.1. 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, not just England and devolved matters. Any new oversight and enforcement procedures should cover the entire country, 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.

8.2. 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 – the Welsh Government introduced a plastic bag charge four years before Westminster did, for example. 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. We hope to see all of the devolved administrations fully engaged on the development of the new watchdog, and we believe it is vital that appointments to it are drawn from of all of the devolved administrations.

We hope that these comments are helpful to you. If you would like us to expand on or clarify any of the points made, please don't hesitate to get in touch with us.