Response to Defra Consultation on Environmental Principles and Accountability for the Environment
31 July 2018

About Energy UK

Energy UK is the trade association for the GB energy industry with a membership of over 100 suppliers, generators, and stakeholders with a business interest in the production and supply of electricity and gas for domestic and business consumers. Our membership covers over 90% of both UK power generation and the energy supply market for UK homes. We represent the diverse nature of the UK’s energy industry – from established FTSE 100 companies right through to new, growing suppliers and generators, which now make up over half of our membership.

Our members turn renewable energy sources as well as nuclear, gas and coal into electricity for over 27 million homes and every business in Britain. Over 730,000 people in every corner of the country rely on the sector for their jobs, with many of our members providing long-term employment as well as quality apprenticeships and training for those starting their careers. The energy industry invests £12bn annually, delivers £88bn in economic activity through its supply chain and interaction with other sectors, and pays £6bn in tax to HM Treasury.

Executive Summary

Energy UK welcomes the opportunity to provide this submission to Defra’s consultation on environmental principles and accountability for the environment. This response has been developed by our Planning Sub-Committee and Environment and Climate Sub-Committee. We welcome the ambition of the new environmental watchdog and recognise the value that this post-Brexit, long-term organisation could provide to Government, the environment and industry alike.

We welcome the proposed principles-based approach and support the relevant phrasing included in the recently-passed European Union (Withdrawal) Act which advocated for those principles to be enshrined in legislation.

As we move towards Brexit it is essential that Defra and its agencies are appropriately resourced and funded to deliver their increased remit as the European Union’s (EU) role diminishes. Resourcing of the existing Defra agencies has long been a concern of Energy UK and our members, as highlighted in past consultation responses.

Energy UK discourages replication of remits across Defra and its agencies; duplicating regulations will create an unnecessary administrative and legal burden for both Government and industry alike. The new watchdog’s operation should not overlap, but work in harmony, with the existing regulatory framework.

We would be happy to discuss any of the points made in further detail with Defra or any other interested party if this is considered to be beneficial.

For more detail about the questions posed within the consultation document please refer to the responses submitted by our members. Should you have any questions regarding this consultation response then please do not hesitate to get in touch via the details below.

We can confirm that this response may be published on the Defra website.

Yours sincerely,
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Response to Questions

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

As the UK leaves the European Union (EU), Energy UK supports the continuation of a high level of environmental standards with strong enforcement in practice. The incorporation of environmental principles in UK legislation could help to deliver this outcome.

However, many industry sectors (including the energy sector) have previously faced challenges from disproportionate environmental regulation, in which very onerous obligations are placed on an operator for little or no environmental benefit in practice. These issues often arise from a mechanical and simplistic application of environmental principles in decisions on regulation and planning, without sufficient account being taken of context, proportionality or costs and benefits. We have provided some examples in our answer to Question 2.

Consequently, in answering both this first question and the overall consultation, we would like to start by highlighting some key guiding rules for the application of environmental principles in policy-making:

- An environmental principle cannot be considered in isolation from other principles or from wider regulatory principles.
- Environmental principles act as guidance to policy-making, not as absolute or prescriptive rules.
- No single environmental principle should be considered to have over-riding primacy over other principles or wider social and economic considerations.

We believe that supporting guidance will be essential for the effective implementation of the environmental principles. These regulatory guiding rules should be included in that guidance or in the statutory policy statement itself.

We consider that all the key environmental principles have been identified in Annex A of the consultation document and we believe that the proposed definitions are appropriate.

However, in line with our comments above, we consider that it is essential that principles of best practice for the development of policy and regulation are also added to the set. Without these, policymakers will not have an integrated approach to the application of principles in the formation of policy.

We believe that the following key principles of best practice are most important to underpin future environmental policy-making:

- Evidence-based regulation principle – Decisions should be based on the best available scientific evidence.
- Risk-based regulation principle – Decisions should be based on an assessment of the risk to the environment.
- Proportionality of action principle – Decisions on actions should be based on an assessment of the full set of costs and benefits of a policy or regulatory proposal.

These are illustrative definitions of these key principles. We recommend that the definitions are developed further as part of the preparation of the statutory policy statement. UK regulators have previously implemented a number of “Better Regulation” initiatives, although these have since been discontinued. We believe that these previous initiatives could be a useful reference in developing best practice principles for regulation.
2. **Do you agree with these proposals for a statutory policy statement on environmental principles (this applies to both Options 1 and 2)?**

Energy UK agrees with the proposals for a statutory policy statement on environmental principles.

However, as mentioned in our answer to Question 1, many industry sectors (including the energy sector) have previously faced challenges from disproportionate regulation. Examples have included:
- The implementation of the EU Eel Regulation.
- The application of the Habitats Directive to coal and gas-fired power station emissions to air.
- The interpretation of the Waste Directive and case law on the definition of by-products and waste recovery.

For this reason, in our view, a statutory policy statement on environmental principles should be considered with great care. In particular, the key principles of best practice should be included alongside the list of environmental principles, whether this is delivered through Option 1 or Option 2 proposed in the consultation.

We welcome the intention to consult on the draft policy statement and any future changes made to it. It is important that stakeholders and practitioners get the opportunity to critique this statement based on their own environmental expertise and experience.

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)?**

Energy UK agrees with the provision outlined in the recently-passed EU Withdrawal Act which dictates that:

"The Secretary of State must within the period of six months beginning with the day on which this Act is passed, publish a draft Bill consisting of—
(a) a set of environmental principles,"

We strongly support these principles being listed in the Environmental Principles and Governance Bill and as such being enshrined in primary legislation in order to ensure accountability for the environment and provide certainty to businesses. This would also ensure an accurate replication of the current system whereby UK government must meet the requirements of the EU’s environmental laws and therefore gives the new environmental body a stable and robust legislative foundation on which to work.

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

Following the decision to leave the EU it is essential that we maintain a high level of environmental protection during and after the exit from the EU and we consider that a new body could help to ensure this. A detailed and public gap analysis of the institutional deficit following the UK’s exit from the EU should be undertaken so as to ensure that the new body does not replicate the work of existing institutions and instead takes over the responsibilities previously held by European institutions.

Energy UK agrees that it is important to maintain a high level of environmental protection during and after the exit from the EU. The proposal to create a new “environmental watchdog” body could address the potential gaps in environmental protection left by leaving the EU. However,
it is important that such an organisation has the resource, remit and powers necessary to hold the Government to account.

Energy UK is concerned that there is potential for the creation of a further environmental body (alongside a large number of existing bodies with existing responsibilities) to lead to duplication, overlap and an additional regulatory burden on business for no corresponding improvement in environmental outcomes. Furthermore, we are concerned that the current consultation proposals do not establish clear tests to determine the appropriate scope of the new environmental watchdog body.

In our view, such tests would include the following challenges for every proposed responsibility of the new watchdog:

- For each potential role and responsibility of the watchdog, is there a clearly identified gap, either now or post-Brexit?
- What are the implications of that gap in practice, in terms of environmental outcomes?
- Did the European Commission (EC) or other EU body previously have this function?
- If not, is there a clear reason why the watchdog now needs to take on this function?
- If these functions are essential, then shouldn’t an existing body be able to deliver them?

As the consultation document explains, there are a great number of existing UK environmental bodies already in place. We are concerned that, at present, the working principle for scoping the new body appears to be “if in doubt, include the responsibility”. We believe that a watchdog designed using a more challenging, structured approach based on a gap analysis will minimise the risks of duplication and overlap and result in a more focused and efficient new body.

A further potential concern is that several additional functions are being put forward for the watchdog that are independent of the immediate driver of Brexit. Given the scale of changes that will be required by Brexit, it is important to consider whether these additional functions are absolutely essential at this time or could be deferred subject to further review.

One weakness of UK-specific environmental policy has been the relative instability of policy decisions. Even if there is no resultant change in policy, uncertainty results in difficulties for businesses wishing to make investment decisions. EU environmental policy tends to be more stable, due in part to the greater complexity of reopening EU decisions once made. A new environmental watchdog body could provide stability during changes in Government, in a similar way to how the Climate Change Act and the Committee on Climate Change (CCC) deliver continuity in UK climate change policy.

It should also be recognised that external scrutiny of the UK’s environmental regime, by other Member States and EU institutions, will be lost following Brexit. It will be fundamental to the future credibility of the UK’s environmental framework that it remains subject to the scrutiny of its peers in some form. We would therefore encourage the UK Government to consider how it intends to replicate such influential external scrutiny and transparency.

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5. **Do you agree with the proposed objectives for the establishment of the new environmental body?**
Yes, Energy UK and our members welcome these proposed objectives, but a final decision should be subject to the findings of the gap analysis recommended in our answer to Question 4.

We would also welcome further clarification on the intentions of the devolved administrations for their own environmental policies, post Brexit. At the very least, we would welcome a level of consistency on environmental policies and enforcement across the UK.

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

We are not aware of any significant gap in the scrutiny of extant environmental law, which is carried out by a wide range of government departments, agencies and stakeholders. Any functions of this nature for the new body should be in response to a clearly defined need. We consider the role of managing complaints to definitely be outside of the new environmental watchdog’s remit.

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

Energy UK considers the 25 Year Environmental Plan to have set out a positive vision for the UK’s environment, however from the point of view of the energy sector it lacked objectives that are specific, measurable and time bound. We would also like to highlight the importance of sufficient funding being available for DEFRA and its agencies to ensure that the plan is effectively carried out. Details of our response to the Environmental Audit Committee’s Inquiry into the 25 Year Environmental Plan can be found here. We also have an overall concern that if existing environmental laws and principles are not enshrined in UK laws once the UK leaves the EU this would be a failure of the spirit of the Plan.

In the same way that the CCC comments on the Clean Air Strategy or Clean Growth Strategy, we would expect the new body to scrutinise, advise and report on the delivery of key environmental policies, such as the 25 Year Environment Plan.

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?

The proposed body appears to have been given a function of handling complaints from members of the public. There are existing mechanisms for such complaints to be dealt with in the UK.

Energy UK is opposed to the proposal that the watchdog will concentrate on issues concerning alleged failure by government authorities to implement the law– the Ombudsmen currently also investigates complaints based on the premise that action taken is not consistent with legal requirements; this should not be a role of the proposed body.

It is imperative that the Government avoids creating overlapping responsibilities between the new watchdog and the existing regulatory environment. Double regulation will have a negative impact on the operating environment for the UK energy industry.

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?

Our members consider that the new body should have legal power equal to that of the EU institutions it is replacing. As such, the body should have the ability to take Government to court,
in the same way that the EC can refer an offending Member State to the Court of Justice of the European Union (CJEU).

Nevertheless, we consider that the scope of the proposed new watchdog should be clearly set out in the Environmental Principles and Governance Bill in order to avoid the risk of unintended ‘regulatory creep’. The Bill should specify a focussed and well-defined remit of the watchdog to hold national Government to account whilst also ensuring certainty and stability for UK businesses.

10. **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?**

Our members have concerns regarding the proposal that the watchdog will concentrate on issues relating to alleged failure by Government authorities, with the potential for the watchdog to have the power to issue binding notices or to intervene in legal proceedings. It is vital that the remit of the watchdog is to hold national Government to account, consistent with the current role of the European Commission; “other authorities” such as Local Authorities or the Environment Agency, should not be within the scope of the new body either directly or indirectly. If such bodies are placed within scope, there is a significant risk of creating ‘double regulation’ whereby the new watchdog could undermine existing UK regulatory decisions and processes.

The power for the watchdog to make a “prominent declaration” in respect of the decisions of such bodies (even if not legally binding) could result in ‘regulation by media’ which, in turn, could increase regulatory uncertainty and risk with a resulting negative impact on UK investment.

We would however welcome further clarification on the intentions of the devolved administrations for their own environmental policies, post Brexit, in particular whether the devolved administrations choose to also fall under the remit of this proposed body. At the very least, we would welcome a level of consistency on environmental policies and enforcement across the UK.

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?**

Energy UK agrees that the international environmental agreements should not fall under the remit of the new body as these should already be covered by existing UK bodies. Currently, EU-derived environmental law, even once transposed into UK domestic law, remains under the jurisdiction of the EC and the CJEU. As such we would expect this legislation to be overseen by the new body on exit from the EU in keeping with our overarching principle of the new body solely replacing the European institutional deficit.

If subsequent experience shows that oversight of the international dimension to environmental law would be beneficial, then the scope of the body’s responsibilities can be reviewed at a later date.

12. **Do you agree with our assessment of the nature of the body’s role in the areas outlined above?**

Energy UK is in agreement with the assessment of the nature of the proposed body’s role in regards to climate change, fisheries and marine environment and agriculture.

We are concerned that, in the consultation document, several functions are being proposed for the watchdog that are independent of the immediate driver of Brexit and are driven instead by domestic UK considerations.
Given the scale of changes that will be required by the UK exit from the EU, it is important to consider whether each additional function for the new body is absolutely essential at this time or could be deferred subject to further review. All potential functions need to be subject to the same gap analysis test for the new body.

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

In principle, the planning role proposed in the consultation for the body, on ensuring the correct application of relevant environmental law within the planning system, is reasonable. However, we are concerned that this role could, in practice, extend beyond this very specific function, which could lead to duplication and conflicting guidance in relation to planning policy.

Planning policy is already very complex, with a large number of statutory bodies already involved. No evidence has been put forward to indicate there will be a significant gap in planning policy oversight after the UK exits the EU. We believe that this potential planning function needs more detailed scrutiny before a decision is made.

In addition, it is not clear to us that the EC and CJEU have existing responsibilities in this respect. If they do not, then this proposal does not meet the criterion of filling the institutional deficit left by Brexit.

Energy UK believes that existing mechanisms for advising on planning policy are sufficient, and that the new body’s role should focus on the Government’s implementation of the 25 Year Environment Plan.

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

Energy UK remains concerned regarding the resourcing of the proposed body. As is detailed above, ensuring that Defra and its agencies are appropriately resourced is a pressing concern for our membership.

If the UK is to adopt environmental principles in primary legislation, it is essential for these principles to apply universally across the UK. Otherwise, the different post-Brexit regulatory regimes across the UK will start with different expectations, which would likely lead to inconsistent outcomes. Such divergence will have negative impacts for both the environment and business confidence.

We support the consultation proposal that the new body’s remit does not cover matters related to climate change. In addition to the reasons given in the consultation, we would add that the nature of climate change impacts is fundamentally different to other kinds of impacts on the environment. Climate change impacts are global in nature, long term and not linked to particular sources of greenhouse gas emissions. Environmental impacts are generally of shorter duration and can be linked to regional, national and local scales of the source-pathway-receptor impact chain. The instruments to deliver climate change policy objectives are qualitatively different to those deployed to enforce environmental law. Consequently, a separate approach to climate change is appropriate.