

Response to the Environment, Food and Rural Affairs Committee and the Environmental Audit Committee Inquiry: Scrutiny of the Draft Environment (Principles and Governance) Bill

31 January, 2019

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 680,000 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 over £12.5bn annually, delivers around £84bn in economic activity through its supply chain and interaction with other sectors, and pays £6bn in tax to HM Treasury.

Executive Summary

1. Energy UK welcomes the opportunity to provide this submission to the Environment, Food and Rural Affairs Committee (EFrac) and Environmental Audit Committee (EAC) inquiry into scrutiny of the Draft Environment (Principles and Governance) Bill. 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.
2. 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. We are particularly concerned that the set-up of the Office for Environmental Protection (OEP) appears to be utilising staff from other agencies hence placing additional pressure on already stretched resources. We would therefore welcome careful consideration of how the OEP can be appropriately resourced with the required numbers of experienced staff, whilst also maintaining, and if possible, improving the level of resource available to the existing teams within Defra and its agencies.
3. It is also important to carefully consider the remit of the new organisation to ensure its scope and objectives are clearly defined. 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.
4. We would appreciate further clarification as to how the OEP, whilst being set up by and having its CEO appointed by Government, will be independent and able to perform its remit as a watchdog.

5. Energy UK would ask that risk-based regulation and proportional action be added to the set of environmental principles so as to avoid onerous obligations being placed on operators for little or no environmental benefit in practice.
6. There is also uncertainty as to the intentions of the devolved administrations for their own environmental policies, post Brexit. We would therefore welcome efforts from the UK Government and devolved administrations to work together to ensure a level of consistency on environmental policies and enforcement across the UK.
7. We would be happy to discuss any of the points made in further detail with the Environment, Food and Rural Affairs Select Committee or the Environmental Audit Committee if this is considered to be beneficial.
8. Should you have any questions regarding this consultation response then please do not hesitate to get in touch.

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

Response to Questions

Q1 Does the proposed constitution of the oversight body provide it with enough independence to scrutinise the Government?

9. It will be important the OEP acts objectively, impartially, proportionately, and transparently as stated in the Bill, but the mechanisms for this will need to be set out clearly to show that there is clear distinction between the OEP and Government, especially as the appointment of the CEO and members will be undertaken by Government. We therefore welcome the commitment of S.12.2 and 3 requiring the OEP to set this out in a clear strategy and suggest that consultation on the draft strategy will be important.

Q2 Does the proposed oversight body have the appropriate powers to take 'proportionate enforcement action'?

10. 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 European Commission can refer an offending Member State to the Court of Justice of the European Union (CJEU).

Q3 Are there any conflicts of interest or overlap with existing government bodies?

11. Until there is greater detail about the way in which the OEP will operate and at what point it will become involved, it is not possible to give a view on this question. This will only be possible with clear terms of reference on operating procedures from public authorities as well as the complaints procedures referred to in question 2 above.
12. Energy UK notes that article 17(3) of the Bill adopts a definition of "public authority" that is any "person carrying out any function of a public nature that is not a devolved function". This wide definition means that companies such as those in the energy sector could be subject to legal action by the proposed OEP.
13. Such companies are already regulated via bespoke environmental permits that are legally enforceable by the Environment Agency so the proposal must be such as not to create additional, and possibly conflicting, enforcement or complaint investigation powers by the OEP. Furthermore, there are private energy companies that solely generate electricity for sale in the wholesale market which is unrelated to public services.

14. In order to avoid unnecessary duplication, Energy UK strongly considers that private undertakings providing energy services should be expressly excluded from being regarded as 'public authorities' in the meaning of article 17(3) of the Bill.

Q4 As drafted are the principles legally enforceable? What will need to be included in the National Policy Statement to interpret the application of the principles?

15. 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.
16. Examples of this include the: implementation of the EU Eel Regulation; application of the Habitats Directive to coal and gas-fired power station emissions to air; interpretation of the Waste Directive and case law on the definition of by-products and waste recovery.
17. For this reason, in our view, a National 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. (See Question 7)
18. We also consider the following to be key guiding rules for the application of environmental principles in policy-making:
- a. An environmental principle cannot be considered in isolation from other principles or from wider regulatory principles.
 - b. Environmental principles act as guidance to policy-making, not as absolute or prescriptive rules.
 - c. No single environmental principle should be considered to have over-riding primacy over other principles or wider social and economic considerations.
19. While many of the principles set out in the Bill are welcome and should form part of the approach of all environmentally aware and compliant industries, we have some concerns about the application of the precautionary principle.
20. The precautionary principle is important but needs applying with care and not as a blanket provision. Marine industries have spent many years assessing any impacts which their activities may cause and working with many bodies to identify mitigation and compensation.
21. Using science and monitoring the impacts of development have been reduced or eliminated and more work is still being carried out. To ensure that proportionality is applied in licence determination, it is therefore essential that all this work and experience is properly applied before any application of the precautionary principle, which should therefore only be used as a last resort where there is no science or knowledge to call upon. Without this control there is a real danger that the precautionary principle is simply applied as a stalling mechanism rather than a truly effective environmental principle.

Q5 Are there any conflicts with other legislators or legislation, for example the Scottish Continuity Bill?

22. As with other questions, it is difficult to say with clarity whether there will be conflicts with other legislation or legislators as more information is needed on the way the OEP will work and the strategy and environment improvement plans which it is required to draft.

Q7 Is there anything else missing that should be included to meet the enforcement, governance and other gaps in environmental protection left by leaving the European Union?

23. For the reasons stated in answer to Question 4, we consider it essential that principles of best practice for the development of policy and regulation are also added to the set of environmental principles. Without these, policymakers will not have an integrated approach to the application of principles in the formation of policy.
24. We consider the following key principles of best practice to be most important in underpinning future environmental policy-making:
 - a. Evidence-based regulation principle – Decisions should be based on the best available scientific evidence.
 - b. Risk-based regulation principle – Decisions should be based on an assessment of the risk to the environment.
 - c. 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.
25. UK regulators have previously implemented a number of “Better Regulation” initiatives, although these have since been discontinued. We consider these previous initiatives to be a useful reference in developing best practice principles for regulation.