

Response to Welsh Government Consultation on Environmental Principles and Governance in Wales Post European Union Exit

7 June 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, who now make up over half of our membership.

Our members turn energy sources 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

Energy UK welcomes the opportunity to provide this submission to the Welsh Government's consultation on environmental principles and governance after Brexit. This response has been developed by our Planning Sub-Committee and Environment and Climate Sub-Committee.

We welcome the proposal to introduce the EU environmental principles that would not continue to be in place post EU Exit into Welsh primary legislation and recognise the value that this long-term measure could provide to Welsh Government, the environment and industry alike.

We welcome the opportunity for stakeholders to help shape the future direction of environmental compliance in Wales. Given the importance of this area, it is appropriate to consider this matter fully and we welcome Welsh Government's commitment to ensuring the process to develop a solution is fair, open and transparent for all stakeholders, is effective and proportionate in delivering strong environmental principles and governance arrangements; and also takes account of specific Welsh circumstances and established methods of accountability.

Although Energy UK recognises that the Welsh Government's starting point is different from that of the rest of the UK, we would encourage the Welsh Government to work with the UK Government, and the other Devolved Administrations, with a view to exploring the scope for a joined-up approach in this important area of environmental protection. From our viewpoint, we would welcome an approach that could offer a high level of consistency on environmental policies and enforcement across the UK in order to ensure a level playing field exists across the UK.

In this context, we would highlight the need to undertake a much more detailed gap analysis and mapping exercise to appraise the existing landscape and determine the various environmental governance mechanisms or gaps across the public sector that will be missing in Wales, and the UK as a result of leaving the EU, taking into account the wider sustainable development goals. A key objective of such a mapping exercise will be to ensure that the responsibilities and regulatory powers to be taken on by any new governance arrangements do not replicate and/or overlap with the existing

environmental responsibilities and regulatory powers of other public bodies such as Natural Resource Wales. In addition, the new arrangements or new oversight body should not replicate, but work in harmony, with the existing regulatory framework including the Well-being of Future Generations (Wales) Act and the Environment (Wales) Act.

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

Response to Questions

Question 1: Do you agree the following principles [Rectification at Source/Polluter Pays] should be included within legislation for Wales?

We welcome the proposal to include the principles of environmental protection within legislation. It is especially important to include the principles within Welsh legislation given the concerns expressed by MPs that the EU environmental principles may be weakened in UK law post EU-Exit. The energy sector in the UK has worked in alignment with the European environmental principles for some time, with these principles deeply embedded in the current legislative and regulatory framework – as an example the Industrial Emissions Directive is transposed into UK law via Permitting Regulations and is implicitly based on the EU Environmental Principles. We would therefore ask that the inclusion of these principles into legislation at a national level is done in a way that ensures the intended meaning of the principles as used in EU policy development is properly captured to ensure a consistent approach for industry.

Energy UK has concerns around the fact that it was unclear if the definitions for polluter and pollution are being considered in the wider context of use and depletion of natural resources to fit with the overarching sustainable development.

An issue raised in the 2014 'Utrecht Legal review of the Polluter Pays Principle'¹ highlights the issue of how multi-party causation is addressed. Although the Polluter Pays principle seems to provide an easy answer to the question 'who is responsible for the cost of environmental measures?' (i.e. the polluter), this easy answer might not be enough in cases where pollution is caused by a multitude of polluters. It may be sensible to consider that (inter)national environmental issues such as water pollution or air pollution, require a joint effort by all categories of polluters and a common governance approach across Devolved Administrations. It would be useful to understand how transboundary co-operation will be included within the implementation framework

Question 2: Do you think there are other principles, which may also need to be included?

Although environmental principles are important in providing a consistent framework, these need to be considered alongside other principles and wider social and economic considerations. Environmental policy-making needs to be evidence-based, risk-based and proportionate - taking into account the costs and benefits of a policy or regulatory proposal.

It might also be prudent to include international and national co-operation as a principle to assist policy formation.

Question 3: Do you agree the duty to pursue sustainable management of natural resources and the application of the SMNR principles should be extended?

Yes, Energy UK acknowledges that gaps would result from a transfer of responsibilities and would therefore support the extension of the duty to apply to additional Welsh public bodies in order to align objectives and provide a consistent basis for managing Wales' natural resources and enable collective decision-making.

¹ Lindhout, P.E. and van den Broek, B., 2014. The Polluter Pays Principle: Guidelines for Cost Recovery and Burden Sharing in the Case Law of the European Court of Justice. *Utrecht Law Review*, 10(2), pp.46–59. DOI: <http://doi.org/10.18352/ulr.268>

Question 4: On which Welsh public bodies, within devolved competence, do you consider a duty to pursue SMNR should apply?

Energy UK supports such a duty applying to all Welsh public bodies.

Accountability

Question 5: Do you agree with the gaps identified, or do you consider there are other gaps, which need to be considered?

Energy UK agrees with the gaps identified. Given that the EU Commission and CJEU will no longer be able to hold the UK or Welsh Government to account on environmental matters after the UK leaves the EU, we consider it important that any new governance structure has a remit to hold the Welsh Government to account. To meet this important responsibility, a new body would need to be fully independent, armed with the necessary powers and adequately resourced with funds and experienced staff.

The development of the new Welsh governance structure should be aligned with the development of the Office for Environmental Protection to ensure consistency across the UK.

We would however appreciate and welcome further clarification on transboundary consultation and how that will be implemented following exit from the EU.

Further consideration should also be given to establish cooperation arrangements between UK regulators and EU regulators, and to participate in discussions with key EU agencies in order to maintain high environmental standards.

Question 6: What role should existing accountability bodies provide in a new environmental governance structure for Wales?

Energy UK considers that existing accountability bodies based on primary legislation should provide either no or a limited role in a new environmental governance structure for Wales in order to avoid duplication.

Question 7: Is the outlined role and objective appropriate for a body responsible for overseeing the implementation of environmental law in Wales?

It is fundamentally important that additional governance arrangements have a clearly defined scope and do not duplicate or contradict existing arrangements. For example, the scope as described seems to overlap with some of the duties of NRW with regard to the implementation of legislation so new proposals will only work if some of the existing functions with NRW are transferred to any new body.

Question 8: Which policy areas should be included within the scope of new governance arrangements?

We agree with the proposed policy areas to be included and note that the scope of a potential additional governance body includes climate change (in contrast to the UK Government proposals for the Office of Environmental Protection). We agree that there are benefits in taking climate change drivers into account; it is fundamentally important that an integrated "joined up" approach is taken to different policy drivers. However, we would suggest that further consideration of the respective roles of the new body and those of the Committee on Climate Change is required to ensure there is not duplication.

Question 9: Do you consider the proposed list of bodies to be appropriate?

In our view the focus should be on replacing the accountability functions removed by the UK's exit from the European Union. As such the remit should be to hold Welsh Government, and the proposed list of bodies outlined in the consultation document, to account similar to the role undertaken by the EC. Including any other bodies should be carefully considered as it potentially duplicates existing responsibilities and does not align with the principles of good regulation. It could also increase regulatory uncertainty and consequently the appetite for investment.

Question 10: Do you consider there are other Welsh bodies, which should also fall within the remit of an oversight body?

In the interests of avoiding duplication of responsibilities and functions, Energy UK considers that there are no other bodies which should fall under the remit of an oversight body.

Question 11: What should be the status, form and constitution of an oversight body?

The oversight body should be able to scrutinise government and its performance in relation to all environmental law, including those laws that are brought into force at a future date.

However, an oversight body should not act as an enforcement body nor should it scrutinise new statutory proposals and policy on behalf of Government where there is direct conflict with its role. Clarity is needed on what such an oversight body could ultimately hold Welsh Government and bodies accountable for. Furthermore, strong links across all UK bodies will be key in order to achieve consistency across all regions of the UK.

Question 12: Should an oversight body be able to act in an advisory capacity?

A new oversight body could potentially act in an advisory capacity if the governance structure is set up in such a way to provide independent comment and does not conflict with its overall function and delivery of its role.

Question 13: Should an oversight body be able to scrutinise implementation of environmental legislation?

Currently, EU-derived environmental law, even once transposed into UK and devolved domestic law, remains under the jurisdiction of the EC and the Court of Justice of the European Union (CJEU). As such, we would expect this legislation to be overseen by new arrangements, such as an independent body, on exit from the EU in keeping with our overarching principle that any new arrangements should solely replace the European institutional deficit.

Question 14: What should be the extent of this function?

As flagged during the consultation phase leading up to the creation of the Office for Environmental Protection by UK Government, our members consider that any role created or new body should have legal power equal to that of the EU institutions it is replacing. As such, whether the Welsh Government decides to create a new function for an existing body or a new body entirely, both should have the ability to take Government to court, in the same way that the EC can refer an offending Member State to the CJEU.

Nevertheless, we consider that the scope of the proposed arrangement should be clearly set out in the new duty in order to avoid the risk of unintended 'regulatory creep'. The duty should specify a focussed and well-defined remit of any new scrutiny arrangements to hold Government to account whilst also ensuring certainty and stability for business.

Question 15: What powers should a body have in order to investigate complaints from members of the public about the alleged failure to implement environmental law?

It is also important that while appropriate open, fair and free of cost governance arrangements should be put in place to scrutinise and allow challenge of Government actions, these should not create a system that is open to misuse by individuals who disagree with a decision, as a means to frustrate development.

The oversight body should have discretion as to whether to act and need only act on a proportionate basis.

Question 16: What informal and formal methods of enforcement do you consider an oversight body should operate in order to delivery on its role and objectives?

Energy UK considers that any approach to enforcement must be focused, in the first instance, on the implementation of positive environmental outcomes. We would urge caution against any

method considering the use of fines against the Welsh Government, which could see communities suffer if measures are introduced to allow Government to recoup the cost of any fines, which ultimately see communities or society as a whole, paying for them.

With particular regard to enforcement, consideration should be given to the potential role of mediation and arbitration in order to drive a solution-based approach which delivers the best possible environmental outcomes which are deliverable within reasonable timescales. To this end, any enforcement action should be clear and have a set timeline, or at least confirmation of when an enforcement action is closed.

We would welcome the new body developing and publishing a policy which provides guidance of the types of cases it is likely to investigate and, if necessary, take enforcement action. This will assist in a greater public understanding of its role and focus.

Question 17: What enforcement actions do you consider need to be available?

It is suggested that as enforcement actions will be transferred in the first instance in the UK Withdrawal Act, these actions can be subsequently reviewed once transferred as to whether they and others need to be included.

Other

Question 18: Would there be advantages in having a shared core set of common environmental principles?

The electricity market operates across the UK as a whole and therefore we would encourage the Welsh Government to work with the UK Government, and the other Devolved Administrations, with a view to exploring the scope for a joined-up approach in this important area of environmental protection. From our viewpoint, we would welcome an approach that could offer a high level of consistency on environmental policies and enforcement across the UK in order to ensure a level playing field exists across the UK.

Question 19: What potential governance structures do you consider are needed to enable collaboration and collective decision-making to enable interface between administrations?

We strongly believe that, as far as is possible, UK-wide mechanisms for the application of principles and for oversight and governance would help with ensuring optimum environmental outcomes are achieved and delivered effectively and efficiently.

In our view, a single UK-wide oversight body would be fundamental in facilitating this. Although the Devolved Administrations have different legal structures, the oversight body could be designed to accommodate this and a single body would by definition ensure co-ordination. However, as a minimum, an individual body should work to ensure they act consistently.

For further information, please contact:

India Redrup
Policy Manager
Energy UK
26 Finsbury Square
London EC2A 1DS

india.redrup@energy-uk.org.uk

Andy Limbrick
Environment Consultant
Energy UK
26 Finsbury Square
London EC2A 1DS

Andy.limbrick@energy-uk.org.uk