



## **DEFRA consultation on environmental principles and accountability for the environment**

*Comments by*

**Sustainable Northern Ireland**

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Sustainable Northern Ireland (SNI) is a networking and support body for statutory and non-statutory organisations concerned with the pursuit of sustainable development in Northern Ireland. We work closely with councils to promote and deliver sustainable development policy and practice at a local level. Our work programmes encourage organisations to integrate the principles of sustainable development throughout their operations and business planning functions, and deliver bold and innovative projects to promote economic, social and environmental wellbeing. Sustainable NI, its Board of Directors and wider public sector membership brings together a range of knowledge, experience and expertise which is used to help develop policy, practice and implementation in the field of sustainable development.

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## Introduction

SNI is principally concerned with working to deliver a more sustainable future for Northern Ireland, which relies heavily on improving the environmental, social and economic wellbeing. This paper sets out our key concerns in relation to the DEFRA consultation on Environmental Principles and Governance and its implications for the future of environmental protection in Northern Ireland.

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### Key Points:

1. **A UK wide body should be jointly developed by all four regions of the UK.**
2. **The body should have a decentralised office based in Northern Ireland.**
3. **Northern Ireland should have its own Environment Commissioner that will liaise and advise members of the NI Executive and Assembly and other key stakeholders.**
4. **Objectives of the new body should include the promotion of north-south environmental co-operation and ensuring that the island of Ireland is treated as a single biogeographic unit.**
5. **Government must bring forward firm proposals for the application of Environmental Principles and Governance in Northern Ireland. Northern Ireland cannot be left in limbo whilst other parts of the United Kingdom move forward with new governance structures.**

## 1. Consultation falls short in a number of areas

We are concerned that the consultation falls short in a number of areas:

- **There will be a considerable enforcement gap** – the consultation envisages a new body with very limited powers, with no power to initiate legal proceedings.
- **People's access to justice is at risk** – the consultation does not enable citizen access to a complaints process; this would be a major shift from current arrangements and constitute a significant weakening of citizens' rights under the current EU governance system.

- **The exclusion of climate change will create a governance gap** – the proposed remit of the new body is to cover all domestic environmental law, except for climate change. Northern Ireland already suffers from a lack of local climate change legislation. The threats posed by climate change and the actions required to contribute to climate change mitigation and adaptation should underpin future environmental governance efforts.
- **Environmental principles will be watered down** – the consultation does not adequately support inclusion of environmental principles in legislation. Environmental principles must be enshrined in legislation and public authorities must be required to apply them.
- **The opportunity to set out environmental goals and objectives is missed** – the consultation mentions leaving the environment in a better state but does not propose to put this, or other broad objectives for nature’s recovery and a healthy environment, in the forthcoming Environment Bill.
- **The nature of the body is not discussed** – more clarity is needed on how the Government intends to ensure that the new body will be independent, robust and equipped with the necessary expertise and resources to provide fit for purpose and effective protection for the environment.

## 2. A Commissioner for Northern Ireland

Nature Matters NI endorse the idea of a single UK-wide body that has a strong local presence in Northern Ireland. This should include a NI-based Commissioner and office that will work with key stakeholders including the NI Assembly and Executive.

Northern Ireland is the only part of the UK that does not have an independent Environment Protection Agency. Therefore, the need for strengthening environmental governance and protection here is greater than in other parts of the UK.

The Commissioner should be appointed via an open recruitment process.

## 3. A UK-wide body

Most environmental issues are transboundary and can only be effectively addressed through coordinated action. Nature Matters NI recognises the important role of the existing common European framework of environmental legislation in facilitating cross-border work – especially on the island of Ireland – and ensuring a level playing field across the EU.

Similar common frameworks will be essential to maintain the UK internal market, facilitate cooperation between the four countries and avoid a deregulatory race to the bottom. A UK common framework of environmental legislation must be developed by all three devolved nations working

jointly with the UK government to set minimum standards. Individual countries should still be able to introduce higher standards and future changes to the framework must require the agreement of all four governments. This framework must be similar to the legislative framework that exists in the EU to ensure that cooperation on the island of Ireland is not disrupted.

A UK-wide body would have several advantages:

- A single “co-owned” body would be more durable and resilient than an England-only body and/or four individual bodies (depending on the political process to agree its formation and the legal means of its ‘birth’).
- It would be easier within a single institution and common approach to enshrining principles to achieve consistency in policy implementation. This in turn would help standardise environmental outcomes for citizens and provide a greater degree of clarity for business. It would also help create a level economic playing field.
- It could develop deeper expertise than four separate bodies. The body would benefit from the pooled expertise and evidence resources of the four regions, which would be particularly advantageous to Northern Ireland.
- It would be well positioned to manage transboundary environmental issues.
- A single body would be more cost effective than four separate bodies.
- The UK will need a strong governance architecture to give trade partners, and signatories of other international treaties, (including of course the EU) confidence that we will meet agreed environmental obligations and outcomes.

#### **4. Promoting north-south co-operation and common governance**

Nature Matters NI welcomes the recognition in the consultation document (paragraph 13) that the environment does not respect boundaries, and that a joined-up approach between UK regions would be beneficial.

This argument is even more important in the context of Northern Ireland in terms of north-south co-operation on the island of Ireland.

The Republic of Ireland will still be operating under the EU framework and if Northern Ireland has a significantly different legislative framework, or lower standards, it will be harder for us to work cooperatively to protect our shared environment. A UK-wide body should have within its core objectives the promotion of north-south environmental co-operation and ensuring that the island of Ireland is treated as a single biogeographic unit.

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

**Question 2: Do you agree with these proposals for a statutory policy statement on environmental principles (this applies to both Options 1 and 2)?**

**Question 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)?**

Environmental principles provide important foundations for the construction, application and interpretation of environmental protections. Internationally recognised principles have underpinned the development of policy and legislation in EU Member states. It has required the UK government to ensure that their environmental policy incorporates consideration of these principles throughout the law and policy making process over the last 40 years. The Government must ensure that environmental principles remain a significant part of domestic law and continue to help shape UK environmental protections (including at devolved level) following the UK's exit from the EU.

The Government has committed to ensure the whole body of EU environmental law continues to have effect in the UK and this must include the EU environmental principles. However, the current proposals on environmental principles are inadequate to replicate the existing arrangements, let alone provide stronger protection.

Key recommendations include:

- Ensure that environmental principles have a firm **statutory footing**. This requires principles to be enshrined in primary legislation enabling general applicability and the establishment of concrete legal standards.
- **A policy statement** should be co-designed and co-owned by the four nations of the UK. This statement will allow for more guidance to be provided on how to apply the principles in the devolved contexts.
- The primary legislation should create **strong corresponding statutory duties on public authorities** to ensure that the principles are central to public decision-making and that failure in this regard can be challenged. This will give the principles a guiding force across environmental policy and decision-making.

### **Statutory Footing and Corresponding Policy Statement**

A non-exhaustive list of environmental principles must be included in the statute to ensure certainty, general applicability and permanence. A policy statement should elaborate the meanings and applications of the principles, providing guidance regarding their application in certain policy areas.

Environmental principles should as a minimum include:

- Polluter Pays Principle
- Precautionary Principle
- Prevention of Pollution at the source
- Promotion of sustainable development
- Integrating Environmental concerns into other policy areas

The legislation enshrining the environmental principles in law should require the Government to publish an environmental principles policy statement providing robust guidance and direction as to the meaning and intended application of these general principles. The statement should be co-designed and co-owned by the four UK governments and laid before the four UK parliaments and devolved Assemblies.

## **Corresponding Duties on Public Authorities**

The proposal for a statutory policy statement on environmental principles is welcome but this is not enough to replicate the current role that the principles play. The primary legislation should establish strong duties on public authorities to ensure that the principles and the guidance included in the statutory policy statement are central to public decision-making and that any failure in this regard can be challenged. This requires the creation of two separate duties that reflect the different characters of the principles and the policy statement, such as:

- a duty to have special regard for the principles themselves; and
- a duty to act in accordance with the policy statement.
- a duty to report compliance with the policy statement.

These duties will inevitably give some discretion to decision-makers given the general nature of the principles and the policy statement, but should be as strong as possible, giving significant legal weight to the principles. This is needed to ensure that the environmental principles play a central role in environmental law and management. Anything less would be a weakening of the current arrangements.

To help ensure compliance with the duties attached to the principles and policy statement, the legislation establishing them and the related duties should give standing to citizens and stakeholders to challenge decisions on the basis of their compatibility with the principles.

In addition, the new oversight body should be tasked with monitoring and enforcing the application of the environmental principles in the UK and empowered to investigate public authorities on the basis of a failure to comply with the duties attached to the principles and the policy statement. This is additional to and not in place of the right of public challenge to these duties by judicial review.

## **The Aarhus Convention**

The UK government has committed to promote the principles contained in the Convention. The Convention should be referred to in future post-Brexit legislation as an indication that the government is reaffirming its commitment to the objectives of Aarhus and the three pillars; access to information, public participation in decision making and access to justice.

## **Environmental Non-Regression Principle**

The White Paper on the future relationship between the EU and the UK has suggested that the government is prepared to agree to a non-regression principle in relation to environmental standards. In practice this would mean that both parties would agree to commit to maintaining common standards.

We welcome the fact that this has been included in the White Paper and wish to see this included in the legislation. This is an important baseline, however we believe that the UK and NI can be more ambitious and should pursue higher environmental standards than the EU.

## **Cross-border co-operation Principles**

There is a serious risk that Brexit will weaken the current level of environmental co-operation between NI and ROI. We do not want to see co-operation in this area fall below the current baseline. We wish to see the inclusion of cross-border co-operation principles in legislation and these should operate in conjunction with the Aarhus principles to facilitate engagement by those who live outside the UK.

## **Addressing the Legislative Gap in NI**

This response recognises the importance of having a UK wide body jointly developed by all four regions of the UK, with a decentralised office based in NI. A single UK wide institution should pursue a common approach to enshrining principles to achieve consistency in policy implementation. This would help standardise environmental outcomes and provide a greater degree of certainty for business. It would also help create a level economic playing field.

We are encouraged that the Permanent Secretary of the Department for Agriculture, Environment and Rural Affairs<sup>1</sup> has welcomed the offer to engage with the UK government to co-design proposals for a new environmental body and principles that work across the UK. He rightly points to concerns regarding the loss of EU procedures for holding government to account, and the heightened relevance

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<sup>1</sup> <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/environmental-audit-committee/environmental-principles-and-governance-consultation/written/86314.html>

of this issue in NI given the historical absence of an independent environmental regulator and the lack of a marine management organisation or equivalent.

However, given the ongoing political impasse in NI, it is not clear how the UK government will ensure environmental principles are given sufficient legislative footing in Northern Ireland after UK withdrawal from the EU. Northern Ireland also has a governance and scrutiny gap in terms of the Council for Nature Conservation and the Countryside (CNCC) being an advisory body without the support of researchers as is the case for the equivalents in Natural Resources Wales, SEPA, and SNH and Marine Scotland, Environment Agency and Marine Management Agency in England and JNCC. There is also a lag in achieving the Government's own targets within the Programme for Government in the latest Environmental Statistics Report<sup>2</sup> including:

- Six out of nine designated shellfish water protected areas (SWPAs) did not comply with the Water Framework Directive guideline E. Coli standard in Shellfish Flesh in 2017
- In 2016/17 the proportion of land area under favourable management was 0.18%,
- 2016/17 the proportion of marine area under favourable management was 4.48%.

It is essential that the UK government offers clear direction on how legislative provisions will be progressed in Northern Ireland. Legislative provisions underpinning the operation of EU environmental principles must be applied across the four UK jurisdictions to ensure a level playing field for stakeholders and to uphold UK environmental standards and actually hold Governments to account in achieving their own goals.

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

According to the report, *UK Environmental Policy Post-Brexit: A Risk Analysis*<sup>3</sup>, there are likely to be significant gaps in environmental governance mechanisms under every plausible Brexit scenario. Gaps have been identified in the regulation of, *inter alia*, energy, climate change, air quality, water, waste, nitrates, food and animal welfare standards, fisheries, and habitats and birds. The difficult issue of the Irish border remains unresolved and raises questions of transboundary movement of waste, and pollution.

We recommend that all the environmental governance protections offered by membership of the EU be fully implemented post-Brexit. This must include non-regression on existing protections and an

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<sup>2</sup> [https://www.daera-ni.gov.uk/sites/default/files/publications/daera/ni-environmental-statistics-report-2018\\_1.pdf](https://www.daera-ni.gov.uk/sites/default/files/publications/daera/ni-environmental-statistics-report-2018_1.pdf)

<sup>3</sup> <https://friendsoftheearth.uk/brexit/uk-environmental-policy-post-brexit>

environmental advancement principle to ensure environmental protection keeps pace with advances in scientific understanding.

**Question 5: Do you agree with the proposed objectives for the establishment of the new environmental body?**

Yes, however the new body should have a UK-wide remit, with satellite agencies responsible for scrutinising the devolved authorities. This is particularly important in Northern Ireland where there is no independent environmental protection agency, and a history of systemic failure of environmental governance. This systemic failure has been well documented<sup>4</sup>.

To ensure the new agency is an effective one, we propose two additional objectives:

- having the power to take legal action against all public bodies, including issuing fines to enforce environmental law; and
- having a mechanism to enable citizens to bring complaints concerning breaches of environmental law.

The primary function of the new body should be to operate as an enforcement mechanism for breaches of environmental law. Without the powers, functions and resources required to deliver that remit, the new body will not be able to operate effectively. This is distinctly separate to developing and issuing advice to the government. Therefore, the body should receive government reports, review government plans and monitor government progress in meeting emissions targets and other environmental standards. The body should also have the power to issue legally binding enforcement notices if the government fails to meet its targets. This should operate as a precursor to the ability of the watchdog to impose fines in the event of government non-compliance. Crucially, the body must also emulate the complaint handling powers of the EU Commission, which currently investigates complaints from both citizens and organizations in relation to breaches of environmental law and standards.

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<sup>4</sup> Ciara Brennan, Ray Purdy and Peter Hjerp “Political, economic and environmental crisis in Northern Ireland: the true cost of environmental governance failures and opportunities for reform” NILQ Vol 68 No 2 (2017).

### **Case Study: Waste management and the Irish border**

Cross-border cooperation after Brexit also requires cooperation on tackling environmental crime. Such cooperation currently exists between Northern Ireland and the Republic of Ireland – this provides both an example for future cooperation within the UK and raises concerns about how cooperation across the Irish border is to be maintained.

Differing rules and costs for waste management between NI and ROI have fuelled waste smuggling in the past: a price-hike for landfill costs in ROI in the early 2000s led to an estimated 250,000 tonnes of waste being illegally dumped in Northern Ireland. A cross-border repatriation plan was established under the auspices of the 2006 EU Shipment of Waste Regulation was to be completed by 2018. Illegal waste shipment across the border continues however and is likely to increase after Brexit as any divergence in waste rules between the two jurisdictions would create new opportunities for smuggling and fuel laundering, while reduced tools for cross-border cooperation (such as the UK leaving the European Arrest Warrant scheme) would make it harder to tackle illegal activities at the border.

This also matters within the UK. After Brexit, waste management and shipment are listed by the Cabinet Office as requiring only non-legislative frameworks. This raises the possibility of greater divergence in waste policy between the four nations, which could lead, as the NI-ROI example illustrates, to private actors abusing the system and increases in waste crime (including cross-border) within the UK.

Such cross-border issues would be easier to address with a co-designed UK-wide body rather than having separate systems of governance that will more likely lead to greater divergence and therefore increasing the risk of adverse waste management outcomes.

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

A YouGov / Friends of the Earth survey found that 83% of people in GB want the same or greater levels of environmental protection after the UK leaves the EU<sup>5</sup>.

Whatever functions the new body has, it must, at a minimum, ensure the same standards of environmental protection as we currently have.

In addition to the scrutiny and advisory role mentioned in the consultation, the new body should have an evidence and assessment role in order to advise government and the devolved authorities about likely scientific changes. The new body should be proactive in advising government and the devolved authorities, rather than simply reacting to changes.

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

The new body should be able to input and report on key environmental policies and it must have sufficient resources to carry out this function effectively.

At the moment, we have no draft proposals for a 25 Year Plan in Northern Ireland. However should one be adopted in the future by Minister(s) it is important that reference is made to a potential Plan in this legislation and the fact that Government, the Executive and public bodies should be held to account for its implementation.

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<sup>5</sup> <https://www.foe.co.uk/sites/default/files/downloads/yougov-survey-brexit-environment-august-2016-101683.pdf>

### **Case Study: Strangford Lough Horse Mussels complaint to European Commission**

The case of Strangford Lough Horse Mussels (*Modiolus*) shows a clear dereliction of the Government of the time to implement the recommendations. Two complaints, the first in 2003 and the second in 2011, by Ulster Wildlife were both upheld by the European Commission. The Northern Ireland Audit Office was damning in its report of the Government's slow response. There is a critical need to be able to hold Government to account and not rely on internal policing. If this case had been taken via Judicial Review there would have been a high cost to the charity.

### **Question 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?**

Yes. The new body should provide the same opportunities to submit environmental complaints and concerns as currently exist within the EU.

However, we would like to see the body go much further than this. This will be an essential part of a number of steps the Government must take if it is to meet its objective "to be the first generation to leave the environment in a better state than that in which we inherited it."

At the moment, the European Commission monitors the implementation of EU environmental laws. When appropriate it then brings forward cases to the Court of Justice of the European Union. The Court delivers rulings on the interpretation of EU environmental law.

It is essential that members of the public and civil society have recourse to a free, accessible, relatively quick and effective mechanism for ensuring that public bodies comply with environmental law.

Anyone should be able to lodge a complaint about what they see as a breach of environmental law. Those that lodge a complaint should not have to demonstrate a formal interest in the matter.

As with any complaints process, effective communication with the complainant is important. If the body proposes not to pursue a complaint then the complainant should be informed of this formally with the opportunity to make comment in response.

The body should publish the criteria it follows when deciding which complaints to pursue.

Complaints should be dealt with within 2 years of being received.

Northern Ireland remains one of the only parts of the European Union that does not have an Independent Environmental Protection Agency. It is crucially important that we have an environmental body in place post-Brexit that is independent of government, given that we are starting from a governance baseline much lower than other parts of the UK.

**Question 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?**

Yes. Advisory notices by themselves will be too weak to properly ensure compliance with environmental law by public authorities.

Thus, some form of binding legal power will be needed if (i) the existing functions of the EU are to be replicated, (ii) the UK is to establish a 'world-leading' watchdog and (iii) the watchdog is to be effective in its mission to ensure legal compliance.

Monitoring and enforcement of the environmental law commitments the UK signs up to in any future agreement with the EU will require a mechanism that is at least equivalent in terms of its effectiveness to the functions currently performed by the Commission and EU agencies.

The new body must be able to initiate legal proceedings, and to intervene in proceedings brought by others where appropriate. The proposal to issue advisory notices is welcome, but no replacement for legal proceedings. The consultation raises the prospect of the body being able to issue binding notices, although little detail is provided on how these would work or in what circumstances they might be justified.

Without the watchdog having the power to initiate actions before the courts this would leave enforcement before the courts to judicial review by individuals and stakeholders which would be seriously challenging and costly.

**Question 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?**

Environmental policy is frequently enforced on the ground by local government and public agencies – this needs to be reflected by the scope of the new body. All public authorities should be within the scope of the new body, to avoid gaps in environmental protection.

Including local (and devolved) government as well as agencies can foster comparison between different parts of the UK and policy learning to better implement environmental policies.

**Question 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?**

**What subject matter should the new environmental body cover?**

It can be very difficult to distinguish between obligations stemming from international law, EU law or domestic legislation as they often overlap – for example on protection of biodiversity, mitigating climate change or delivering access to information and justice in environmental matters.

As such, to deliver world leading environmental policy, it makes sense to include all environmental policy – irrespective of its origin – in the remit of the new body.

**Question 12: Do you agree with our assessment of the nature of the body's role in the areas outlined above?**

There are clear overlaps between agriculture, fisheries management and the environment. The inclusion of agriculture and fisheries is therefore welcome. But there are also strong overlaps and sometimes tensions between climate change adaptation and mitigation and environmental protection. As such, in line with advice from the UK Climate Change Committee, climate change should be integrated within the new body's remit.

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

Land use and planning are critical to environmental protection – or destruction. Planning decisions which respect environmental principles are likely to face less opposition from the local population, improving the quality of the planning process.

Redesigning environmental governance in the UK after Brexit is a key opportunity to break down the silos inherited from EU membership – planning, environmental protection, agriculture, fisheries, climate change kept separate - and design a new body which could oversee all these areas and the tensions between them.

Northern Ireland's Planning Appeals Commission and Water Appeals Commission are not specifically focused on environmental issues and do not have the technical knowledge for complex environmental issues. Therefore decision-making, including those made in the marine environment, needs additional capacity to increase the expertise informing those decisions.

The new body should also be able to advise on subsequent iterations of marine spatial plans. The new body should advise on tiered policies such as coastal policies. It is our recommendation that a tiered policy approach is included to move towards a truly holistic form of environmental governance.

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

We believe that Northern Ireland should have its own Environment Commissioner. This is especially important given the fact that NI has the lowest baseline of all 4 UK regions when it comes to environmental governance and accountability. Northern Ireland, along with Greece, holds the unenviable status of being the only parts of the European Union without an independent Environment Protection Agency

The Commissioner will represent the new body / watchdog and will liaise with and advise members of the NI Executive and Assembly and other key stakeholders. The Commissioner will ensure that environmental legislation in Northern Ireland is implemented and that environmental principles are enforced.

The environment does not respect political borders. This means the new body will have to tackle issues that go beyond geographical borders – e.g. English pollution in Wales or vice-versa.

The new body is being developed for England – but we need UK-wide solutions to the forthcoming environmental governance gaps after Brexit. This means either 4 bodies, a UK wide body or a mix of both: such as a 4+1 model where 4 offices tackle governance issues specific to their own regions and the UK wide level tackles reserved matters, transboundary issues etc.

The powers of the new body will further depend on policy arrangements within the 4 nations – from legislative framework to no framework. The common frameworks discussion needs to feed into the governance discussion: what governance tools do we need across the UK to ensure clean water, air etc. and what does this entail in terms of UK-wide frameworks?

Finally, as identified in the frameworks discussion, NI is currently cooperating with ROI on a number of environmental issues – this is likely to require specific governance arrangements to underpin continued cooperation after Brexit.

This submission serves only to offer some limited comments on the plethora of issues to be considered in depth as part of a review of environmental governance in the UK. We would be pleased to provide additional opinion if it will be helpful.

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