

## **Defra Consultation on Environmental Principles and Governance after EU Exit**

*This submission is on behalf of the Marine Conservation Society (MCS). For over 30 years, the Marine Conservation Society (MCS) has been the leading charity in the UK working solely to protect our seas, shores and marine life. Our vision is for seas full of life – where nature flourishes and people thrive. Our mission is to make political, cultural and social change for healthy seas and coasts that support abundant marine wildlife, sustainable livelihoods and enjoyment for all.*

### **Response to questions 1-3**

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

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

**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?**

Whilst the current system is not perfect, the European Commission (EC) and the Court of Justice of the European Union (CJEU) have strong enforcement powers available to them by way of infraction proceedings and fines against Member States in breach of environmental laws.

The marine environment, and the environment generally, often lacks a representative voice – relying on environmental NGOs and dedicated individuals to stand up and make a case when public bodies are not complying with the law. Projects or damaging activities can go ahead because public bodies have access to resources and expertise and can argue a case “all the way” whereas an individual or NGO may run out of funding or personnel resource. Often the environment is seen as an inconvenience, a hurdle which must be overcome or mitigated against in order to proceed with a project or activity. In order to protect against this “box ticking” it is vital that the current environmental protections are not watered down as a result of EU Exit.

MCS would like to see protections strengthened so that governments and public bodies can be held to account if they are in breach. In order to achieve this, environmental principles must be on the face of primary legislation as in Option 1 on page 7 of the consultation. As a minimum, MCS would like to see the nine environmental principles listed at section 16 to the European Union Withdrawal Act 2018 underpinning future policy-making<sup>1</sup>. If the Government is serious about its ambition to leave the environment in a better state than it inherited it then there are other environmental principles which could also be included in the Environmental Principles and Governance Bill. This could include the non-regression principle which would ensure that there would be no weakening of environmental standards in law, the “no deterioration” principle in the

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<sup>1</sup> <http://www.legislation.gov.uk/ukpga/2018/16/section/16/enacted>

Water Framework Directive, the no-harm principle and the principle that animals should be recognised as sentient beings.

It is also important that the “proportionality principle”, a current general principle of EU law, is correctly implemented and that the approach suggested in paragraph 40 of the consultation document is revisited so as to ensure that there is not too much weight placed on “*national priorities, such as economic prosperity and job creation*” at the expense of environmental considerations.

A policy statement alone will not be sufficient as it can too easily be ignored by a public body which is determined to press ahead with a particular course of action (or inaction). Principles must be included on the face of legislation and legislation must achieve the following:

- Environmental principles should apply to all non-governmental public bodies and bodies performing public functions as well as to government departments. If the principles were only to apply to government bodies this could lead to a situation where other bodies, such as local authorities, could introduce their own policies without having considered or having applied the environmental principles.
- Environmental principles should be used to guide decision making across government and public bodies. If the government only has to “have regard to” an environmental principles policy statement (as is currently proposed in the consultation) then it could allow government to say that it has considered the environmental principles but has decided against prioritising them in favour of other pressures (such as trade). The legislation should include a stronger duty such as it being unlawful to act in a way which is incompatible with an environmental principle (as set out in the Human Rights Act s6(1)). In addition, it should apply to individual decisions and not just to policy making.
- Environmental impacts in the marine environment cross boundaries and so it is important that there is genuine co-development and co-design in relation to embedding environmental principles on the face of legislation across England and each of the devolved administrations. To date engagement and collaboration has been poor.

#### **Question 4**

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

The EC and the CJEU have performed important functions in enforcing EU environmental law against member states and it is important that these functions are not weakened after EU exit. An example of this “governance gap” and the impact on the marine environment is in relation to the proposed Fisheries Bill. MCS is pressing for environmental principles (such as the precautionary principle and best available scientific evidence) to be included on the face of the bill itself rather than transposed as secondary legislation - the regulations currently in the

Common Fisheries Policy will become statutory instruments (SIs) in UK law. As SIs it is possible for the existing regulations to be abolished or watered down by future governments without parliamentary scrutiny. Having environmental principles on the face of primary legislation will help to maintain and strengthen environmental protection after EU Exit.

Whilst the current system should not be weakened and the new environmental body should be expected at the very least to provide the same level of environmental protection as currently available, it should be noted that it can still be remarkably difficult for an individual or an environmental NGO to bring enforcement proceedings against a Government or public body which is in breach of environmental laws. Whilst lodging a complaint via the EC website is not of itself complicated, the ensuing process can be complex, costly and most importantly, can take a very long time. Where environmental damage is being caused in a Marine Protected Area (MPA), if the process of enforcement takes a long time then the damage can be done before the body in breach is held to account or made to comply. The judicial review process is available in the UK courts, however, this is costly, time limited and subject to constraints such as applying only to a particular decision and subject to appeal.

In particular, it is important that the following functions are replicated by the new body:

- The EC regularly reports on information provided by Member States in relation to what measures have been implemented in order to achieve the objectives of EU laws. Committees (made up of representatives of the Member States) known as “comitology committees” are set up to assist the EU Commission with evidence gathering and to help to identify measures which need to be taken in order to comply with the objectives of a directive. There is a comitology committee on the Marine Strategy Framework Directive.
- Expert groups advise the EC on how to implement policy.

The new body should also have the ability to gather technical information and report to the public on compliance with environmental law and to identify problems and progress complaints as required.

As currently proposed the new body will only have power to issue “non-binding advisory notices” to central government departments – this is a significant weakening of powers in comparison to the current ability of the EC to issue a formal notice to a member state giving the member state a fixed time to comply with environmental law and can then refer cases to the CJEU. It is vital that the new watchdog has the power to do more than just issue advisory notices. It must also have the power to issue legal proceedings, intervene in legal proceedings brought by others and other enforcement remedies should also be considered, such as restorative orders.

Binding notices are proposed in the consultation document but without any detail about how this would work. If the new body were to have the power to set out steps which need to be taken to remedy a breach of environmental law and then to have the power to enforce in court in the

case of non-compliance, then binding notices could be effective. The same would apply to the suggestion of environmental undertakings – they would only be effective if the body has the ability to enforce them through the courts in the event of non-compliance.

#### **Question 5**

##### **Do you agree with the proposed objectives for the establishment of the new environmental body?**

Whilst MCS agrees with the proposed objectives for the new environmental body, its remit should not be limited to central government but must be widened to include all public bodies. The body should have the power to scrutinise, to pursue complaints and to enforce in the case of breaches of environmental law.

It is also vital that the new body is independent of governments otherwise there is a risk that it could be abolished by future governments, become too close to, or fall under the control of a particular government department. It should be appointed by and accountable to Parliament.

The body must also receive adequate ring-fenced funding, in a similar way to the National Audit Office model and a body of parliamentarians should set the budget and scrutinise its performance. Members of the body must come from a variety of backgrounds and expertise (legal, technical experts from a range of scientific disciplines, economists, etc.).

#### **Question 6**

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

Yes it should have the ability to scrutinise the Government and public bodies' compliance with environmental law and it should also have the ability to publish guidance on compliance with environmental law as the European Commission does.

#### **Question 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?**

Yes the new body should have the ability to scrutinise, advise and report, although it must also be able to enforce in the case of breach of environmental law. The new Environment Act could provide the basis for the 25 year environment plan targets to be enshrined in law and enforced by the environmental body in the case of non-compliance.

#### **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 absolutely. The complaints process must be simple, free and accessible (e.g. via a website as for EC complaints) with a robust and transparent process and agreed outcome. The body should have the remit to investigate and pursue complaints without cost to a member of the

public who makes a complaint. Following EU exit, if the ability to make a complaint to the EC is no longer available, the only option for a member of the public or NGO which considers that there has been a breach of environmental law will be judicial review (JR). It will be insufficient and unfair for JR to be the only mechanism available to the public. The environmental body's remit should extend to non-compliance with environmental law by all public bodies, not just government, and should include the ability to pursue complaints, investigate and enforce.

### **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?**

Advisory notices alone are unlikely to provide a strong enough deterrent to breaches of environmental law by governments or public bodies. Advisory notices can be used as a useful first step, but in the event of non-compliance the body must have the ability to commence legal proceedings and to step in to existing legal proceedings.

JR proceedings should not be the only legal action available. JRs are often costly to the individual or an NGO and the process can take time and resources which an individual or NGO may not have. Governments on the other hand are very well resourced to fight a JR challenge. In recent years the accessibility to the JR process has been undermined by the introduction of the ability to vary the "default cap" which restricted the costs for an individual to £5,000 and for an organisation to £10,000. In addition, a claimant is only able to recover £35,000 of their legal costs in the event that they win a JR challenge. The time limit for bringing a JR has also been reduced to just 6 weeks, court fees have doubled and legal aid is much harder to access. The result is that JR cases can often be too risky and too costly for a claimant to proceed with. The other flaw with the JR process is that it is a challenge to an individual decision of a government body – it often does not look at the "merits" of a decision but rather focuses on whether a public body has acted unlawfully and the threshold to be reached is very high and difficult to reach. Often the outcome will be that the public body will simply make the same decision again but without the procedural irregularities.

The new body should have a full "toolkit" of enforcement measures available to it. Other enforcement mechanisms which could be made available to the new body are:

- Binding notices – as mentioned above – which would set out the steps that are to be taken to achieve compliance along with the ability to enforce in the courts in the case of non-compliance;
- Environmental undertakings – as mentioned above – again with the ability to enforce in court in the event of non-compliance;
- Fines – although it is important that any fines are sufficiently high to provide a deterrent and not simply seen as "the cost of doing business";
- Restoration orders – this could be a more effective way than fines of ensuring that damage to the environment is stopped and restored;
- Injunctions – mandatory injunctions for non-compliance could be considered.

Some practical examples of the issues which can arise following non-compliance with environmental law are set out below.

### **Case Study - Enforcement in a Marine Protected Area**

MCS has direct experience of challenging public bodies to ensure compliance with environmental law. In 2006, MCS challenged the lack of action being taken to ensure that fishing did not damage Marine Protected Areas (MPAs). After an exchange of strongly worded legal letters by MCS and Client Earth to Defra and others, Defra agreed to implement new rules to manage fishing in MPAs through new by-laws. Whilst this particular complaint was successful, it is important to note that a system change was effectively an “easy win” for Defra when faced with the alternative of a possible court battle. Enforcement action becomes much harder where a determined Government or public body is insistent on carrying on with a particular project or activity and has resources and personnel at hand to fight any judicial review challenge. This is why it is important to provide the body with the option of using various enforcement measures.

In addition, MCS has seen many instances where damaging development or activity goes ahead in an MPA because the “reasons of overriding public interest” clause in the Habitats Directive is invoked. At the moment the EC can step in with the threat of fines or infraction proceedings which can be an effective “stick” to ensure enforcement by a member state. If we lose this recourse our environment will inevitably suffer as a result.

### **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?**

As mentioned above, the new body should not only be able to hold national government directly to account but its remit should be extended to breaches of environmental law by all public bodies and bodies performing public functions. As currently proposed, the government would be required to take enforcement action against other public bodies for breach of environmental law. This is likely to be ineffective and complex for already stretched government departments, and it should be up to the environmental watchdog – rather than central government – to investigate compliance and ensure enforcement to remedy breaches by all public bodies.

### **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?**

No, the body should have the power to make a complaint where a government body is in breach of an international environmental agreement as well as in relation to domestic environmental law.

### **Question 12**

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

No the body should be able to enforce all environmental law. This should include under the Climate Change Act (the Committee on Climate Change currently has no enforcement powers).

**Question 13**

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

Whilst it is not anticipated that the new body would get involved in the review of individual planning decisions, it should be able to take enforcement action where major planning decisions or future planning strategies are non-compliant with environmental law. The new body should be able to advise on planning policy and whether it is compliant with environmental law.

**Question 14**

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

The Environment Act should ensure that environmental principles are incorporated into primary legislation and should give legislative underpinning to the government's 25-year environment plan. It should also ensure that the government is in compliance with its international obligations under, for example, the Aarhus Convention.

It is also important to ensure that the government works more closely with the devolved administrations to aim for a cross-UK approach to environmental protection and conservation and that such an approach respects the devolution settlements. The new body could be co-designed and co-owned by the four UK nations with national offices to ensure effective accountability at a local level – in a similar way to how the Equalities and Human Rights Commission operates across the UK. Funding could come from all four parliaments.

To date we are aware that consultation between the four administrations has been limited and it is vital that the levels of engagement between the governments are increased and improved. The four governments worked together and signed up to the UK Marine Strategy and UK Marine Policy Statement and a similar joint working approach should be taken with the design of the new environmental body.