



DEFRA CONSULTATION

**ENVIRONMENTAL PRINCIPLES AND
GOVERNANCE AFTER THE UNITED KINGDOM
LEAVES THE EUROPEAN UNION**

**RESPONSE BY THE
AGRICULTURAL LAW ASSOCIATION**

1 AUGUST 2018

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1.0 The Agricultural Law Association

1.1 Background

The Agricultural Law Association ('the ALA') was formed in 1976 and is the UK's largest inter-professional organisation devoted to the law and business of the countryside.

We focus on the law in a non-partisan, apolitical way in order to promote its knowledge, understanding and development among those who advise rural businesses.

The ALA has over 1370 members across the legal, surveying, accountancy, farm business consultancy professions together with academia and members with specific expertise in international trade and investment; with all principal professional firms and, uniquely, all other principal member organisations within the agriculture sector represented within the membership.

We are a member of the following current sector cross organisation groups in the UK:

Tenancy Reform Industry Group
Agricultural Representatives Bodies Group (Taxation)
Scottish Land Commission – Tenant Farming Advisory Forum
Land Partnerships Service – National Advisory Group

We are also the largest member association of the European Council of Rural Law.



1.2 OUR RESPONSE

This response is submitted on behalf of the ALA and its members and we look forward to working with DEFRA and other Government agencies and sector organisations on continued discussions on policies governing the environmental principles and accountability for the environment.



PART 1: ENVIRONMENTAL PRINCIPLES

2.1 The Environmental Principles ('the Principles') and Legal basis and intended effect

- 2.1.1 We note the Consultation sections on Principles in International Law, in European Union law and policy and in national law and policy.
- 2.1.2 We also note that Consultation proposals for a Statement of environmental principles as being central to government policy, with the Statement offering the creation of a new and comprehensive Policy Statement setting out the Principles, which we support to provide clarity and consistency of the Principles that will apply after the United Kingdom ('UK') has left the European Union ('EU').
- 2.1.3 At the time this Consultation was published, the EU (Withdrawal) Bill was still passing through its Parliamentary stages. Subsequently, the Bill stages have now been completed and Bill has now received Royal Assent. We therefore refer to the European Union (Withdrawal) Act 2018 ('the Act') in our Response.
- 2.1.4 The Consultation provides two alternative options under para 29.
- 2.1.5 With reference to these options and to Section 16 (1) of the Act, '*the Secretary of State must, within the period of six months beginning with the day on which this Act is passed [i.e. by 26 February 2019] publish a draft Bill [an Environmental Principles and Governance Bill 'the Bill'] consisting of –*
- (a) a set of environmental principles,*
 - (b) a duty on the Secretary of State to publish a statement of policy in relation to the application and interpretation of those principles in connection with the making and development of policies by Ministers of the Crown,*
 - (c) a duty which ensures that Ministers of the Crown must have regard, in circumstances provided for by or under the Bill, to the statement mentioned in paragraph (b),*



- (d) provisions for the establishment of a public authority with the functions for taking, in circumstances provided for by or under the Bill, proportionate enforcement action (including legal proceedings if necessary) where the authority considers that a Minister of the Crown is not complying with environmental law (as it is defined in the Bill), and*
- (e) such other provisions as the Secretary of State considers if appropriate.*

2.1.6 Having considered the wording of Section 16 (1) (a) of the Act, the Act now supersedes the options put forward by this Consultation under paragraphs 29 and 32-39, as the Act makes it clear that the environmental principles must be set out in the Bill and therefore for clarity, our working assumption is that once the principles have been set out in the Bill, they will be binding.

2.1.7 Furthermore, Section 16 (2)) states that *'the set of environmental principles mentioned in subsection (1) (a) must (however worded) consist of –*

- (a) the precautionary principle so far as relating to the environment,*
- (b) the principle of preventative action to avert environmental damage,*
- (c) the principle that environmental damage should as a priority be rectified at source,*
- (d) the polluter pays principle,*
- (e) the principle of sustainable development,*
- (f) the principle that environmental protection requirements must be integrated into the definition and implementation of policies and activities,*
- (g) public access to environmental information,*
- (h) public participation in environmental decision-making, and*
- (i) access to justice in relation to environmental matters.*

2.1.8 With reference to 2.1.7 above and Annex 1 of the Consultation, we note that Section 16 (2) includes all those principles offered as examples of environmental principles in Annex 1.



- 2.1.9 The Bill and the Policy Statement as required under the Act, must be clear and comprehensive on the use and definition of the environmental principles on a UK wide basis and we refer to our comments below where the precise operation of many of these principles has been contested in the past and may be contested in the future.
- 2.1.10 Whilst it must also acknowledge any differences, if any, to definitions adopted in the devolved administrations, many of the principles have an international dimension and definitions are well established at international level; which would seem to restrict the degree to which the principles could be defined differently in various geographical regional.
- 2.1.11 For example, in Wales, the definition of sustainable development is recited in the Well-being of Future Generations (Wales) Act 2015, Section 2 as *'the process of improving the economic, social, environmental and cultural well-being of Wales by taking action, in accordance with the sustainable development principle (see section 5), aimed at achieving the well-being goals (see section 4).'*
- 2.1.12 We seek clarification on how far the jurisprudence of the Court of Justice of the European Union will be taken account in formulating the definitions of the principles. For example, Case T-13/99 Pfizer Animal Health SA v Council [2002] and Case C-236/01 Monsanto Agricoltura Italia SpA and Others v Presidenza del Consiglio dei Ministri and Others [2003], which both considered the definition and application of the precautionary principle.
- 2.1.13 A further observation is that the Future Generations (Wales) Act reflects European Union environmental principles whilst the Consultation refers to the international definition of the principles. This difference could lead, first, to different interpretations between Wales and England/DEFRA acting as central government; second, international definitions tend to be underpinned by old and lower baselines/standards than in the EU and therefore a potential reduction in environmental protection.



- 2.1.14 The adopted definition of the Precautionary Principle within the UK should guard against inconsistency and vagueness in its application and should only be employed in genuine circumstances of scientific uncertainty.
- 2.1.15 There is discussion of whether the precautionary principle is an 'approach' or a 'principle' at international level in, for example, the decision of the WTO Appellate Body *EC – Hormones*, WT/DS26/AB/R and WT/DS48/AB/R, 16 January 1998, paras 120-125 (the Appellate Body seeming to accept that the precautionary principle is fairly well established in the environmental context at least).

2.2 Geographic application of the principles

- 2.2.1 With reference to 2.1.9 above, the Policy Statement must ensure that the status of existing definitions is not undermined where definitions are established (see 2.1 above).

PART 2: ACCOUNTABILITY FOR THE ENVIRONMENT

3.1 EU environmental oversight and enforcement functions & existing national mechanisms for environmental accountability

- 3.1.1 We acknowledge the proposals for a new independent body to hold government to account on the environment.
- 3.1.2 Whilst we agree with the proposals for this new authority, its ability to succeed in holding government to account will depend on the extent of its powers beyond simply scrutiny and guidance.
- 3.1.3 The new body should have the power to investigate and sanction/fine government for failure to adhere to its 25 Year Environment Plan and the obligations on government to be set out in the Bill.



- 3.1.4 Furthermore, we submit that in addition to powers under 3.1.3 above, the new body should have the ability to set up an independent inquiry and to appoint independent judiciary to such an inquiry.
- 3.1.5 However, whilst we consider that the new body should have the powers in 3.1.3 and 3.1.4 above, the measure of success of the new body (and indeed that of government) in its oversight function, shouldn't be measured by an increasing level of investigation and fines but rather by a low level of the same which would indicate successful 'on the ground' management of delivery and compliance with environmental objectives. If sanctions and/or fines are high then this would indicate a failure in the delivery and management frameworks adopted.

A NEW, INDEPENDENT AND STATUTORY BODY HOLDING GOVERNMENT TO ACCOUNT FOR THE ENVIRONMENT

3.3 Goals and objectives in creating a new environmental body

- 3.3.1 We agree with the proposed objectives of the new body under para 79 of the Consultation.

Functions of the new body

3.4 General scrutiny and advice

- 3.4.1 We agree that the new body should be able to scrutinise, advise and report on the delivery of key environmental policies.
- 3.4.2 In addition, we refer you to 3.1.3 and 3.1.4 and the additional powers that we consider 'a' new body should have to hold government to account and provide a mechanism for enforcement action against government if it fails to adhere to its environmental objectives.
- 3.4.3 We consider that in order to maximise the objectiveness and independency of the proposed new body, that it should report to Parliament rather than Government.



Should that be accepted, one suggestion is for the new body to report to the House of Commons Environmental Audit Committee.

- 3.4.4 The alternative may be as suggested by the Environmental Audit Committee in their 8th Report of Session 2017-19 published on 18 July 2018, the creation in UK law of an 'Environmental Enforcement and Audit Office ('EEAO') *'reporting to Parliament to ensure that the governance, enforcement, oversight and policy functions currently carried out by the European Commission and European Environment Agency are not lost on leaving the EU'*

<https://publications.parliament.uk/pa/cm201719/cmselect/cmenvaud/803/803.pdf>

3.5 Responding to complaints

- 3.5.1 The new body should have a remit and powers to respond to and investigate complaints from members of the public on failures to implement environmental law

3.6 Enforcing government delivery of environmental law

- 3.6.1 We do not consider that advisory notices alone are sufficient. The Consultation refers to Binding Notices and we submit that the new body should have the power to issue enforcement/stop notices.
- 3.6.2 In this respect, we refer you to Section 16 (1) (d) of the Act which states the the Bill should consist of *'provisions for the establishment of a public authority with the functions for taking, in circumstances provided for by or under the Bill, proportionate enforcement action (including legal proceedings if necessary) where the authority considers that a Minister of the Crown is not complying with environmental law (as it is defined in the Bill).*



3.7 Scope and range of application

- 3.7.1 We are concerned with the ability of government to hold other public authorities to account should the new body direct the government accordingly where the actions of another public authority result in the government failing to meet its obligations.
- 3.7.2 We therefore consider the new body should have the ability to hold other public authorities to account directly.

3.8 Nature of the new environmental body

- 3.8.1 Whilst there are mechanisms in place for compliance with international law, the new body would fulfil a useful function in having the powers to oversee the Government's compliance with the UK's international obligation.

3.9 Subject matter to be covered by the new body

- 3.9.1 We note the assessment of the new body's role in the areas set out in paragraphs 125 to 132. The method and approach to how the environmental principles are applied to the UK agricultural sector are of critical importance as stated in our Conclusion at 6.0 below.
- 3.9.2 In addition, the new body should have a role in overseeing the implementation and success of any existing agri-environment scheme or future land management scheme as part of the government's schemes for meeting its obligations to the environment.

3.10 Interaction with planning policy

- 3.10.1 We do not consider that the remit of the new body should be as a statutory consultee in relation to planning matters and specifically, individual planning applications however, it should have the ability to respond to national strategic planning policy.



4.0 PART 3: OVERALL ENVIRONMENTAL GOVERNANCE

- 4.1 As a general comment, and with reference to 3.1.4 above, we consider that the new body should have the power to appoint an independent judiciary panel which not only deals with issues of investigation and enforcement but also on any misinterpretation of policy by government and/or other public bodies; to include the power to set up a judicial inquiry.
- 4.2 An additional role for the new body should also be to advise on nationally applicable derogations in situations of significant environmental risk or climatic events.

5.0 ANNEX A: ENVIRONMENTAL PRINCIPLES

- 5.1 As a general comment, the definitions of the environmental principles are not forward looking (unlike the current EU definitions and interpretations under EU law) and reflect older versions (more international definitions) of the principles.

6.0 CONCLUSION

- 6.1 We have welcomed the opportunity to consider the Government's policy proposals through this Consultation
- 6.2 The 'environmental agenda' in this Consultation has very important implications for the 'agricultural agenda' in the *Health and Harmony* Consultation. To provide one example, it would appear that the Polluter Pays Principle is to be the benchmark to be exceeded before farmers become entitled to payments under environmental land management schemes, with the result that its precise delineation has great practical and financial consequences.
- 6.3 **We urge Government to continue to engage with all stakeholders within the agricultural sector on the areas of policy as set out in this Consultation and specifically, on the Bill and Policy Statement as and when these are published.**



An acknowledgment of the world market exposure of the agriculture sector and its finely balanced profitability by Government is of crucial importance to provide a sound business foundation to deliver the Government's aspirations for the protection and enhancement of the environment and its objectives in the 25 Year Plan for the Environment.

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