



Consultation Response

Environmental Principles & Governance in Scotland

Scottish Wildlife Trust Response

11 May 2019

The Scottish Government should adopt the four key EU environmental principles as the basis of policymaking, in addition to the integration principle, and a new 'future generations' principle. A new watchdog and environmental court should also be established.

Introduction

The Scottish Wildlife Trust welcomes this opportunity to respond to the consultation on Environmental Principles and Governance in Scotland. We have contributed to and fully support the detailed response of Scottish Environment LINK. Here, we set out what principles and governance mechanisms the Trust believes can help ensure existing protections remain in place, while developing Scotland's potential role as an environmental leader.

The Scottish Government has recently declared a climate emergency. The First Minister has indicated strong support for meeting the conclusions of the Climate Change Committee's report – for Scotland to have net-zero emissions by 2045. These are welcome interventions in the discussion.

At the same time, reports from around the world, from WWF's Living Planet 2018 report to the just-released findings of the UN IPBES Global Assessment, detail a world in flux as ecosystems collapse. As the IPBES Chair saysⁱ,

The health of ecosystems on which we and all other species depend is deteriorating more rapidly than ever. We are eroding the very foundations of our economies, livelihoods, food security, health and quality of life worldwide.

The report says that 'transformative change' is essential, and that action is necessary now, from the very local to the global. Scotland can and must do more than discuss this.

At present, as a member of the EU Scotland is part of the largest body of environmental laws and regulations – a framework that has proved reactive to many emerging issues, often taking the global lead. Whilst imperfect, this network of norms, principles, laws, and governance mechanisms, in short the EU institutions, must *at least* be fully replicated in Scotland.

The Trust argues, however, that as Scotland takes the lead in declaring a climate emergency, in promising net-zero emissions by 2045 at the latest, there is room and need to go further. Commitments to be world-leading must be matched by actions and legislation to underpin it. This ambition needs to be enshrined in law, with independent means of accountability, including access to environmental justice.

This means replacing EU oversight and complaints mechanisms with Scottish ones: establishing a properly-resourced, fully independent watchdog for the environment, and an Environmental Court based on the Aarhus Convention for Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

It also means that, in addition to replicating the four main EU environmental principles as the *basis of government policy*, we need to ensure these are integrated across government and public bodies (as is currently the case), and that they reflect the needs of future generations. To those ends, the Trust believes a new duty should include two further principles: the integration principle, and the 'future generations' principle.

Replicating the mechanisms for complaints and oversight, and enshrining the governance principles in a new duty, are essential acts. But they are not, by themselves, sufficient. Compliance with EU standards across the Member States is not only a function of hard legal powers, but also soft powers of norms, influence, and cooperation. These will be far harder to replicate outside of the community in which they emerge.

The Scottish Government, therefore, must help ensure that communities of knowledge and practice continue post-Brexit, from joint research projects to cooperation and the sharing of knowledge. This would be helped by some form of affiliation with the EEA, whether as sub-national entity, or as the UK, which Scotland should continue pressing for.

Key Points

- Scottish Wildlife Trust collaborated with and support the response of Scottish Environment LINK. More detailed responses to the consultation questions may be found there.
- We welcome the commitment “to maintain or exceed EU environmental standards”.
- Following the damning UN report into UK's compliance with the Aarhus Convention, and loss of EU complaint mechanisms, Scotland should establish a new Environmental Court according to the principles of the Aarhus Convention.
- Scotland should establish a fully autonomous environmental watchdog to oversee government and public authority activity, answerable to the Scottish Parliament.
- The principles should be the *basis of* policy, rather than just being guidance for policy to ‘have regard to’, as the consultation document currently suggests.
- The environment is fundamental to economic and social activity – to a greater or lesser extent, all policymaking has the potential to impact on the environment. The government should not solely adjudicate on which areas of policy are deemed to have environmental significance, and thus all areas of policymaking should be subject to oversight.
- This level of integration across policy areas is not new: as signatory to the UN Sustainable Development Goals, all areas of government activity are supposed to be informed by consideration of the Goals.
- At present, the Treaty of Amsterdam requires that the environmental principles be integrated across all EU activity. Scotland should replicate this level of integration to ensure environmental policies are not developed in silos, nor policies developed without being informed by environmental principles.
- Sustainability and environmental impact are responsibilities of all areas of government and local authority policy.
- The Trust believes a new duty should adopt all four of the EU's principles, with the addition of the integration principle (already part of EU law by the Treaty of Amsterdam), and a new ‘future generations’ principle to ensure the needs of future generations are not hampered by actions now. This would create a world-leading set of principles on which policy should be based, ensuring Scotland has an environmental legislative framework fit for its commitments.

Question responses

Question 1: Do you agree with the introduction of a duty to have regard to the four EU environmental principles in the formation of policy, including proposals for legislation, by Scottish Ministers?

Partially – The Trust supports the introduction of a duty stipulating that policy *be based on* the four environmental principles, with the addition of an integration principle as outlined in Question 3. “Based on” should replace the phrase “to have regard to” in order to match the prominence of the principles in EU law.

Article 191 (2) of the Treaty on the Functioning of the European Union states:

Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

“Shall be based on” makes clear the principles described in Article 191 are fundamental to policy development. Given the Scottish government’s commitment “to maintain or exceed EU environmental standards”, it is essential that the relationship between policymakers and the principles is specific, enforceable and fit for purpose. We would therefore welcome change in phrasing to make clear that policy is developed according to, rather merely with regard to, the principles.

Question 2: Do you agree that the duty should not extend to other functions exercised by Scottish Ministers and public authorities in Scotland?

No – with the First Ministers declaration of climate emergency and the new net-zero targets, plus recent UN and WWF reports, we need to replicate or go beyond the intent, principle and scale of integration of EU law. All government and public bodies should be covered in order to achieve the scale and integration necessary to combat biodiversity and climate crises.

At present, the EU principles, as quoted above in Article 191 (2), apply to all ‘Union policy on the environment’. This implies far wider application than the consultation document suggests.

Question 3: Do you agree that a new duty should be focused on the four EU environmental principles? If not, which other principles should be included and why?

The four principles should all be included. The Trust, however, believes two further principles are necessary to replicate the existing standards, and develop world-leading legislation to tackle the scale of environmental crises.

The new duty should ensure the existing 4 principles are *the basis of* policy, but we must also consider the integration principle, and the possibility of developing a world-leading principle regarding the rights of future generations.

If Scotland’s commitments are to go further, it stands to reason that guiding principles should go further to enable this – in particular, the rights of future generations should be included as an environmental principle. As a concept, the Welsh Assembly committed this to law in the Future Generations Act, a progressive step that the UN described as world-leading. It embodies the concept of sustainable development in the Brundtland Commission report, where sustainable development means meeting- “the needs of the present without compromising the ability of future generations to meet their own needs”.

Including this principle in the duty would help towards closing the legislative gap in Scotland, where a number of strategies are without legislative backing, and commitments could easily vary with political attitudes. This is important for holding government to account on its commitments.

The integration principle is also important. ClientEarth describe this as:

This principle sits alongside the others and requires that environmental protection is integrated into all other policy areas and activities, with a view to promoting sustainable development. Integration is less developed than the other principles in EU law, but nevertheless has an important conceptual role in bringing environmental issues and considerations into all areas of policy, recognising that environmental matters do not exist in a vacuum.

The integration principle is not explicitly mentioned alongside the other four principles. However, it is the clear intent of the Treaty of Amsterdam that environmental principles be integrated across all EU functions. This should be replicated in Scotland.

As such, the Trust believes a new duty should be based on six principles:

- The precautionary principle
- The prevention principle
- The principle that environmental damage be rectified at source
- The polluter pays principle
- The integration principle
- The future generations principle

Question 4: Do you agree there should be an associated requirement for a policy statement which would guide the interpretation and application of a duty, were one to be created?

Yes – this would help non-experts better understand the relevance and application of a duty. The language should be as strong as current arrangements, as outlined in our answer to Question 1.

Question 5: What do you think will be the impact of the loss of engagement with the EU on monitoring, measuring and reporting?

Substantial – cross-border issues, e.g. biosecurity and multi-scale impacts in biodiversity, would have less coordination. In conservation, EU volunteers on reserves – practical ‘on the ground’ conservation – would likely be vastly restricted. This would be important for monitoring and management, including designated sites. In addition, there would be potential impacts to environmental research through loss of EU funding.

Question 6: What key issues would you wish a review of reporting and monitoring requirements to cover?

Whilst it is impossible to speculate what issues may arise, as a minimum the following should be covered:

- Biodiversity: species abundance, distribution, etc.
- Representativeness, condition and connectivity of protected areas.
- Invasive non-native species.
- Air, water, marine quality standards, light pollution, etc.
- Waste, including recycling and compostable materials.
- Chemicals.
- Procedural comparisons: e.g. SEA, EIA, access to justice, etc.

We would stress that any framework should be reactive enough to respond to emerging issues, in line with best practice and according to the latest scientific assessments.

Question 7: Do you think any significant governance issues will arise as a result of the loss of EU scrutiny and assessment of performance?

Yes, there will be an immediate loss of oversight. This could result in less compliance with EU regimes, contributing to regression in Scotland post-Brexit.

In addition, there would be a loss of momentum – historically the EU is a leader and takes the initiative in environmental laws and regulations. Scotland is left more exposed to emerging issues if it does not at least maintain alignment with EU protections – hence the importance of adopting the environmental principles, especially the precautionary principle.

Question 8: How should we meet the requirements for effective scrutiny of government performance in environmental policy and delivery in Scotland?

Scotland should establish a new environmental watchdog and Environmental Court, as detailed in the answers below, and detailed further in the Scottish Environment LINK response.

The announced Citizens' Assembly concerning the future direction of Scotland will provide a means for voicing concerns and possible ways forward for sustainability transitions. The Scottish Government should be open to such discussions.

Question 9: Which policy areas should be included within the scope of any scrutiny arrangements?

All policy areas interact, to greater or lesser extents, with the environment.

Sustainability and consideration of the environment needs to underpin all areas of government policy. This approach is already adopted in the Sustainable Development Goals. A watchdog should therefore have the power, if need be, to scrutinise any areas of policy that fail to abide by the environmental principles outlined here.

Question 10: What do you think will be the impact in Scotland of the loss of EU complaint mechanisms?

There will be significant impact from the loss of complaint mechanisms, which stands to impede access to environmental justice and could lead to a loss of accountability if such mechanisms are not replaced on a like-for-like basis.

Question 11: Will a new function be required to replace the current role of the European Commission in receiving complaints from individuals and organisations about compliance with environmental law?

Yes. In order, as this consultation paper makes clear ought to be the case, to maintain or exceed standards, an Environmental Court should be established in Scotland. This would mean Scotland complies with the Aarhus Convention on environmental justice, citizens maintain or exceed their current powers to hold government actions, or inaction, to account, and that Scotland indicates it is serious about putting the environment and climate change central in its outlook.

This is essential following the First Progress Reviewⁱⁱ of the UK's compliance with the Aarhus Convention, released in March 2019, which concluded that the UK is and has been in breach of the Convention since it entered into effect 8 years ago. This has made it harder for people to bring cases of endangered biodiversity, air pollution, and others. Prohibitive costs are cited as a key reason for this.

As such, a new Environment Court should be established according to the principles of the Aarhus Convention. We outline in Question 13 how a new statutory body should be established to help enforcement and investigation of complaints.

Question 12: What do you think the impact will be in Scotland of the loss of EU enforcement powers?

On enforcement, there will likely not be a significant, immediate impact, as the UK, as well as most Member States, comply most of the time with most requirements. However, this is not universal, and a loss of enforcement will mean that if greater action is taken to ensure member states' compliance on targets, the UK and Scotland will lose out on this. This could be especially important, for example, in air quality, where urban targets in the UK and Scotland are consistently not met, with significant health and environmental repercussions.

Longer term, there could be significant implications for trade with the EU if environmental standards slip further and fail to comply with European standards. The absence of enforcement powers could encourage further non-compliance in Scotland the UK.

Furthermore, compliance with environmental standards is often not contingent on hard enforcement powers, but softer powers of influence and norms. Without being a part of this community, compliance with environmental standards could fall further.

Question 13: What do you think should be done to address the loss of EU enforcement powers? Please explain why you think any changes are needed.

A new, fully independent watchdog should be established.

In our view, there is a need for a new body to administer and undertake investigations of complaints. We note with interest that the UK Government is already committed to such an approach with the Office of Environmental Protection proposed to have this role – and, indeed, with interim measures being developed in case of a 'no deal' Brexit in advance of the establishment of the OEP.

We note, however, that the proposed OEP by the UK government would fall short of replicating the role that EU structures currently play. A Scottish equivalent can and should go further than this. It should ensure that the same breadth of policy areas is subject to its scrutiny as is currently the case with the EU.

A Scottish 'watchdog' must be genuinely independent of the Scottish Government (established by and accountable to Parliament) and be empowered/resourced to undertake scrutiny and investigations – as well as, ultimately, if any investigation is unresolved, to issue notices of remedy and/or make a reference to an appropriate Court. Only with such powers, resources and rights, would a 'watchdog' become a sufficient replacement for the EU complaint mechanism - where, it must be stressed, the ultimate sanction, for the Commission, should it consider that a Member State is in breach of its environmental obligations is to refer that State to the Court of Justice.

ⁱ UN, 2019; <https://www.un.org/sustainabledevelopment/blog/2019/05/nature-decline-unprecedented-report/>

ⁱⁱ UN, 2019, First progress review of the implementation of decision VI/8kon compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention. https://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP6decisions/VI.8k_UK/Correspondence_with_the_Party_concerned/First_progress_review_on_VI.8k_UK_adopted_24.02.2019.pdf