

Consultation of Environmental Principles and Governance in Scotland

11th May 2019

Previously ClfA, BEFS, ALGAO and Archaeology Scotland responded to the [Call for evidence – EU Environmental and Animal Welfare Principles - 27/03/2019](#) - many of the points made apply equally to this consultation.

Comments here are primarily concerned with highlighting the vital importance of the polluter pays and precautionary principles to the historic environment sector. These principles underpin the system of investigation and protection of heritage assets of archaeological interest in the planning system. Any impact on the legal basis of these principles could expose these safeguards to weakening in any future policy change.

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Scotland's cultural heritage is a key part of our environment. Whether the physical heritage of traditional farm buildings, villages, field boundaries, ancient monuments, woods, and parkland, or the cultural traditions associated with human interaction with the land. In Scotland's landscapes, it is virtually impossible to separate the cultural from the natural. This historic environment is important as part of wider landscape management, delivering substantial benefits for communities - attracting inward investment, as a key driver of rural tourism and, through conservation, by creating skilled employment, often in areas where jobs are scarce.

Q1 - 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?

We agree with a duty to have regard to the four EU environmental principles in the formation of policy, including proposals for legislation, by Scottish Ministers.

The EU environmental principles currently underpin aspects of the care and protection of Scotland's historic environment. This is because the polluter pays principle has provided the model for developer-funded archaeological investigation and mitigation in the planning system since 1994.

A precautionary principle is also adopted through this system, whereby prior investigation of land which has a high potential to yield archaeological discoveries is required, providing safeguards against undiscovered sites being destroyed without opportunity to investigate.

These EU-derived environmental principles help to protect the provisions for safeguarding the historic environment by guiding future governmental decision-making and policy reform. They also provide a mechanism by which it would be possible to challenge in court actions which are inimical to these principles.

However, BEFS supports the NTS and ClfA view that 'have regard to' is not strong enough wording and would support 'shall be based on' which prevents any potential weakening of current environment legislation.

Q2 – Do you agree that the duty should not extend to other functions exercised by Scottish Ministers and public authorities in Scotland?

The limited scope suggested here could have unintended consequences. Current environmental principles apply to '[EU] union policy' which gives a far more broadly applicable set of duties.

We have recommended previously to both Westminster Government and the Devolved Administrations that amendments are introduced to the EU Withdrawal Bill that would transpose Environmental Principles from the Treaty on the Functioning of the European Union into domestic law in order to secure a continuing statutory underpinning for these environmental principles after exit-day. So far this has not happened.

We would also support other statutory measures to legislate domestically for environment principles. To achieve legal continuity, any future Environmental Principles Policy should be:

- **established in law:** either in statute directly, or underpinned by a strong legal base
- **subject to parliamentary and public consultation:** set out in Standing Orders and statute.
- **binding:** with a duty to comply
- **applied to all public and private bodies:** Government Departments, agencies, and courts, as well as private developers, infrastructure providers, and contractors
- overseen by an arbiter with prosecutorial functions: with strong remedies for non-compliance
- **devolution-sensitive:** Whether enacted at a UK level or by each of the four UK administrations, the approach should be agreed by all devolved parliaments

Q3 – 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?

BEFS supports the NTS response

YES and extended.

We support the creation of a duty to cover the four EU environmental principles. We also wish to see other existing environmental principles incorporated into domestic law to ensure compliance with international commitments. It is noted that the current Westminster draft Environment (Principles and Governance) Bill refers to ‘environmental principles’ as meaning the four principles set out under Q1, along with principles for sustainable development; integration of environmental protection requirements into policy and activity; public access to environmental information; public participation in environmental decision-making; access to justice in relation to environmental matters. Including these principles, as well as the principle of non-regression, would help ensure consistency of approach across the UK and ensure Scotland maintains its desire to be a world leader on environmental matters.

Q4 - 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?

BEFS believe that there is an opportunity to go further and establish a principles policy which is proportionate to the challenge of passing on our environment in better condition. In this regard, any future Environmental Policy statement should be:

- **comprehensive:** including international legal principles that have developed more recently than the Treaties, including non-regression, no net loss and individual environmental responsibility.
- **accompanied by an implementation plan:** laying out plans for integrating the principles in UK decision-making.

Q5 - What do you think will be the impact of the loss of engagement with the EU on monitoring, measuring and reporting?

BEFS believes that loss of engagement with the EU will jeopardise continuous data (potentially impacting future baseline data in a number of sectors), data monitoring, data measurement and reporting arrangements. BEFS is supportive of the measures outlined by Scottish Environment LINK to mitigate negative impacts through, for example, the Scottish Government pressing the UK to join the European Environment Agency (EEA) as a non-EU member. Also we urge the Scottish Government to enable continued participation in existing networks (public sector, academic and NGO) that facilitate data and knowledge exchange, sharing best practice etc.

Q6 - What key issues would you wish a review of reporting and monitoring requirements to cover?

Q7 - Do you think any significant governance issues will arise as a result of the loss of EU scrutiny and assessment of performance?

BEFS supports the NTS view:

YES.

The loss of oversight in terms of performance and decision-making is significant, as is the ability to make inter-jurisdictional comparisons on environmental performance.

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Q8 - How should we meet the requirements for effective scrutiny of government performance in environmental policy and delivery in Scotland?

We refer you to the answer to Q2 – the importance of an independent arbiter, with sufficient capacity and power to act as an effective ‘watch-dog’ will be key.

Q9 - Which policy areas should be included within the scope of any scrutiny arrangements?

BEFS advocate application of the Integration principle here and support the approach proposed by Scottish Environment LINK ie. that the scope cover any policy which has potential to affect the environment, rather than to ‘environmental policies’. LINK identifies that scrutiny should cover: the state of elements of the environment; functions affecting the environment; measures; reports on implementation; cost benefit analyses; and the state of human health and safety.

Q10 - What do you think will be the impact in Scotland of the loss of EU complaint mechanisms?

Q11 - 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?

Q12 - What do you think the impact will be in Scotland of the loss of EU enforcement powers?

The potential loss of any level of enforcement powers risks a decline in compliance and regard for environmental protections. BEFS would raise the wider issue of enforcements being carried out across Scotland (be that environmental or planning and historic environment related) – these enforcements need greater resourcing. Whilst actions requiring EU enforcement may be rare – we need to look closer to home to ensure the greatest protections for our environment are being assured.

Q13 - What do you think should be done to address the loss of EU enforcement powers? Please explain why you think any changes are needed?

BEFS supports the NTS view:

We would advocate establishment of an independent watchdog, along with a continuation of environmental principles derived from the Aarhus Convention (specifically public access to environmental information; the right to participate in environmental decision-making; and access to justice in relation to environmental matters).

And would reiterate that enforcement is a far greater issue which demands national, and supra-national action, with independent oversight.

BEFS would be happy further to discuss the issues raised in this consultation insofar as they affect the historic environment. **SUBMITTED VIA ONLINE FORM - 10/05/2019**