

# Energy UK response to the Environmental Audit Committee's Environmental Governance Inquiry

1<sup>st</sup> June 2018

## About Energy UK

Energy UK is the trade association for the GB energy industry with a membership of over 100 suppliers, generators, and stakeholders with a business interest in the production and supply of electricity and gas for domestic and business consumers. Our membership encompasses the truly diverse nature of the UK's energy industry – from established FTSE 100 companies right through to new, growing suppliers and generators, which now make up over half of our membership.

Our members turn renewable energy sources as well as nuclear, gas and coal into electricity for over 27 million homes and every business in Britain. Over 730,000 people in every corner of the country rely on the sector for their jobs, with many of our members providing lifelong employment as well as quality apprenticeships and training for those starting their careers. Annually, the energy industry invests over £11bn, delivers £88bn in economic activity through its supply chain and interaction with other sectors, and pays £6bn in tax to HM Treasury.

## Executive Summary

1. Energy UK and our members welcome the opportunity to provide this submission into the Environmental Audit Committee's Environmental Governance Inquiry. This response has been developed by our Planning Sub-Committee and Environment and Climate Sub-Committee. We welcome the ambition of the new environmental watchdog and recognise the value that this post-Brexit, long-term organisation could provide to Government, the environment and industry alike.
2. As articulated in our [earlier submission](#) into the Environmental Audit Committee's (EAC) 25-Year Environment Plan Inquiry, we remain concerned regarding the resourcing of the proposed body. Ensuring that Defra and its agencies are appropriately resourced is a pressing concern of our membership.
3. Following the decision to leave the European Union (EU) it is essential that we maintain a high level of environmental protection during and after the exit from the EU and we believe that a new body could help to ensure this. A detailed and public gap analysis of the institutional deficit following the UK's exit from the EU should be undertaken so as to ensure that the new body does not replicate the work of existing institutions and instead takes over the responsibilities previously held by European institutions.
4. We believe that future environmental policy-making should be underpinned by the following key principles:
  - i. The Polluter Pays Principle
  - ii. Proportionality based on a clear assessment of costs versus benefits
  - iii. Better Regulation Principles
  - iv. Sustainable Development.
5. These principles should be listed in the Environmental Principles and Governance Bill and as such be enshrined in primary legislation in order to ensure accountability for the environment and provide certainty to businesses.
6. Our members have concerns regarding the proposal that the watchdog will concentrate on issues relating to alleged failure by government authorities, with the potential for the watchdog to have the power to issue binding notices or to intervene in legal proceedings. We believe

that the remit of the watchdog should be to hold national government to account, consistent with the current role of Europe; “other authorities” such as Local Authorities or the Environment Agency, should not be within the scope of the new body either directly or indirectly. If such bodies are placed within scope, there is a significant risk of creating ‘double regulation’ whereby the new watchdog could undermine existing UK regulatory decisions and processes.

7. We believe that the Environmental Principles and Governance Bill should set out a specific and well defined remit of the watchdog to hold national Government to account to the aims in the 25 Year Environment Plan, whilst also ensuring the integrity of the existing UK regulatory framework is maintained to provide essential stability for UK businesses.
8. For more detail about the questions posed within the consultation document please refer to the responses submitted by our members. Should you have any questions regarding this consultation response then please do not hesitate to get in touch via the details below.

I can confirm that this response may be published on the Parliamentary website.

**Joshua Atkins**

Policy Manager, Generation  
Energy UK, Charles House  
5-11 Regent Street  
London, SW1Y 4LR

[joshua.atkins@energy-uk.org.uk](mailto:joshua.atkins@energy-uk.org.uk)

## Responses to Questions

Do the proposals in the Government's consultation meet the ambition set out in the 25 Year Plan to consult on "a new, world-leading, independent, statutory body to give the environment a voice, championing and upholding environmental standards as we leave the European Union"? If not, what more needs to be done?

9. We believe that the 25-Year Environmental Plan set out a positive vision for the UK's environment, however from the point of view of the energy sector it lacked objectives that are specific, measurable and time bound. We also have an overall concern that if existing environmental laws and principles are not enshrined in UK laws once the UK leaves the EU this would be a failure of the spirit of the plan.
10. We believe that it is important that the Government consults on the detail of future environmental legislation with a wide range of stakeholders to ensure that it delivers the best outcomes for the environment, the public and UK industry. We are particularly interested in the detail of the proposed consultation on the principle of environmental net gain in developments, and in the forthcoming overarching chemicals strategy. We hope that the more detailed proposals which the Government will publish for consultation will provide some of the necessary detail that we highlight in this response.
11. As we move towards Brexit it is essential that Defra and its agencies are appropriately resourced and funded to deliver their increased remit as the EU's role diminishes. We are cognoscent of the strains placed on agencies in recent months and have consistently provided support as far as is practicable, with our members hosting Marine Management Organisation staff for induction, industry training and sabbaticals. However, we have concerns regarding the Government's ability to create and implement the legislation and administrative bodies necessary to achieve the aims of the 25-Year Environmental Plan.
12. As the UK leaves the EU, Energy UK members support the continuation of a high level of environmental standards with strong enforcement in practice. We consider the incorporation of environmental principles in UK legislation to help to deliver this outcome. However, Energy UK members have previously faced challenges from disproportionate regulation, arising from the application of environmental principles in decisions on regulation and planning without regard to proportionality or costs and benefits. Examples have included:
  - i. The implementation of the EU Eel Regulation.
  - ii. The application of the Habitats Directive to coal and gas-fired power station emissions to air.
  - iii. The interpretation of the Waste Directive and case law on the definition of by-products and waste recovery.
13. The challenges have threatened to impose additional constraints and costs without producing any significant improvement in environmental outcomes. Consequently, if the UK is to enshrine environmental principles in law, then it would be appropriate to build in safeguards in the application of these principles, to ensure proportionate regulation in practice. This could be done by including principles for regulatory best practice alongside the environmental principles. Best practice principles could include:
  - i. a risk-based approach to environmental regulation,
  - ii. the selection of controls that are proportionate to the scale of environmental risk presented by each regulated activity and
  - iii. the consideration of costs and benefits in regulatory decisions.
14. In the recent past, UK regulators introduced the concept of "Better Regulation", which included a set of principles along the lines of the above suggestions. "Better Regulation" has since been discontinued. We believe that this was a backward step and the opportunity should be taken to re-introduce a similar approach.
15. Our members have voiced concerns regarding the potential for the new watchdog to have the power to issue binding notices or to intervene in legal proceedings as this would create another level of regulation in the UK which is not required and could lead to a significant risk of

creating “double regulation” whereby the watchdog could undermine existing UK regulatory decisions and processes. This could increase regulatory uncertainty which in turn could be detrimental to UK investment.

16. Against this background we believe that the scope of the proposed new watchdog should be clearly set out in the Environmental Principles and Governance Bill in order to avoid the risk of unintended ‘regulatory creep’. The Bill should specify a focussed and well defined remit of the watchdog to hold national Government to account whilst also ensuring certainty and stability for UK businesses.

Will a Governance and Principles Bill make all of the legal changes necessary to achieve the ambition of improving the environment for future generations? Are other legal changes required to improve the environment and if so, what interaction will there be with the new governance and principles regime, and is it possible for them to be designed separately?

17. Please see our earlier responses under points 9 – 16.

What are the risks of ongoing uncertainty about governance and principles while other major decisions are being made, e.g. on the Withdrawal Agreement and the Trade Bill?

18. Please see our earlier responses under points 9 – 16.

19. The legislative uncertainty faced by the energy sector, which will persist until the outcome of negotiations to leave the EU is known, makes it difficult for developers to commit to investing in the infrastructure and projects which the UK requires to drive forward its ambitious and world-leading climate change mitigation strategy.

Are the proposals in the Government’s consultation adequate to meet the enforcement, governance and other gaps in environmental protection left by leaving the European Union? Are there any aspects in which they offer stronger environmental protection than existing arrangements? If not, what more needs to be done and by when?

20. Energy UK agrees that it is important to maintain a high level of environmental protection during and after the exit from the EU. The proposal to create a new “environmental watchdog” body could address the potential gaps in environmental protection left by leaving the EU. However, it is important that such an organisation has the resource, remit and powers necessary to hold the Government to account.
21. Energy UK is concerned that there is potential for creation of a further environmental body (alongside a large number of existing bodies with existing responsibilities) to lead to duplication, overlap and an additional regulatory burden for no corresponding improvement in environmental outcomes. Furthermore, we are concerned that the current consultation proposals do not establish clear tests to determine the appropriate scope of the new environmental watchdog body.
22. In our view, such tests would include the following challenges for every proposed responsibility of the new watchdog:
- i. For each potential role and responsibility of the watchdog, is there a clearly identified gap, either now or post-Brexit?
  - ii. What are the implications of that gap in practice, in terms of environmental outcomes?
  - iii. Did the European Commission or other EU body previously have this function?
  - iv. If not, is there a clear reason why the watchdog now needs to take on this function?
  - v. If these functions are essential, then can’t an existing body deliver them?

As the consultation document explains, there are a great number of existing UK environmental bodies already in place. We are concerned that, at present, the working principle for scoping the new body appears to be “if in doubt, include the responsibility”. We believe that a watchdog designed using a more challenging, structured approach based on a gap analysis will minimise the risks of duplication and overlap and result in more focused and efficient new body.

23. A further potential concern is that several additional functions are also being put forward for the watchdog that are independent of the immediate driver of Brexit. Given the scale of changes that will be required by Brexit, it is important to consider whether these additional functions are absolutely essential at this time, or could be deferred subject to further review.
24. One weakness of UK-specific environmental policy has been the occasional reopening of previous policy decisions. Even if there is no resultant change in policy, the uncertainty from such reviews results in difficulties for businesses wishing to make investment decisions. EU environmental policy tends to be more stable, due in part to the greater complexity of reopening EU decisions once made. A new environmental watchdog body could provide a stability of approach through changes in government, in a similar way to how the Climate Change Act and the Committee on Climate Change deliver continuity in UK climate change policy.

Do the proposals in the Government's consultation set the basis for an appropriate relationship between the proposed body and other statutory bodies (for example, the Environment Agency, Committee on Climate Change, National Audit Office, regulators like Ofwat etc.), Parliament and the devolved institutions? If not, what needs to change?

25. Please see our earlier responses outlined under points 20-24.
26. The proposed body appears to have been given a function of handling complaints from members of the public. This is not a role currently undertaken by European institutions and there are existing mechanisms for such complaints to be dealt with in the UK.
27. Energy UK is opposed to the proposal that the watchdog will concentrate on issues concerning alleged failure by government authorities to implement the law rather than other matters dealt with by the Ombudsmen such as poor service or miscommunication – the Ombudsmen currently investigate complaints based on the premise that action taken is not consistent with legal requirements also; this should not be a role of the proposed body. It is vital that the remit of the watchdog is to hold national government to account only, consistent with the current role of Europe; 'other authorities' should not be within the scope of the new body either directly or indirectly. If 'other authorities' such as Local Authorities or the Environment Agency are placed within scope of the watchdog, there is a significant risk of creating "double regulation" whereby the watchdog could undermine existing UK regulatory decisions and processes. The power for the watchdog to make a "prominent declaration" in respect of the decisions of such bodies (even if not legally binding) could result in 'regulation by media' which, in turn, could increase regulatory uncertainty and risk with a resulting negative impact on UK investment.

Whether the proposals in the consultation on incorporating environmental principles into UK law are sufficient to replicate or provide a stronger level of environmental protection than the existing arrangements? If not, what needs to change?

Is there sound logic behind the decision to exclude climate change from the remit of the new body? Does this risk leaving the enforcement of climate change law weaker than the rest of environmental law?

28. We and our members support this decision, the nature of climate change impacts is fundamentally different to other kinds of impacts on the environment. Climate change impacts are global in nature, long term and not linked to particular sources of Greenhouse Gas emissions. Environmental impacts are generally of shorter duration and can be linked to regional, national and local scales of the source-pathway-receptor impact chain. The instruments to deliver climate change policy objectives are qualitatively different to those deployed to enforce environmental law. Consequently, a separate approach to climate change law is appropriate.

What would be the benefits and weaknesses of a UK-wide approach? Has there been sufficient collaboration between HMG and the devolved administrations on this matter, and are the right processes in place to agree the most environmentally rational settlement?

29. If the UK is to adopt environmental principles in primary legislation, it is essential for these principles to apply universally across the UK. Otherwise, the different post-Brexit regulatory regimes across the UK will start with different expectations, which would likely lead to inconsistent outcomes. Such divergence will have negative impacts for both the environment and business confidence.