

Response to Scottish Government Consultation on Environmental Principles and Governance after Brexit

10 May 2019

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 covers over 90% of both UK power generation and the energy supply market for UK homes. We represent the diverse nature of the UK's energy industry – from established FTSE 100 companies right through to new, growing suppliers and generators, who now make up over half of our membership.

Our members turn energy sources into electricity for over 27 million homes and every business in Britain. Over 680,000 people in every corner of the country rely on the sector for their jobs, with many of our members providing long-term employment as well as quality apprenticeships and training for those starting their careers. The energy industry invests over £12.5bn annually, delivers around £84bn in economic activity through its supply chain and interaction with other sectors, and pays £6bn in tax to HM Treasury.

Executive Summary

Energy UK welcomes the opportunity to provide this submission to the Scottish Government's consultation on environmental principles and governance after Brexit. This response has been developed by our Planning Sub-Committee and Environment and Climate Sub-Committee. We welcome the proposal for a new legal duty on Scottish Ministers and recognise the value that this post-Brexit, long-term measure could provide to Scottish Government, the environment and industry alike.

We welcome the opportunity for stakeholders to help shape the future direction of environmental compliance in Scotland and we recognise that Scottish Government has not yet reached a conclusion on the best institutional governance framework. Given the importance of this area, it is appropriate to consider this matter fully and we welcome Scottish Government's commitment to ensuring the process to develop a solution is fair, open and transparent for all stakeholders, is effective and proportionate in delivering strong environmental principles and governance arrangements; and also takes account of specific Scottish circumstances and established methods of accountability.

Energy UK recognises that the Scottish Government's starting point is that the new duty should cover Scotland and areas that are the responsibility of the Scottish Government. However, we would encourage the Scottish Government to work with the UK Government, and the other Devolved Administrations, with a view to exploring the scope for a joined-up approach in this important area of environmental protection. From our viewpoint, we would welcome an approach that could offer a high level of consistency on environmental policies and enforcement across the UK in order to ensure a level playing field exists across the UK.

In this context, we would highlight that the need to undertake a much more detailed gap analysis and mapping exercise to appraise the existing landscape and determine the various environmental governance mechanisms or gaps across the public sector that will be missing in Scotland, and the UK as a result of leaving the EU, taking into account the wider sustainable development goals.

Moreover, there will need to be further engagement with stakeholders to inform and test the adequacy of this exercise. A key objective of such a mapping exercise will be to ensure that the responsibilities and regulatory powers to be taken on by any new governance arrangements do not replicate and/or overlap with the existing environmental responsibilities and regulatory powers of other public bodies such as SEPA, SNH and Marine Scotland. In addition, the new duty's operation should not overlap, but work in harmony, with the existing regulatory framework including Scotland's National Performance Framework.

We would be happy to discuss any of the points made in further detail with Scottish Government or any other interested party if this is considered to be beneficial. Our responses to selected questions are set out below.

Response to Questions

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?

Yes, Energy UK supports the Scottish Government's proposal to address the loss of legal force for the EU environmental principles through a new legal duty on Scottish Ministers to have regard to EU environmental principles in the development of policies and legislation. We support the wider aim to match, as close as possible, the current effect of the principles on Scottish environmental policy and law.

We warmly welcome the proposal to bring forward a high-level policy statement to guide interpretation and application of the environmental principles and the new duty and consider it appropriate that this statement should have a statutory basis and be refreshed to take account of changing policy direction especially within EU.

We recognise that the Scottish Government's starting point is that the new duty should cover Scotland and areas that are the responsibility of the Scottish Government. However, we would encourage the Scottish Government to work with the UK Government, and the other Devolved Administrations, with a view to exploring the scope for a joined-up approach in this important area of environmental protection. From our viewpoint, we would welcome an approach that could offer a high level of consistency on environmental policies and enforcement across the UK in order to ensure a level playing field exists across the UK.

We would also welcome further clarification on the future interaction with the new Office of Environmental Protection proposed by UK Government, in particular whether the Scottish Government and the devolved administrations choose to give regard or align with the remit of the Office for Environmental Protection.

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

Energy UK agrees that the duty should only apply to the formation of policy and draft legislation by the Scottish Government and not to the exercise of powers and functions by the Scottish Government and other public authorities.

It is imperative that the Government avoids creating overlapping responsibilities between the new duty and the existing regulatory environment. Double regulation will have a negative impact on the operating environment for the UK energy industry.

Our members have concerns regarding the proposal that the duty would extend to cover issues relating to alleged failure by Government authorities. It is vital that the remit of the duty is to hold Scottish Government to account, consistent with the current role of the European Commission. If “other authorities” such as local authorities or SEPA, are placed within the scope of the duty either directly or indirectly, this arrangement should only replicate the current situation and reflect the existing duties already placed upon public agencies. If left unchecked, there is a significant risk of creating ‘double regulation’ whereby existing regulatory decisions and processes are undermined which, in turn, could increase regulatory uncertainty and risk with a resulting negative impact on investment.

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?

As the UK leaves the European Union (EU), Energy UK supports the continuation of a high level of environmental standards across all areas of the UK, with strong enforcement in practice. The incorporation of environmental principles into this new duty could help to deliver this outcome.

However, many industry sectors (including the energy sector) have previously faced challenges from disproportionate environmental regulation, in which very onerous obligations are placed on an operator for little or no environmental benefit in practice. These issues often arise from a mechanical and simplistic application of environmental principles in decisions on regulation and planning, without sufficient account being taken of context, proportionality or costs and benefits.

Consequently, we would like to highlight some key guiding rules for the application of environmental principles in policy-making:

- An environmental principle cannot be considered in isolation from other principles or from wider regulatory principles.
- Environmental principles act as guidance to policy-making, not as absolute or prescriptive rules.
- No single environmental principle should be considered to have over-riding primacy over other principles or wider social and economic considerations.

We consider a policy statement to be essential for the effective implementation and application of the environmental principles.

However, in line with our comments above, we consider it essential for principles of best practice for the development of policy and regulation to be also added to the set. Without these, policymakers will not have an integrated approach to the application of principles in the formation of policy.

We consider the following key principles of best practice to be the most important to underpin future environmental policy-making:

- Evidence-based regulation principle – Decisions should be based on the best available scientific evidence.
- Risk-based regulation principle – Decisions should be based on an assessment of the risk to the environment.
- Proportionality of action principle – Decisions on actions should be based on an assessment of the full set of costs and benefits of a policy or regulatory proposal.

These are illustrative definitions of these key principles. We recommend that the definitions are developed further as part of the preparation of the duty and accompanying policy statement. UK regulators have previously implemented a number of “Better Regulation” initiatives, although these have since been discontinued. In Scotland, SEPA’s draft Strategic Infrastructure (Transport and Utilities) Sector Plan¹ demonstrates a more integrated and whole-systems approach to regulation so as to

¹ SEPA (2018) Draft Strategic Infrastructure (Transport and Utilities) Sector Plan. Available [here](https://consultation.sepa.org.uk/sector-plan/strategic-infrastructure-transport-utilities/): <https://consultation.sepa.org.uk/sector-plan/strategic-infrastructure-transport-utilities/>.

support sustainable practices, strong environmental performance and innovation. We consider these example initiatives to be a useful reference in developing best practice principles for regulation.

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?

Energy UK agrees with the proposals for a policy statement to accompany the duty on environmental principles and guide its interpretation and application. A high-level policy statement could set out more detailed explanation of how the prescribed environmental principles should be interpreted and applied. This approach will allow for the policy statement to be reviewed and updated over time in light of new scientific or legal information as necessary. We recognise that it is important that the policy statement is informed by the latest scientific and legal knowledge, as well as engagement with stakeholders, and, accordingly, we would suggest that there be a requirement for full consultation on the draft statement and any future changes to it.

We consider that this approach would help to deliver upon the Scottish Government's commitment to maintaining high environmental standards and presents the prospect of a high degree of stability and longer-term certainty in respect of the principles underlying Scotland's future environmental protection regime.

In the past, the energy sector has faced challenges from disproportionate environmental regulation without sufficient account being taken of context, proportionality or costs and benefits. For this reason, in our view, both the new duty and policy statement on environmental principles should be considered with great care. In particular, the key principles of best practice should be included alongside the list of environmental principles.

It is also important that the policy statement is informed by the latest scientific and legal knowledge, as well as engagement with stakeholders, and, accordingly, we would suggest that there be a requirement for full consultation on the draft statement and any future changes to it.

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

We would appreciate greater clarity on the options for Scotland's ongoing relationship with the European Environment Agency (EEA) and its members after the UK exits the EU. We consider it valuable to understand what the process for becoming a 'cooperating country' would entail.

While the UK's exit from the EU could provide some opportunities to simplify Scotland's environmental reporting activities, this could come at the cost of no longer being able to compare ourselves with the EU on a like-for-like basis or share information effectively.

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

We share the concerns raised in the consultation document around the subsequent deficit brought about by the loss of EU institutions' role in terms of providing a framework for monitoring, measuring and reporting on environmental outcomes as well as sharing expertise toward developing guidance and advice on best practice. We would therefore welcome efforts to investigate how best to bridge the gap and sustain relationships in the longer-term, especially in relation to transboundary environmental issues and international agreements.

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

Energy UK recognises that external scrutiny of Scotland's environmental regime, by other Member States and EU institutions, will be lost following Brexit. It will be fundamental to the future credibility of Scotland's environmental framework that it remains subject to the scrutiny of its peers in some form.

We therefore welcome the Scottish Government's consideration of how it intends to replicate such influential external scrutiny and transparency.

Following the decision to leave the EU, it is essential that we maintain a high level of environmental protection during and after exit. We consider that a new body could help to ensure this happens in Scotland through addressing the potential gaps in environmental protection left by leaving the EU. 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 any new body does not replicate the work of existing institutions and instead takes over the responsibilities previously held by European institutions.

Energy UK is concerned that there is potential for the creation of a further means of scrutinising government (alongside a number of existing bodies with existing scrutinising responsibilities such as Scottish Parliament and the Scottish Information Commissioner) to lead to duplication, overlap and an additional regulatory burden on business for no corresponding improvement in environmental outcomes. In considering the scope of any new governance framework we would suggest the following clear tests are used to determine the appropriate scope:

- For each potential role in scrutiny and assessment of performance the body covers, is there a clearly identified gap, either now or post-Brexit?
- What are the implications of that gap in practice, in terms of environmental outcomes?
- Did the European Commission (EC) or other EU body previously have this scrutiny role?
- If not, is there a clear reason why a new body now needs to take on this role?
- If these functions are essential, then shouldn't there be an existing body be able to deliver them?

Our view is that any new governance framework designed using a more challenging, structured approach based on a gap analysis will minimise the risks of duplication and overlap and result in a more focused and efficient new body.

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

We consider the policy areas listed in paragraph 72 of the consultation document to be appropriate, however Energy UK would appreciate the opportunity to revisit this as the direction of travel and scope of the principles and associated statement become clear.

It is also imperative that Scottish Government avoids creating overlapping responsibilities between any new scrutiny arrangements and the existing regulatory environment. Double regulation will have a negative impact on the operating environment and investment for the energy industry in Scotland.

In the same way that the CCC comments on the Clean Air Strategy or Clean Growth Strategy, we would expect the new arrangements to scrutinise, advise and report on the delivery of key environmental policies. That being said, we do not support the consultation's proposal that any new scrutiny arrangements cover matters related to climate change. We consider the nature of climate change impacts to be 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 is appropriate.

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?

It is important that while appropriate governance arrangements should be put in place to scrutinise Government actions, this should not create a system that is open to misuse by individuals who disagree with a decision, as a means to frustrate development.

Energy UK is opposed to the proposal that future arrangements or a new body would concentrate on issues concerning alleged failure by government authorities to implement the law– the Ombudsmen currently also investigates complaints based on the premise that action taken is not consistent with legal requirements.

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?

Currently, EU-derived environmental law, even once transposed into UK and devolved domestic law, remains under the jurisdiction of the EC and the CJEU. As such, we would expect this legislation to be overseen by new arrangements, such as an independent body, on exit from the EU in keeping with our overarching principle that any new arrangements should solely replace the European institutional deficit.

As flagged during the consultation phase leading up to the creation of the Office for Environmental Protection by UK Government, our members consider that any role created or new body should have legal power equal to that of the EU institutions it is replacing. As such, whether Scottish Government decides to create a new function for an existing body or a new body entirely, both should have the ability to take Government to court, in the same way that the EC can refer an offending Member State to the Court of Justice of the European Union (CJEU).

Nevertheless, we consider that the scope of the proposed arrangement should be clearly set out in the new duty in order to avoid the risk of unintended 'regulatory creep'. The duty should specify a focussed and well-defined remit of any new scrutiny arrangements to hold Scottish Government to account whilst also ensuring certainty and stability for Scottish businesses.

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