

Why the proposed new environmental body should enforce climate law

Briefing for parliamentarians and policy makers
September 2018

Summary

Leaving the EU will create a major gap in the UK's climate protections, yet the government's current proposals for post-Brexit environmental governance ignore this entirely. This briefing explores this climate gap and sets out why the proposed new environmental body must include climate change within its remit.

The European Commission, Court of Justice and other EU agencies have been essential in ensuring compliance with environmental law in the UK. The UK government has recognised that Brexit will create a governance gap and has proposed a new environmental body to hold government to account. Greener UK welcomes these proposals, and the government's aspiration for a world-leading environmental governance system. However, there are a number of concerning gaps in the current proposals, which we have described in our response to the Environmental Principles and Governance (EPG) consultation.¹ Here, we set out in more detail our concerns about one gap in particular: the exclusion of climate change - one of the largest environmental challenges we face - from the new body's remit.

At present, the UK's Climate Change Act requires parliament to set five-yearly carbon budgets based on evidence from the Committee on Climate Change. These budgets are met by a combination of domestic and EU policies that reduce emissions, such as those on vehicle standards. This twin track approach of meeting climate targets through domestic and jointly designed EU policy is to be hampered as a result of Brexit, and existing EU climate governance mechanisms will be lost. This comes at a time when the Committee on Climate Change suggests the UK is not on track to meet its fourth and fifth carbon budgets, indicating a slowing of the UK's climate progress.

Why does this matter?

1. **More than half of UK emissions reductions are set to be delivered by EU rules.** Leaving the EU means losing the European Commission's oversight of more than 55 per cent of emissions reductions expected in the UK by 2030.² The Commission has powers to enforce the delivery of these policies by introducing milestones, corrective measures and, as a last resort, penalties. Not developing an equivalent enforcement regime would amount to a weakening of the UK's climate governance. The UK's existing domestic mechanism of judicial review is too narrow in scope and remit, and too restrictive in terms of access, including costs, to provide the equivalent functions.
2. **Carbon blindness would undermine the new environmental body.** Environmental and climate policy overlap: for example, species protection

needs to account for climate change, and air quality solutions can help reduce carbon emissions. A climate-blind body would risk conflicting and negative outcomes for both the natural environment and climate goals.

To address this challenge, the new body's remit must include climate change. This would create equivalence to the current system and ensure rigour in holding the government to account, which is necessary to meet the prime minister's commitment to create a 'world leading' organisation.

Why there will be a climate governance gap

The key argument put forth by the government against including climate change within the remit of the new environmental body is the presence of the Climate Change Act and the functions performed by the Committee on Climate Change (CCC). The CCC is an essential body at the heart of UK climate progress. However, it is an advisory and strategy body only: it lacks enforcement powers so cannot hold the government to account for missing, or failing to plan how it will meet, its carbon budgets. Unlike the Commission, the CCC does not have the power to elicit information from government. Parliament has a broad role in scrutinising the government in all policy areas, but this does not fill the role of independent enforcement of the law.

Nor can the charity sector provide the same level of robust and independent enforcement of climate law as the European Commission. This is recognised in the EPG consultation, which states that in the UK's domestic governance framework, "there is no public authority with a standing responsibility for bringing proceedings against government on the environment, and the process does not have the same scope or remedies as EU action."³ In particular, the existing mechanism of judicial review is too narrow in terms of scope and remit, too restrictive in terms of access, including costs, and too limited in terms of remedies and sanctions, to form the basis of future enforcement.

Currently, 55 per cent of UK emission reductions expected by 2030 are derived from EU law, and these underpin the delivery of the UK's domestic carbon budgets. The EU (Withdrawal) Act now provides for these climate-related laws to be converted into domestic law, but, if the new enforcement body has no climate remit, these laws will have no enforcement mechanisms attached.

Furthermore, the EPG consultation document accurately identifies the need for the new body to oversee all domestic environmental law, and not merely EU-derived legislation, stating that "the new body is likely to be most effective when it considers this body of law together".⁴ The same reasoning should apply to climate change law and the proposed watchdog should therefore have all climate law, including existing domestic climate-related law as well as EU-derived law, within its enforcement remit.

Another aspect of the climate governance gap lies in the EU's ability to require governments to ensure they are on track to meet their climate goals, including by requiring the achievement of milestones, or payments into a finance mechanism which invests in low-cost decarbonisation measures. The precedent for this approach lies in the Governance of the Energy Union Directive, which the UK has supported.⁵ After the UK leaves the EU, these processes could be replaced by,

among other things, the new watchdog issuing binding notices to the government requiring specific corrective measures to meet legal targets. Such an approach would ensure the government meets climate goals, helping to avoid a situation in which government falls so far behind in progress on achieving carbon goals that they become all-but-impossible to achieve.

Potential for conflict between climate and wider environmental governance

Environmental and climate regulation are often intertwined. For example, the restoration of peat bogs can conserve local biodiversity while also sequestering carbon from the atmosphere. Similarly, electric vehicles reduce both local air pollution and carbon emissions. There are many areas where environmental regulation significantly overlaps with distinct climate change outcomes including farming, afforestation, flood management, onshore and offshore fossil fuel development and related planning consents, soil management, land use and forestry.

If the new environmental body is explicitly prevented from considering climate – as the EPG consultation proposes –the value of policies that deliver benefits for the climate alongside other environmental benefits might be overlooked. Worse, a carbon-blind environment body could be unable to recommend or enforce an environment measure that would achieve decarbonisation as well as other environmental objectives (e.g. switching to LPG for buses on air quality grounds vs electric buses). The CCC has recognised this overlap, arguing that “mitigating and adapting to climate change forms an essential component of progress which cannot be disentangled from a wider assessment of the state of the natural environment.”⁶

This, then, suggests the need for a broad split of responsibility between the CCC and the new environmental body. The former should retain its status as the principal advisor and strategy body for climate related policy, whereas the latter should be empowered to review and enforce compliance with obligations on climate change.

What functions should the new environmental body perform on climate change?

| Governance function | Existing arrangement | Role for the new environmental body |
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| <p>Power to enforce corrective action by government and relevant public authorities</p> | <p>The Commission currently has the power to enforce corrective action by member states to ensure they remain in line with EU-wide targets. This is primarily done through a mix of creating milestones and inbuilt flexibilities like purchasing offsets, failing which, infringement cases could be brought on the member state. This is a unique governance role for the Commission in ensuring climate targets are met in a timely and cost-effective manner.</p> <p>For example, in the case of renewable energy targets, member states could be required to pay into a financing platform if they fail to reach their baseline targets by 2021. (e.g. Ireland currently faces such a scenario and so would the UK if it continued in the EU effort sharing mechanism)</p> | <p>55 per cent of UK emissions reductions are expected to be delivered by EU-derived regulation. Within this context, Brexit presents a gap in governance as the domestic mechanisms are weaker compared to enforcement provided by the Commission and ECJ.</p> <p>An independent enforcement body is vital to ensure the government does not veer off track from meeting its carbon budgets. The body must be equipped with the power to take corrective action, including with penalties where necessary.</p> |
| <p>Enforcing carbon budgets</p> | <p>The UK's carbon budgets are domestically set and are underpinned by the Climate Change Act. The law offers the possibility for individuals or charities to pursue a judicial review to establish non-compliance with the law. No case has yet been brought that relates to meeting carbon budgets, but the CCC has identified a growing policy gap in meeting the fourth and fifth carbon budgets.</p> | <p>With a climate remit, the new environmental body could be empowered to enforce compliance with carbon budgets.</p> <p>The new watchdog's role here needs to be very carefully calibrated with that of the CCC. It is also particularly pertinent that an enforcement process is designed that improves on the established limitations of judicial review. It needs to be clear how compliance with carbon budgets could in practice be enforced.</p> |

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| <p>Close interaction with agencies like EA, CCC and NIC, ensuring their advice is duly considered and any enforcement action is taken on the basis of such advice</p> | <p>Agencies like the Environment Agency and Natural England are non- departmental public bodies that advise on and deliver broad environmental objectives that include managing some overlaps with climate change. These overlaps are primarily on climate adaptation such as managing the risks of flooding from climate change or advising on better environmental land management.</p> <p>The CCC and the National Infrastructure Commission are technical advisors to parliament and government, on climate change mitigation, adaptation and long term infrastructure resilience.</p> <p>Regulations like the Climate Change Agreements and Carbon Reduction Commitment (CRC) Energy Efficiency Scheme with clear implications for carbon abatement are currently managed by the Environment Agency, providing another indication of overlap of regulatory goals.</p> | <p>Including climate within the remit of the new body would ensure a strong enforcement mechanism that bolsters the existing functions of these agencies, while also holding them to account.</p> <p>On climate in particular, the new body should work closely with the CCC to back up the CCC's policy advice and enforce obligations under the Climate Change Act. Where the government fails to develop policies that meet the carbon budgets, therefore breaching domestic climate law, the new environment body could issue notices, obliging the government to design and implement policies within a specific time period.</p> |
| <p>Monitoring and reporting obligations</p> | <p>The government monitors and reports annually on greenhouse gas emissions. Concurrently, the CCC monitors the progress of policy towards meeting the legislated carbon budgets. The CCC publishes a progress report once every year with an obligation on the government to respond to its recommendations.</p> <p>Similarly, the government is required to produce, within a 'reasonably practicable' duration, an emissions reduction plan after the legislation of carbon budgets.</p> | <p>The Climate Change Act mandates the development of an action plan from the government that meets the carbon budget. In this regard delays should be avoided, such as the 15-month delay before publishing the last Clean Growth Strategy.</p> <p>The new environment body should be given the powers to pursue necessary measures, legal or otherwise, to ensure the government develops timely strategies.</p> |
| <p>Civil society engagement</p> | <p>Currently there is a free and straightforward process for citizens across the UK to raise a complaint to the European</p> | <p>While domestic courts are expected to perform some of the functions of the ECJ after Brexit, it is also</p> |

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| | <p>Commission in light of any breach of EU law. But, under the Climate Change Act, a more prohibitive (owing to high costs) process of judicial review has to be undertaken.</p> | <p>necessary to create an independent body that is able to, appropriately represent the concerns of the public. And, as noted earlier, the onus of ensuring government compliance should not be on citizens or NGOs but instead a public authority with a standing responsibility to enforce compliance with the law, including the ability to bring proceedings against the government, if necessary, as a last resort.</p> |
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Endnotes

1 http://greeneruk.org/resources/Greener_UK_response_to_Defra_EPG_consultation_310718.docx.pdf

2 Committee on Climate Change, 2016, *Meeting carbon budgets – Implications of Brexit for meeting UK climate policy*, page 15 <https://www.theccc.org.uk/wp-content/uploads/2016/10/Meeting-Carbon-Budgets-Implications-of-Brexit-for-UK-climate-policy-Committee-on-Climate-Change-October-2016.pdf>

3 Department for Environment, Food and Rural Affairs, *Environmental principles and governance after the UK leaves the EU*, July 2018, Table 1 <https://consult.defra.gov.uk/eu/environmental-principles-and-governance/>

4 Para 122 and 123, *ibid.*

5 These payments, managed by the European Commission, are made by member states that are significantly behind on their targets and could pay for decarbonisation efforts in other parts of the EU, thereby contributing to the wider target. See the Governance of the Energy Union Directive:

<http://data.consilium.europa.eu/doc/document/ST-10307-2018-ADD-2/en/pdf>

6 Committee on Climate Change, Letter to Michael Gove MP on May 30 2018, <https://www.theccc.org.uk/wp-content/uploads/2018/06/Letter-CCC-to-Michael-Gove-Environmental-Watchdog.pdf>

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