GREENER UK

Environmental principles and governance after the UK leaves the EU

Environmental Governance Consultation
Environmental Regulations EU Exit Team
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Greener UK welcomes the opportunity to respond to this important consultation. Greener UK is a coalition of 13 major environmental organisations tracking Brexit to make sure that existing environmental protections are not weakened or lost. It is also committed to ensuring that the unique moment that Brexit offers is taken up to improve and enhance the UK's environment, so that the government's commitment to enhance the environment for the next generation is truly delivered. This response complements that submitted by Wildlife and Countryside Link, which we support.

We welcome and support the government's ambition and aspiration for a world-leading environmental governance system underpinned by the application of environmental principles.

However, there are a number of concerning gaps in the consultation and the proposals fail to replicate the current role of EU bodies in several key regards. Given this, it would be difficult to describe them as world-leading, as the government has said it wants them to be:

- There will be a serious enforcement gap. The consultation envisages that the new body would have limited powers, with no power to initiate legal proceedings. This would severely constrain its ability to ensure compliance with environmental law and be in conflict with Section 16 of the European Union (Withdrawal) Act 2018, which requires legal proceedings to be included as one of the provisions of the forthcoming draft Environmental Bill.
- The ability to initiate legal proceedings is one of a range of powers that will be needed in order for this body to ensure compliance with the law. For example, effective and dissuasive remedies and sanctions, such as fines and the issuing of binding notices requiring compliance with environmental law, must also be made available.
- The citizens' complaints mechanism is at risk. The consultation does not strongly back a complaints process, and appears to downplay the vital role civil society has played in upholding environmental law.
- The exclusion of climate change from the new body's remit will create a governance gap.
- Environmental principles are at risk of being watered down. The consultation does not strongly back listing environmental principles in legislation (again, in conflict with Section 16 of the European Union (Withdrawal) Act 2018), and

proposes only a very weak duty in relation to an environmental principles policy statement.
- The opportunity to set out additional environmental goals, objectives and duties is missed. The consultation mentions leaving the environment in a better state several times but does not propose to put this, or other broad objectives for nature's recovery and a healthy environment, in the forthcoming Environment Bill. Forward looking objectives to improve the state of the environment must be included in the bill, as well as a new legislative framework to ensure that those objectives will be met.
- The nature of the new body is not discussed. More clarity is needed on how the government intends to ensure that the new body will be independent, robust and equipped with the necessary expertise and resources to do the job well.

Question 1. Which environmental principles do you consider as the most important to underpin future policy-making?

Greener UK considers that Section 16(2) of the European Union (Withdrawal) Act 2018 sets out a useful minimum list of environmental constructs which should be given appropriate legal underpinning in the forthcoming Environment Bill. However, the statutory list should be non-exhaustive and viewed as a minimum list only, so that new principles, following public consultation and the appropriate parliamentary procedures, could be added in the future if needed.

The list in Section 16(2) of the Act includes a range of important environmental principles, objectives and rights, which must therefore be treated appropriately in terms of application (see below). These are:

(a) the precautionary principle so far as relating to the environment
(b) the principle of preventative action to avert environmental damage
(c) the principle that environmental damage should as a priority be rectified at source
(d) the polluter pays principle
(e) the principle of sustainable development
(f) the principle that environmental protection requirements must be integrated into the definition and implementation of policies and activities
(g) public access to environmental information
(h) public participation in environmental decision-making
(i) access to justice in relation to environmental matters

The Aarhus rights listed in (g)-(i) of the Act must be fully enshrined as enforceable rights in legislation. Their legal role is different to that of the principles, and so they must be treated differently and appropriately.

We consider that the Environment Bill should also incorporate the following into UK law:

- The non-regression principle (this holds that there should be no rollback of environmental protections, but rather a ratcheting up of ambition in subsequent law reform).
- A principle that environmental management should take place at the appropriate temporal and spatial scales should also be considered. This would ensure that

environmental issues are addressed at a scale that makes best ecological sense.
- A high level of environmental protection should be included as an objective of environmental law and policy, as it is in Article 191 of the Treaty on the Functioning of the European Union. It can be tied to the application of the environmental principles and used to help determine their proportionate application, clarifying that activities taken in order to achieve that objective are legitimate.
- The principle that full regard should be paid to the welfare requirements of animals, recognising that animals are sentient beings (currently enshrined in Article 13 of the Treaty on the Functioning of the European Union).

Question 2. Do you agree with these proposals for a statutory policy statement on environmental principles (this applies to both Options 1 and 2)?

The impact of environmental principles

The impact of the environmental principles in EU law is somewhat understated in the consultation document, especially in paragraphs 23 and 28. The environmental principles perform a number of different roles in EU law, including guiding policy development and policy implementation, guiding the interpretation of legislation, structuring the exercise of discretion by public decision-makers, and, in some cases, providing a standard for judicial review.

The impact of the principles extends deeply and routinely into administrative decision making, often having a binding effect on those delivering EU measures, including for example in respect of GMOs, pesticides, waste regulation and water regulation. The most striking example may be the way in which the Habitats Directive is said to give expression to the precautionary principle: Planning Inspectorate decisions are often notable for their careful, but pragmatic, application of a very demanding judicial approach to the precautionary principle.

So the impact of the environmental principles in EU law goes beyond "[guiding] our environmental policy making and legislation" (paragraph 28). Environmental principles are the bedrock of environmental law and set the framework for policy development and implementation. After the UK leaves the EU, the environmental principles should continue to play their current role of routinely guiding and shaping day to day administration affecting the environment. This would be neither novel nor disruptive, and would not trump the language of the legislation governing the regulatory regime being applied, which always remains central.

The options in the consultation document

Neither of the two options set out in the consultation document go far enough. The nature of the duty proposed in the consultation document is of concern. A duty 'to have regard' to the principles policy statement would be insufficient to ensure that the central role of the principles in EU law is replicated in UK law. Such a duty is at best little more than a tick-box exercise and all too easily ignored. The Select Committee on the Natural Environment and Rural Communities Act 2006 recently examined the efficacy and impact of the duty in Section 40 of the Act on public bodies to 'have regard to' the purpose of conserving biodiversity. The Committee found that the duty was "weak, unenforceable and lacks clear meaning".[1]

We are concerned that unless the wording of the duties on environmental principles is stronger and the proposed fiscal consideration exception removed, it will be too easy for environmental protection to be either ignored or subordinated to other priorities, such as economic growth or the requirements of new trade agreements.[2]

Greener UK recommendations

We recommend that the following statutory duties should be included in the Environment Bill:

- A duty on all public authorities (not just Ministers of the Crown) to apply the principles in the exercising of relevant functions (not just the making and development of policies).
- A duty on all public authorities (not just Ministers of the Crown) to act in accordance with the policy statement on environmental principles (this would ensure consistency with existing government policy on how national policy statements are to be taken into account by decision makers).[3]
- All public bodies, including the courts, should be required to read and give effect to legislation in a way that is compatible with the environmental principles.

Anything less would lead to a weakening of the current widespread and deeply-rooted roles of the principles. The Environmental Audit Committee has recommended that the Environment Bill must include provisions for all public bodies to act in accordance with the principles.[4]

We note that there are other duties available elsewhere in UK law that offer potential models for the duties on principles. For example, Section 6(1) of the Human Rights Act 1998 holds that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. There are also duties to have special regard to particular important matters, for example in the Planning (Listed Buildings and Conservation Areas) Act 1990.

Environmental principles policy statement

We note the proposal in paragraph 36 of the consultation document that a policy statement must represent and be informed by the latest scientific and legal knowledge and that it should be developed following consultation as well as presented to parliament for scrutiny, approval and review (we suggest a rolling five-year cycle). While we support the proposed role for parliament, we are not convinced that new scientific knowledge should necessarily affect the policy statement – the principles policy statement should provide a high-level framework for the application of the principles, rather than being an emanation of scientific research itself.[5]

Given the need for the policy statement to be in place before current EU governance arrangements cease, it will need to be prepared swiftly. We suggest that the government sets out a clear delivery timetable for the policy statement as part of its response to this consultation.

Question 3. Should the Environmental Principles and Governance Bill list the environmental principles that the statement must cover (Option 1), or should the principles only be set out in the policy statement (Option 2)?

Question 3 has now been superseded by the European Union (Withdrawal) Act 2018 which requires the forthcoming draft Environment Bill to include the principles set out in Section 16(2) of the Act. We strongly support their inclusion in statute for reasons of certainty, permanence, accountability and enforceability.

However, the statutory list should be non-exhaustive and viewed as a minimum list only, so that new principles, following public consultation and the appropriate parliamentary procedures, could be added in the future if needed.

Greener UK would strongly encourage the UK government, the Scottish government, the Welsh government and the Northern Ireland executive to work together to agree a co-designed and co-owned common list of environmental principles, which should be incorporated into the statute book of each jurisdiction of the UK. Given the time that co-design will take, this joint work is required urgently.

Question 4. Do you think there will be any environmental governance mechanisms missing as a result of leaving the EU?

The UK's departure from the EU will create a number of gaps in our governance mechanisms, which must be addressed, including the requirement to:

- Monitor and measure the state of the environment in a fully transparent fashion.
- Ensure proper implementation of environmental law and policy.
- Check compliance with environmental law and policy by government, business and other actors.
- Enforce environmental law by initiating investigations into possible breaches and responding to complaints from citizens and civil society organisations.
- Identify and act on breaches, with the application of appropriate remedies and sanctions (including legal and financial sanctions).
- Review and report information regarding both the state of the natural world and performance against policy objectives.
- Publish environmental information fully and transparently.

We agree with the conclusion in paragraph 73 of the consultation document that while existing domestic arrangements cover some of the important EU environmental protection mechanisms, they come with a number of constraints and limitations and do not fully meet the government's ambitions for effective environmental governance after the UK has left the EU.

Question 5. Do you agree with the proposed objectives for the establishment of the new environmental body?

Paragraph 79 sets out objectives, proposing that the new body should:

- Act as a strong, objective, impartial and well-evidenced voice for environmental protection and enhancement.
- Be independent of government and capable of holding it to account.
- Be established on a durable, statutory basis.

- Have a clear remit, avoiding overlap with other bodies.
- Have the powers, functions and resources required to deliver that remit.
- Operate in a clear, proportionate and transparent way in the public interest recognising that it is necessary to balance environmental protection against other priorities.

We agree with the first five objectives. However, we are concerned about the final part of objective six. While the new body will clearly need to operate transparently and in the public interest, its purpose should be to monitor, scrutinise and enforce compliance with environmental law, and not to 'balance' this against other priorities which are the responsibility of other government departments and agencies. It should not be the role of the body to decide how government is to balance its various objectives, but rather to ensure that it complies with its legal obligations.

We suggest that objective two should be for the new body to be independent of government and capable of holding it and other public authorities to account. We suggest that there should also be an objective to deliver public access to environmental justice (at least on a level that is currently provided by the EU).

The route to setting up an independent body

For the objectives relating to independence to be delivered in practice, the following essential criteria must be met:

- The new body must be accountable to parliament and not government, with a line of sight to a dedicated parliamentary committee along the lines of the relationship between the National Audit Office and the Public Accounts Commission.[6]
- If collaboration between the UK and other governments and assemblies leads to a co-designed, co-owned body, as we hope it will, then accountability should be to all parliaments and assemblies and it should only be possible to dismantle the body with the consent of all relevant legislatures.
- The Environment Act should provide a statutory basis for the independence of the body.
- The Environment Act include a clear purpose for the body, empowering and requiring it to act on behalf of people, nature and the environment. This could mirror the general duty assigned to the Equalities and Human Rights Commission in Section 3 of the Equality Act 2006.[7]
- There should be no power of direction for ministers over the body, and the chief executive officer should have complete discretion in carrying out the functions of that office, as is the case for the Comptroller and Auditor General.
- Funding must be provided, held and scrutinised by parliament, with settlements and estimates agreed in a three-way negotiation between government, the body and the relevant parliamentary committee. The body should be scrutinised by the National Audit Office which should observe these negotiations and assess whether the body is receiving adequate funding to fulfil its duties and whether it is providing value for money.
- Board members/commissioners/non-executive directors should be shortlisted, interviewed and appointed by an independent appointments panel, following an open process of national advertising across the UK. The panel itself should be appointed by the Commissioner for Public Appointments. Appointment of the chair should be confirmed following a pre-appointment hearing of the relevant parliamentary committee.

- Changes to the body's remit and governance should only be made if there is a two thirds majority of the relevant parliament(s), as is the case for the Press Recognition Panel.
- Appointment of the body's chief executive officer should be the responsibility of the members/commissioners/non-executive directors. Consideration should be given to making this a time-limited term of ten years, as is the case for the Comptroller and Auditor General.
- Appointment of all other staff, including the executive leadership group, should be the responsibility of the chief executive officer.
- The body should be responsible for preparing its own strategy, following consultation with relevant stakeholders; the body's chair should be required to report to parliament(s) on an annual basis on progress on delivering the aims and objectives of the strategy, through a written report and annual appearance before the relevant parliamentary committee. The report must also include an assessment of the extent to which the body is able to exercise its functions and discharge its duties independently from government.

The consultation is apparently quite strong on independence, liberally mentioning the word 'independent' but just saying something will be independent, will not make it so. There is no magic wand of independence; guaranteeing the independence of the body will require robust and novel legislation to ensure that the new body is independent from the outset and that its powers, functions, membership and funding cannot be chipped away as soon as it makes a decision that is unpopular with government. Creating a substitute arrangement for the Commission does not lend itself to precedent and we believe that a new approach is needed. We believe that a parliamentary body would be demonstrably viable and capable of and best placed to undertake the range of roles envisaged for the new body, including enforcement action against public bodies.

We have examined the role, functions and independence of a large number of bodies including Non Departmental Public Bodies such as the Equalities and Human Rights Commission, the Committee on Climate Change, the Environment Agency, the Information Commissioner's Office, Natural England and the Office for Budget Responsibility, and parliamentary bodies such as the National Audit Office, the Electoral Commission and the Parliamentary and Health Service Ombudsman. Our research, which includes direct engagement and interviews with many of these bodies, as well as with a number of government departments, has revealed that Non Departmental Public Bodies have limited, and in many cases severely curtailed independence. This manifests itself in a number of direct ways including through interference and direction on appointments, uncertainty and reductions in funding and a weakening or reduction in remit. There are also indirect effects where bodies are culturally unable or unwilling to stand up to government because of fears that this will impact on their funding, functions and future.

We note that following its inquiry into this consultation the Environmental Audit Committee has recommended that the new body should report to parliament and be modelled on the National Audit Office.[8]

Taking all these factors into account, Greener UK's preferred model for the body is a Non-Administratively Classified Parliamentary Entity as explained on page 24 of the Cabinet Office's guidance for departments on the classification of public bodies. Non Departmental Public Bodies have theoretical independence but reality and

experience suggests that this model is unlikely to provide the necessary level of independence for the body to hold government to account.[9]

In summary, it is vital that appropriate safeguards are put in place to ensure independence. These safeguards must include ensuring longevity, a guaranteed budget (lasting for more than one year), an appointments process managed independently from government and independence on the use of powers without government direction.

Question 6. Should the new body have functions to scrutinise and advise the government in relation to extant environmental law?
Question 7. Should the body be able to scrutinise, advise and report on the delivery of key environmental policies, such as the 25 Year Environment Plan?

It is important to recognise that the new body's primary role will be as an enforcement body and that advisory or scrutiny functions should be complementary to this.

Advising government and public authorities on the implementation of extant environmental law obligations would be a valuable function for the body to have. It would contribute to the body's enforcement functions by pre-empting problems and clearly setting out what the body considers to be best practice for meeting environmental obligations. This will be especially useful in dealing with systemic problems on particular thematic issues.

As part of its advice/scrutiny function with respect to extant environmental law, the body should be able to produce recommendations that public authorities must follow in order to avoid more formal enforcement action. If these recommendations are not followed, the body may then need to initiate formal legal proceedings and/or issue binding notices, as set out in our response to Question 9.

The 25 Year Environment Plan proposes annual reports. The intention to produce these reports should be backed up by a legal obligation to do so. This would be a valuable way to help ensure that policy commitments made in the plan are achieved. The new body could review reports such as these, scrutinising government action and advising on how it can best meet its policy commitments. There would also be merit in introducing legal obligations to report on the implementation of other aspects of government policy on the environment.

Advising on the implementation of existing law and policy is a markedly different task to advising on the development of new law or on the environmental outcomes of proposed changes in legislation.

The latter is no doubt a valuable task, but it may be challenging to locate it in the same body responsible for the enforcement of existing law.

Existing parliamentary committees and environmental bodies play an important role on policy scrutiny and advice, including assessing the effectiveness of existing legislation and calling for new legislation when necessary. The new body should work proactively with such bodies to deliver its advisory role in the most effective way, taking into account the remits and strengths of other bodies and working to ensure that approaches are complementary, achieve robust environmental

outcomes and provide clarity for stakeholders and the public on respective roles and responsibilities. It is likely that formal agreements on ways of working will be needed with a number of these bodies. For example, see the memorandum of understanding between the Environment Agency and the Health and Safety Executive.[10]

We have suggested this approach to limit the number of new bodies required to carry out these functions, and to ensure that the valuable opportunity to increase advice and guidance to government and public bodies around meeting environmental aims is not lost. However, the primary role of the watchdog should be to enforce environmental law and hold government to account.

We would therefore see it as key that the body be adequately resourced to carry out its enforcement functions and that controls are put in place to ensure that the enforcement function is carried out independently from the advice function. We would be open to considering other potential approaches including setting up a new advisory body along the lines of the Climate Change Committee, but it is critical that an enforcement role is created.

We welcome the prime minister's announcement that the government will bring forward the first Environment Bill in over 20 years. The Bill should set out ambitious broad goals for environmental improvement and nature's recovery, and a process for establishing legally binding SMART goals in law.[11]

Question 8. Should the new body have a remit and powers to respond to and investigate complaints from members of the public about the alleged failure of government to implement environmental law?

It is essential that the body is able to respond to and investigate complaints from the public. The consultation document asks whether the new body should have such a role, rather than how this should be undertaken. Losing this function would be a major shift from current arrangements and constitute a significant weakening of civil society's recourse (via the European Commission) to a free, accessible, relatively quick and effective mechanism for ensuring that public authorities comply with environmental law. Such a mechanism must also be provided by the new body.

Citizens should be able to file a complaint about a potential breach of environmental law. The complaints procedure will need to be cost-free and apply a more intense scrutiny of the merits than judicial review, which is sometimes mooted as an alternative to the CJEU.

Ongoing communication with and involvement of the complainant is important. Complainants need to understand why their claim is not being pursued when that is not appropriate. If the body does decide to pursue a complaint, the complainant should be involved in the ongoing proceedings. People should be involved not only in identifying problems, but also in developing solutions as does, for example, the Hungarian Office of the Ombudsman for Future Generations and the New Zealand Parliamentary Commissioner for the Environment.[12]

The body's procedures should be open, iterative and deliberative. The new body can improve on the EU's processes by more actively and transparently involving complainants and other stakeholders.

The new body should be able to apply its discretion to decide which cases to investigate, as the Commission does now, rather than be under a duty to investigate all complaints.

Question 9. Do you think any other mechanisms should be included in the framework for the new body to enforce government delivery of environmental law beyond advisory notices?

Monitoring and enforcing compliance are critically important components in the effectiveness and stringency of environmental law and policy. Without proper oversight of the actual implementation of environmental law, the UK government and public bodies would in practice be held to a lower standard of environmental delivery, able to pick and choose which laws they obeyed and which they flouted, even if in principle the statute book remained unchanged. The Environmental Audit Committee has recommended that the new body should have "effective and proactive enforcement powers, with the power to fine government departments and agencies that fail to comply".[13]

Advisory notices

The consultation proposes that the 'enforcement' body will have only advisory functions. While advisory notices or action plans agreed between the body and the authority in question may result in valuable steps to improve compliance, legal force is needed to prevent authorities being able to simply ignore that advice. For example, Section 22 of the Equality Act 2006 gives the Equalities and Human Rights Commission the power to require a body to produce an action plan, but this power does not exist in isolation and the Commission is also able to take a number of other, more punitive actions including the initiation of legal proceedings and the serving of injunctions and compliance notices. A similar suite of powers is needed for the new body if it is to enforce compliance with environmental law in an effective manner.

It is, of course, reasonable to expect that the majority of the issues of non-compliance investigated by the watchdog will be settled without the need for legal action. The new body must act proportionately, as Section 16(1)(d) of the European Union (Withdrawal) Act 2018 indicates it should. However, recourse to legally binding mechanisms must be available, as a power of last resort. Sometimes this will be the most proportionate course of action in order for the body to meet its statutory purpose and duties.

Legal powers are not only valuable per se, but also enhance the seriousness with which any advice and recommendations made by the watchdog will be taken. A legal deterrent is an essential part of the enforcement process and is needed to achieve parity with existing EU arrangements, as well as to establish a world-leading environmental body. Knowing that there are hard sanctions at the end of a compliance procedure infuses the whole process with significance, causing it to be taken more seriously.

The ability to initiate or intervene in legal proceedings

The new body must, therefore, be able to initiate legal proceedings, and to intervene in proceedings brought by others where appropriate, especially where this would assist the court because of the body's expertise in or experience of the matter being heard. This is standard practice for independent regulators monitoring compliance with the law. For example, Section 30(1) of the Equality Act 2006 provides the Equalities and Human Rights Commission with the capacity to institute or intervene in legal proceedings, whether for judicial review or otherwise. This matter has been somewhat overtaken by the passing of the European Union (Withdrawal) Act 2018 which requires the government to include provisions within the draft Environment Bill for the body to have enforcement functions, including legal proceedings if necessary.

Binding notices

The consultation raises the prospect of the body being able to issue binding notices, although little detail is provided on how these would work or in what circumstances they might be justified.

In a world-leading approach to enforcement such notices would be a powerful step along the route of ensuring compliance. In principle, Greener UK supports an escalating notices-based enforcement regime, providing that this means that such notices should require a public authority to comply with the law, including by setting out what steps must be taken if necessary. It will be important that such notices are enforceable before the courts, backed with investigatory powers and the compulsion to provide information.

Under the Data Protection Act 1998, for instance, the Information Commissioner has the power to serve a notice where she is satisfied of a breach of the data principles. The data notice sets out requirements for action as specified in the notice to deal with data protection.

Similarly, in instances where the Equalities and Human Rights Commission thinks that a public authority has not complied with the public sector equality duty, the Commission has the power to serve a compliance notice under Section 32 of the Equality Act 2006. The notice may require compliance with the duty or provide an opportunity for a written proposal to show the steps that will be taken to ensure compliance. This written information must be produced to the Commission within 28 days of receipt of the compliance notice. A notice may also require further information to be produced to the Commission for the purposes of assessing compliance. Failure to comply with such a notice can result in the Commission applying to the relevant court for an order requiring compliance. Failure to comply with the Court order is a criminal offence.

If an investigation by the Commission finds that an organisation has committed an unlawful act, the Commission can issue an unlawful act notice under Section 21 of the Equality Act 2006. This details the breach and can recommend any necessary action to avoid it being repeated or continued. It may also require an action plan to be prepared. Giving the new body proper legal powers such as these would increase the likelihood of developing mediated solutions.

Where government or other authorities fail to comply, dispute the findings of the body, or simply wish to appeal the scope of the steps to be taken, an appellate procedure should enable the matter to be reviewed. This might be by way of the Environmental Tribunal, the Civil Court or the High Court. A special jurisdiction should be created to allow the Court/tribunal a wide range of remedies based on a hearing of the evidential and legal merits of the matter.

The new body should develop and publish its own enforcement policy, to set out its intended approach to bring about compliance with regulatory requirements, its approach to enforcement and the general regulatory principles which it intends to follow. It should also set out the criteria that it will consider when deciding the most appropriate response to a breach of legislation.

Financial penalties

It is generally accepted that one of the strengths of the existing EU compliance framework is the ability of the CJEU to financially penalise infringements of EU law by Member States with the use of financial penalties. Financial penalties are and should always be a last resort.

Clearly, the threat of enforcement through the CJEU is an important and critical element, as evidenced by their ability to drive action by Member States. Therefore, fines should be made available as a sanction for the new body.

Other sanctions and remedies

Under the Environmental Liability Directive a range of remedies can be applied to public and private bodies for causing environmental damage. These could be replicated for the new body to some extent. For instance, the following could be adapted:

- Preventative measures: requiring the government to take the necessary preventive measures and/or require the steps that must be taken to be preventive of harm.
- Remedial action: requirement to take remedial steps to return damaged natural resources, or harm caused by inaction, or restoration of environmental damage together with full implementation of measures/law through plans or new proposals.
- Compensatory measures: allowing for status quo to continue but for harm to be compensated through restoration of the environment where net positive gain could be demonstrated.

Other remedies could include the following examples from the New Zealand Environmental Court:

- Directing the government to comply with a mandatory order.
- Directing the government to set out how it will ensure laws/ instruments are produced to avoid, remedy, or mitigate adverse effects on the environment.
- Financial compensation orders for reasonable costs associated with avoiding, remedying or mitigating effects caused by a failure to comply with the above.

Other potential sanctions and remedies include:

- Suspension or removal of senior staff members.
- Requiring relevant staff to appear before a public inquiry.
- Suspension or relocation of statutory powers.
- A 'special measures' procedure, such as those brought by Ofsted or the Care Quality Commission, which could act as a powerful deterrent because of the ensuing reputational impact.
- Appropriate sanctions for contempt of court.

In summary, Greener UK considers that the new body must be equipped with powers equivalent to or exceeding those proposed below if it is to be effective in upholding the implementation of environmental law by both government and public authorities:

- The right to initiate and intervene in legal proceedings.
- The ability to undertake formal investigations into potential breaches of environmental law.
- The power to issue binding notices that must be complied with and are backed up by the courts. These notices may require steps such as the creation of action plans, the implementation of certain policies, the provision of information or compensation payments.
- The ability to issue sanctions if an authority fails to comply with a binding notice/court order to improve compliance with the law. These should include fines and could include relocation of powers or introducing 'special measures'.
- The ability to conduct inquiries on systemic problems in particular policy areas and make recommendations that public authorities must follow, unless they have good reason not to.

Question 10. The new body will hold national government directly to account. Should any other authorities be directly or indirectly in the scope of the new body?

All public bodies should come within the scope of the new body in so far as they deal with environmental matters.

The new body should be able to hold public authorities as well as ministers to account and the consultation is too limited in the proposed jurisdictional scope of the body. This is despite explicit recognition in the consultation that "[a]ctual delivery of policy measures and laws, while partly undertaken by government itself, is more commonly performed by responsible authorities such as the Environment Agency, the Forestry Commission, the Marine Management Organisation, Natural England, local authorities and others".

It is particularly important that the body has enforcement powers over all public bodies as many public bodies have important environmental duties and functions that are at arm's length to central government (for example, the licensing functions of Natural England and the Environment Agency).

It would therefore be sensible and reasonable for these authorities to fall within the scope of the watchdog. Otherwise, important safeguards will be lost, and communities alienated from those responsible for looking after their local

environments if the only way to challenge a decision taken at a local level is via national government.

The aim should not be to interfere with the functioning or role of these bodies as long as they are meeting their obligations under their statutory duties. However, the body should be able to hold these bodies directly to account on their statutory duties, advising on how best to comply with the law. Enforcement action should be taken against such bodies if they are not in compliance with or failing to achieve their duties.

The consultation document lists many of the statutory bodies with which the new body will need to work closely, but contains little detail on how this co-operation should work in practice. While such collaboration should be developed directly between the respective bodies, further clarity is needed now, especially given our recommendation that all public bodies should come within the scope of the new body in so far as their activities have an impact on environmental matters.

Question 11. Do you agree that the new body should include oversight of domestic environmental law, including that derived from the EU, but not of international environmental agreements to which the UK is party?

Greener UK agrees that the remit of the new body include oversight of all domestic environmental law (adapting the definition from the Environmental Information Regulations), regardless of the origin of that law, whether domestic or retained EU law. Creating a distinction between these two types of law after exit would create an artificial and unhelpful hierarchy, and risks rendering new legislation weaker if there were to be no accountability mechanism.

The body should have a role in overseeing international environmental agreements. This role is often or in many cases fulfilled by European institutions and does need to be replaced by a domestic mechanism. The Environment Bill provides the government with an opportunity to incorporate international environmental law obligations into domestic law.

Question 12. Do you agree with our assessment of the nature of the body's role in the areas outlined below?

The new body should have a role in relation to all of the policy areas outlined in the consultation document in so far as they intersect with environmental matters. We disagree with the proposal that the new body should have no role in the oversight or enforcement of climate change legislation.

The Committee on Climate Change (CCC) plays an important advisory and strategy role on the implementation of the Climate Change Act 2008. However, it has no enforcement powers. By contrast, 55 per cent of UK's greenhouse gas reductions to 2030 are subject to European Commission oversight and ECJ enforcement because they will be delivered through laws the UK agreed to via the EU. Losing this crucial governance mechanism could materially harm the UK's ability to achieve its targets. Failing to replace this enforcement function would be inconsistent with the government's pledge to ensure UK environmental standards match or exceed those set in place by the EU. The governance of the EU energy union also introduces milestones and interim targets for member states to meet, ensuring a robust

mechanism of enforcement through corrective measures, ahead of breach (for example in relation to the renewable energy directive).

We see no logic for separating climate from other environmental laws when it comes to accountability or enforcement. The proposals risk creating a significant governance gap on climate laws after exit.

The relationship between the new body and the CCC will require careful consideration to ensure that the bodies work in a synergistic way and that the institutional dynamic of the CCC as independent expert advisor to government and parliament is protected. For instance, we believe that the new body should not seek to replicate or repeat the functions of the CCC. However, a legitimate role for the new body could be to conduct its own investigations on climate change and it should have an enforcement role where legal duties are breached. This could take the form of binding notices, judicial reviews or ultimately even sanctions if necessary.

We are also concerned that explicitly excluding the new body from considering climate could mean that the assessment of policies that provide multiple public benefits (for example, peat bog restoration, which benefits water quality and biodiversity as well as climate) would be done in a less holistic way than might otherwise be the case.

Finally, the CCC does not currently have the power to require information, for example full details on how BEIS is planning to meet the 4th/5th carbon budget as set out in the clean growth strategy. Providing the new body with a power to request or require such information to be produced publicly would be a helpful addition to the powers already held by the CCC.

Question 13. Should the body be able to advise on planning policy?

Greener UK considers that the new body should be able to advise on planning policy and enforce environmental law with respect to planning. However, we are concerned that the consultation appears to envisage the new body having no remit to engage with individual planning decisions. This would be problematic and would prevent the body from effectively overseeing critical parts of environmental law such as those relating to environmental impact assessment and the impact of planning decisions on air and water quality law.

We believe the new body should be tasked with a clear remit to engage with planning decisions that raise issues of a significant and strategic nature. If this function is exercised proportionately it will not result in either delay to the planning process or any adverse impact on the delivery of infrastructure or housing targets, as some have suggested.

However, if the government continues to propose that the new body should be excluded from challenging planning decisions where these are not compliant with environmental law, then this would not achieve parity with current arrangements, let alone constitute a world-leading approach.

The following are examples where intervention by the new body might be necessary in the planning field in order to ensure that:

- The Environmental Impact Assessment Regulations are correctly followed in relation to applications for EIA development.
- The Strategic Environmental Assessment Regulations are correctly followed.
- Planning decisions are taken in accordance with the Habitats Regulations and other relevant environmental law requirements.

The new body would need to restrict its role to strategic interventions, for example in relation to developments with potentially very substantial environmental impacts. There are a number of possible ways in which such interventions could be achieved:

- Direct intervention in relation to the consideration of planning applications with substantial or repeated environmental impacts (whether those decisions are being taken by local planning authorities, the Planning Inspectorate or Secretary of State following a planning inquiry).
- Strategic reviews of the ways in which environmental law generally is implemented through planning.
- The power to initiate statutory appeals (for example under Section 288 of the Town and Country Planning Act 1990) where a grant of planning permission (or other planning decision) has been made in a manner that the new body considers to be in breach of relevant environmental law.

This would not be "another tier in the planning process" but would simply allow the new body to participate in existing planning processes in order to fulfil its remit to uphold the requirements of environmental law.

As well as providing national policy advice on the implementation of the environmental aspects of existing planning policy and suggesting future potential changes, we suggest the body could be a statutory consultee on development plans of a strategic nature, such as the new style city-region plans that are emerging and regional scale proposals, for example the Cambridge-Milton Keynes-Oxford Corridor.

The sheer scale of development associated with these initiatives has the potential to raise significant environmental challenges. The new body should also be able to advise on compliance matters relating to large scale projects that fall under the Nationally Significant Infrastructure Projects regime established by the Planning Act 2008 where these raise relevant issues.

Question 14. Do you have any other comments or wish to provide any further information relating to the issues addressed in this consultation document?

There are three additional areas on which we wish to provide comments.

The benefits and weaknesses of a UK-wide approach

A UK-wide approach (as a single/joint body or an arrangement between four bodies) would have a number of advantages:

- A single/joint co-owned body would be more durable and resilient than an England-only body and/or four individual bodies. However, this would require a political process of real co-design to agree its formation and legal provenance which respected the powers and institutions of each jurisdiction.

- It would be easier within a single/joint institution and common approach to enshrining principles to achieve consistency in policy implementation and legislative interpretation. This in turn would help standardise environmental outcomes for citizens and provide a greater degree of certainty for business. It would also help create a level economic playing field.
- It would avoid a situation in which four similar but separate bodies are required to operate under unequal resources and potentially could develop deeper expertise than four separate bodies could.
- It would benefit from the pooled expertise and evidence resources of the four countries, which might be particularly advantageous to the smaller countries.
- It would be well-positioned to manage transboundary environmental issues.
- The UK will need a strong governance architecture to give trade partners, and signatories of other international treaties, (including of course the EU) confidence that we will meet agreed environmental obligations and outcomes.
- It could act in each government's interests to prevent competitive deregulation (a 'race to the bottom') by one or more of the other governments.

But, there are some potential disadvantages:

- Unless the political conditions of co-design and co-ownership were met, a UK-wide approach would be viewed, by devolved administrations, as undermining devolution and thus unacceptable – this would be counter-productive.
- It would take more time to set up a UK-wide body, due to the need to reach agreement between UK and devolved governments, which could result in delays.
- Without greater clarity on the respective functions/responsibilities of the respective parliaments/governments, there is potential for the genuine UK-wide and England functions/responsibilities of the UK government to become interwoven and/or dominate. This could be to the detriment of scrutiny in the other jurisdictions.

The origins and political ownership of the body are vital to its acceptability and effective operation in a multi-jurisdictional state such as the UK. For example, if it were to be proposed by the Joint Ministerial Committee, and co-designed by all administrations working together, that would be a clear signal of its ownership by all four countries and ensure that its structure/operations reflected devolution arrangements, including responsibility to each parliament and recognition of different legal and institutional systems.

Greener UK welcomes the recognition in paragraph 13 of the consultation document that the environment does not respect boundaries, and that a joined up approach would be beneficial. However, it is difficult to assess whether there has been sufficient collaboration between the UK government and the devolved administrations on this matter, and whether the right processes are in place to agree the most environmentally rational settlement. This is because many of the discussions take place within processes such as the Joint Ministerial Committee, or in quadrilateral working groups of officials, which currently have no direct stakeholder engagement and lack transparency. Further information is available in the report from the Institute for Government on Devolution after Brexit, which sets out how the governments of the UK should approach new UK-wide agreements and what mechanisms and institutions will be necessary to support new agreements and broader relationships between the governments after Brexit.[14]

During debates on their respective Continuity Bills, the Welsh government committed to take the first proper legislative opportunity to enshrine the environmental principles into law and close the governance gap, while the Scottish parliament passed amendments and made further commitments to protect EU environmental principles and address governance gaps post-Brexit. The Scottish government has now published the report from the sub-group of its Roundtable on Environment and Climate Change on governance issues; this includes a passage on the UK dimension.[15]

The Welsh and Scottish governments and Department of Agriculture, Environment and Rural Affairs, Northern Ireland executive submitted written evidence to the Environmental Audit Committee's inquiry into the environmental principles and governance consultation. The Welsh government expresses its keenness to work with other administrations in addressing the environmental governance gap. The Scottish government remains ready to co-operate to seek to agree common approaches across the four administrations in the UK where this is in the best interests of Scotland's environment and people. The Northern Ireland executive, without prejudice to the views of incoming ministers, pledges to continue to work collaboratively with the UK government and the other devolved administrations to improve environmental governance.[16]

These welcome commitments offer a good basis on which to discuss and develop proposals that would ensure that governance and enforcement gaps are addressed across the whole of the UK.

Ambitious and measurable goals for nature's recovery and a healthy environment

A bill limited to the establishment of a new watchdog and incorporating the environmental principles into primary legislation could not make all the legal changes necessary to achieve the ambition of improving the environment for future generations. This is because the new body will only be able to enforce existing legislation. New objectives need to be put in legislation to leave the environment in a better state than we found it, on which the new body could then hold appropriate bodies to account.

The draft bill must include ambitious and measurable goals for nature's recovery and a healthy environment, setting a gold standard for a number of areas. It must also establish processes to define more detailed targets, metrics, and delivery mechanisms.

The government should also give legislative expression to its commitment not to weaken existing protections, enshrining this as a domestic principle of non-regression.

A sense of urgency

Assuming that there is an agreed implementation period then the government has until the end of 2020 to ensure that the Environment Bill is passed, the new policy statement on principles published and the new body established.

Given that parliamentary business will have to manage a great deal of other exit-related legislation, there will be a need for a greater sense of urgency.

It is clearly important to ensure that sufficient time is taken to design robust, workable legislation, with full stakeholder consultation, and setting up the body itself will inevitably take time. But we are keen to ensure that further delays do not occur as that will most likely mean that the government's commitment to ensure there is no governance gap after exit will not be addressed. We therefore suggest that the government must, as a minimum:

- Provide ample opportunity for pre-legislative scrutiny of and consultation on the draft Environment Bill and draft principles policy statement as this will help shape and develop robust provisions.
- Introduce the Environment Bill very early in the second parliamentary session so that it can commence its parliamentary journey well before the 2019 summer recess.
- Develop contingency plans, including to address a no deal scenario. These should include exploring the scope for setting up a shadow body on an interim basis. The government should set out progress on this issue in its response to the consultation, and publish proposals as to how and when further decisions on governance in a no deal situation will be made.

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[3] S104 of the Planning Act 2008 (subsections 3, 4, 5 and 6) and S47(2) of The Infrastructure Planning (Changes to, and Revocation of, Development Consent Orders) Regulations 2011
[4] Para 110 https://publications.parliament.uk/pa/cm201719/cmselect/cmenvaud/803/80302.htm
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