

## Briefing for MPs on the committee stage of the European Union (Withdrawal) Bill

November 2017

### Summary

Around 80 per cent of environmental law and policy in the UK is based on EU law. As the UK leaves the EU, standards of environmental protection should not be lowered. 83 per cent of the public believes that we should either maintain or strengthen standards for protecting wildlife in the UK (YouGov poll, August 2016).

As currently drafted, the UK government's European Union (Withdrawal) Bill fails to properly retain the whole body of environmental law (an objective set out in the government's White Paper).<sup>1</sup> It also fails to safeguard standards of environmental protection and the institutional arrangements needed to ensure environmental law works in practice.

Greener UK supports the amendment of the Withdrawal Bill to remedy these problems. In some cases there are a number of amendments seeking to achieve these goals. We have highlighted our preferred amendments in bold and include the text for these at the end of this briefing:

**1. To fully retain and secure the future status of environmental law post-Brexit (62, 93-95, 102, 103, NC25, NC55, NC2, NC58)**

The Withdrawal Bill does not retain certain obligations and objectives that are currently found in EU directives. It also allows for policy changes to be made to retained EU law via ministerial powers after Brexit. Both of these go against the stated objectives of the Bill.

**2. To enshrine the environmental principles in domestic law (101, 105, NC28, 9, 10, NC60, NC67, 336)**

Principles such as the precautionary principle are essential to the direction and interpretation of environmental law. The principles can also be used as the basis for a legal challenge and to guide future decision making, but the Withdrawal Bill seriously waters down the role of these important principles.

**3. To provide for new governance arrangements (NC27, 104, NC37, NC62, NC63, 342)**

Robust enforcement mechanisms are needed for when environmental requirements are not being met by government bodies. Currently we rely on EU institutions to provide many of these functions, and the Withdrawal Bill does not ensure that these functions will be retained.

**4. To restrict appropriately the use of delegated powers (96-100, NC24, 1, 2, 12, 13, 15, 25, 26, 27, 56, 138)**

The powers to make 'corrections' in the bill are currently too broad, general and vague. Amendments are needed to ensure that ministers are not given too much discretion in modifying retained EU law.

**5. To allow for robust parliamentary scrutiny of corrections to the law (NC26, 3, 4)**

Parliament must retain sovereignty over the law making process. An essential part of this is adequate scrutiny mechanisms for the exercise of delegated powers contained in the Bill.

This briefing sets out the amendments Greener UK would support to the Withdrawal Bill to ensure it protects the environment and environmental law.<sup>2</sup>

**1. Fully retain and secure the future status of environmental law post-Brexit**

Amendments **62** (Day 3), **93-95** (Day 2), **102** and **103** (Day 8b), **NC25, NC55** (Day 6), NC2 and NC58 (day 2)

The Withdrawal Bill does not currently ensure that environmental law will firstly be retained in its entirety and secondly safeguarded from watering down in the future. The bill must be amended to prevent a reduction in environmental protection both now and in the future.

Gaps will open up in environmental law through Brexit because some obligations are currently contained only in directives and not in the transposing domestic laws. These include obligations on member states and the Commission, such as reviewing, reporting and research requirements, essential obligations to ensure legal safeguards are being properly implemented and any further controls or standards required are put in place.<sup>3,4,5</sup> Because these do not currently exist within domestic legislation, these requirements need to be brought across and currently the Withdrawal Bill does not include this requirement.

These obligations should be retained and transferred to the appropriate domestic body or set of bodies.<sup>6</sup> Greener UK supports amendments to address these deficiencies and other failures in the bill to properly retain environmental law. Amendments **62, 93, 94** and **95** ensure that essential environmental provisions will not slip through the net.

Second, the future of environmental law must be safeguarded by ensuring that it is for each of the relevant legislatures (and not ministers) to decide whether and how to modify it in the future. As stated in the UK government's White Paper, "Parliament (and, where appropriate, the devolved legislatures) will be able to decide which elements of [retained EU law] to keep, amend or repeal".<sup>7</sup> This is the correct approach to the future modification of law that is crucial to the health of people and nature.

The Withdrawal Bill does not currently guarantee that environmental law will only be modified by the UK's parliaments once we have left the EU. In fact, it even contains provisions in Schedule 8 that specifically extend ministerial powers so that they can be used to modify what were EU regulations post-Brexit. This ought to be changed to safeguard environmental laws on matters such as chemicals and timber regulations from being altered without proper parliamentary and public scrutiny.

Greener UK supports amendments **NC25** and **NC55**, which specify a process for modifying retained EU law post-Brexit that strikes a more appropriate balance of powers. The amendments acknowledge that it is sometimes necessary to amend technical provisions via secondary legislation while reserving the power to make substantive modifications to acts of parliament. Amendments **102** and **103** remove the extension of ministerial powers to modify some aspects of retained EU law post-Brexit.

## 2. Enshrine the environmental principles in domestic law

Amendment numbers **NC60, NC67 (Day 2), 9, 10, 101, 105, 336 (Day 3), NC28 (Day 8B)**

Environmental law is composed not only of specific substantive obligations (such as to not disturb wildlife or to not use certain chemicals), but also a broad and comprehensive framework in which these obligations are embedded. This framework includes a number of environmental principles that underpin and aid the interpretation of these environmental laws, assisting governments, agencies and the courts in understanding the aims and objectives of environmental law requirements.

The principles can also currently be used as the basis for a legal challenge, but the Withdrawal Bill will remove or dilute these valuable principles.<sup>8</sup> Greener UK in particular supports amendments **101, 105** and **NC28**, which ensure that the environmental principles are fully retained.

The principles are extremely valuable parts of environmental law. For example, the polluter pays principle ensures that those responsible for damaging our environment must pay, and the precautionary principle provides an invaluable safety net when we are unsure what the effects of a certain chemical or activity might be.

The environmental principles are currently part of the body of EU environmental law, found in the Treaty on the Functioning of the European Union and also in a wide number of international legal agreements that the UK is party to. They are not principles especial to the EU, but rather principles of environmental law in general. It is essential that the UK continues to honour its international commitments and to show itself as a world leader in environmental protection by putting these in domestic law.

### 3. Provide for new governance arrangements

Amendment numbers **NC27, 104**, NC37, NC62, NC63, 342 (Day 6)

Environmental laws are only effective when they have strong institutions and mechanisms to support and implement them in practice. Laws on paper are not self-executing, and governments often do not fully implement measures they have enacted. Furthermore, robust enforcement mechanisms are needed for when environmental requirements and standards are not being met.

Until now, we have been very reliant on EU institutions and processes to achieve this.<sup>9</sup> While the precise role of EU or other bodies in overseeing future relationships between the UK and EU will depend on the outcome of the negotiations, the UK and devolved governments will need to work together to replace some key oversight functions with new domestic arrangements. There are no UK bodies at the moment that consistently scrutinise progress by government departments and others, in meeting their environmental obligations, including meeting agreed standards and targets and to hold them to account in cases of failure or unjustified delay.

Furthermore, at the heart of the current compliance systems is the ability of citizens to hold governments to account on environmental standards by means of current EU institutions.

Current plans to replace the governance roles of EU institutions in the Withdrawal Bill are severely lacking. In the worst case scenario, they permit ministers to abolish existing functions and place too much reliance on judicial review which has an important but limited role. And, even when new bodies are to be established to perform crucial oversight functions, there is far too much ministerial discretion left in their design: essentially allowing ministers to mark their own homework on compliance with environmental law.

The UK government should now commit to establishing new institutions and mechanisms for environmental governance once we leave the EU and new compliance systems must enable citizens and NGOs to assess justice and effective remedies through new institutions. They should be established through a consultative open process via primary legislation, in agreement with the devolved administrations. Greener UK supports amendments **NC27** and **104** which seek to achieve this.

### 4. Restrict appropriately the use of delegated powers

Amendment numbers **NC24, 96**, 1, 2, 15, 25, 56, 138 (Day 6), **97**, 12, 26 (Day 7B), **98, 99, 100**, 13, 27 (Day 7A)

Considerable modification of the UK's statute book will be needed to make sure that it functions properly and effectively once we have left the EU. It is appropriate for a significant proportion of these modifications to be made by statutory instrument, given their technical nature and the limited time available before exit day.

However, it is crucial that any powers given to ministers to make such modifications are restricted: they must be used only to ensure that retained EU law

continues to operate with equivalent scope, purpose and effect. Environmental law must not be tampered with during the process of 'correcting' the UK's statute book as we leave the EU resulting in lower standards. For example, ministers must be prevented from using Withdrawal Bill powers to lower permissible air quality levels.

Greener UK supports amendment **NC24**, which places a general and overarching restriction on the use of all delegated powers in the Bill; amendments **96, 97, 98, 99 and 100** also additionally specify that powers must not be used in a way that lowers environmental standards.

## **5. Allow for robust parliamentary scrutiny of corrections to the law**

Amendment number **NC26**, 3, 4 (Day 7A)

There are a number of ways in which the Withdrawal Bill threatens to shift power from the public and their elected representatives and gives it to ministers. For example, failure to properly safeguard environmental law from future modification by statutory instrument or failure to ensure that the public will have proper access to justice in environmental matters following Brexit.

This emergence of a democratic deficit is most serious in the scrutiny procedure afforded to statutory instruments made under the Bill. Currently the Bill envisages that the existing negative and affirmative procedures will suffice for this task of constitutional significance. However, neither of these bestow the appropriate levels of discretion to Parliament in scrutinising the upheaval of our statute book.

Greener UK supports amendment **NC26** proposing the establishment of a Westminster Parliamentary Committee tasked with first sifting then scrutinising any statutory instruments made under the Withdrawal Bill. This process would empower MPs to have a proper say in the reconstruction of our laws, including the ability to make amendments to draft laws and to recommend that a modification should not be made by statutory instrument.

## Annex – full text of amendments

### 1. Fully retain and secure the future status of environmental law post-Brexit

<b>House of Commons Amendment Number</b>	<b>Text of Amendment</b>
93	Clause 4, page 2, line 45, leave out sub-paragraph (b)
94	Clause 4, page 3, line 4, leave out paragraph (b)
95	Clause 4, page 3, line 9, at end insert—  “(4) Where, following the United Kingdom’s exit from the EU, no specific provision has been made in respect of an aspect of EU law applying to the UK or any part of the United Kingdom immediately prior to the United Kingdom’s exit from the EU, that aspect of EU law shall continue to be effective and enforceable in the United Kingdom with equivalent scope, purpose and effect as immediately before exit day.  (5) Where, following the United Kingdom’s exit from the EU, retained EU law is found to incorrectly or incompletely transpose the requirements of EU legislation in force on exit day, a Minister of the Crown shall make regulations made subject to an enhanced scrutiny procedure so as to ensure full transposition of the EU legislation.”
62	Schedule 1, page 15, line 28, leave out paragraph 4

NC55	<p>To move the following Clause—</p> <p><b>“Treatment of retained law (No. 2)</b></p> <p>(1) Following the day on which this Act is passed, no modification may be made to retained EU law except by primary legislation, or by subordinate legislation made under this Act.</p> <p>(2) The Secretary of State must by regulations establish a schedule listing technical provisions of retained EU law that may be amended by subordinate legislation.</p> <p>(3) Subordinate legislation to which subsection (2) applies must be subject to an enhanced scrutiny procedure, to be established by regulations made by the Secretary of State after approval in draft by both Houses of Parliament, which must include consultation with the public and relevant stakeholders.</p> <p>(4) Delegated powers may be used only to modify provisions of retained EU law listed in any Schedule made under subsection (2) to the extent that such modification will not limit the scope or weaken standards of equalities, environmental and employment protection, and consumer standards.”</p>
102, 103	Schedule 8, page 50, leave out paragraphs (3) and (5)

## 2. Enshrine the environmental principles in domestic law

<b>House of Commons Amendment Number</b>	<b>Text of Amendment</b>
101	<p>Schedule 1, page 15, line 17, delete paragraph 2 and insert—</p> <p>2. (1) Any general principle of EU law will remain part of domestic law on or after exit day if:</p> <ul style="list-style-type: none"> <li>(a) it was recognised as a general principle of EU law by the European Court in a case decided before exit day (whether or not as an essential part of the decision in the case);</li> <li>(b) it was recognised as a general principle of EU law in the EU Treaties immediately before exit day;</li> <li>(c) it was recognised as a general principle of EU law by any direct EU legislation (as defined in section 3(2) of this Act) operative immediately before exit day; or</li> </ul>

	<p>(d) it was recognised as a general principle of EU law by an EU directive that was in force immediately before exit day.</p> <p>(2) Without prejudice to the generality of sub-paragraph (1), the principles set out in Article 191 of the Treaty on the Functioning of the European Union shall be considered to be general principles for the purposes of that sub-paragraph.</p>
105	Schedule 1, page 15, line 21, leave out paragraph 3
NC28	<p>To move the following Clause—</p> <p><b>General environmental principles</b></p> <p>(1) In carrying out their duties and functions, public authorities must have regard to and apply the principles set out in this section.</p> <p>(2) Any duty or function conferred on a public authority must be construed and have effect in a way that is compatible with the principles in this Section and the aim of achieving a high level of environmental protection and improvement of the quality of the environment.</p> <p>(3) The principles in this section are—</p> <ul style="list-style-type: none"> <li>(a) the need to promote sustainable development in the UK and overseas;</li> <li>(b) the need to contribute to preserving, protecting and improving the environment;</li> <li>(c) the need to contribute to prudent and rational utilisation of natural resources;</li> <li>(d) the need to promote measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change;</li> <li>(e) the precautionary principle as it relates to the environment;</li> <li>(f) the principle that preventive action should be taken to avert environmental damage;</li> <li>(g) the principle that environmental damage should as a priority be rectified at source;</li> <li>(h) the polluter pays principle;</li> <li>(i) the principle that environmental protection requirements must be integrated into the definition and implementation of policies and</li> </ul>

	<p>activities, in particular with a view to promoting sustainable development;</p> <p>(j) the need to guarantee participatory rights including access to information, public participation in decision making and access to justice in relation to environmental matters.</p> <p>(together the “environmental principles”).</p> <p>(4) In carrying out their duties and functions, public authorities shall take account of—</p> <p>(a) available scientific and technical data;</p> <p>(b) environmental benefits and costs of action or lack of action; and</p> <p>(c) economic and social development.</p> <p>(5) Public authorities, shall when making proposals concerning health, safety, environmental protection and consumer protection policy, take as a base a high level of protection, taking account in particular of any new development based on scientific facts.</p> <p>(6) Subsection (7) applies in any proceedings in which a court or tribunal determines whether a provision of primary or subordinate legislation is compatible with the environmental principles.</p> <p>(7) If the court is satisfied that the provision is incompatible with the environmental principles, it may make a declaration of that incompatibility.</p> <p>(8) In formulating and implementing agriculture, fisheries, transport, research and technological development and space policies, public authorities shall pay full regard to the welfare requirements of animals as sentient beings, while respecting the administrative provisions and customs relating in particular to religious rites, cultural traditions and regional heritage.</p>
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### 3. Provide for new governance arrangements

House of Commons Amendment Number	Text of Amendment
NC27	<p>To move the following Clause—</p> <p><b>Institutional arrangements</b></p> <p>(1) Before exit day a Minister of the Crown must make provision that all powers and functions relating to the environment or environmental protection that were exercisable by EU entities or other public authorities anywhere in the United Kingdom before exit day which do not cease to have effect as a result of the withdrawal agreement (“relevant powers and functions”) will—</p> <ul style="list-style-type: none"> <li>(a) continue to be carried out by an EU entity or public authority;</li> <li>(b) be carried out by an appropriate existing or newly established entity or public authority in the United Kingdom; or</li> <li>(c) be carried out by an appropriate international entity or public authority.</li> </ul> <p>(2) For the purposes of this section, relevant powers and functions relating to the UK exercisable by an EU entity or public authority include, but are not limited to—</p> <ul style="list-style-type: none"> <li>(a) monitoring and measuring compliance with legal requirements,</li> <li>(b) reviewing and reporting on compliance with legal requirements,</li> <li>(c) enforcement of legal requirements,</li> <li>(d) setting standards or targets,</li> <li>(e) co-ordinating action,</li> <li>(f) publicising information including regarding compliance with environmental standards.</li> </ul> <p>(3) Within 12 months of exit day, the Government shall consult on and bring forward proposals for the creation by primary legislation of—</p>

	<p>(a) a new independent body or bodies with powers and functions at least equivalent to those of EU entities and public authorities in Member States in relation to the environment; and</p> <p>(b) a new domestic framework for environmental protection and improvement.</p> <p>(4) Responsibility for any functions or obligations arising from retained EU law for which no specific provision has been made immediately after commencement of this Act will belong to the relevant Minister until such a time as specific provision for those functions or obligations has been made.</p>
104	<p>Clause 7, page 6, line 6, at end insert—</p> <p>(5A) A public authority established under this section will be abolished after two years.</p>

#### 4. Restrict appropriately the use of delegated powers

House of Commons Amendment Number	Text of Amendment
NC24	<p>To move the following Clause—</p> <p><b>Scope of delegated powers</b></p> <p>Subject to clauses 8 and 9 and paragraphs 13 and 21 of Schedule 2, any power to make, confirm or approve subordinate legislation conferred or modified under this Act and its Schedules must be used, and may only be used, insofar as is necessary to ensure that retained EU law continues to operate with equivalent scope, purpose and effect following the United Kingdom's exit from the EU</p>
96	<p>Clause 7, page 6, line 18, at end insert—</p> <p>(g) limit the scope or weaken standards of environmental protection.</p>
97	<p>Clause 8, page 6, line 38, at end insert—</p>

	(e) limit the scope or weaken standards of environmental protection.
98	Clause 9, page 7, line 8, at end insert—  (e) limit the scope or weaken standards of environmental protection.
99, 100	Clause 17, page 14, line 13, at end insert—  (8) Regulations under this section may not limit the scope or weaken standards of environmental protection.  (9) No regulations may be made under this section after the end of the period of two years beginning with exit day.

## 5. Allow for robust parliamentary scrutiny of corrections to the law

House of Commons Amendment Number	Text of Amendment
NC26	To move the following Clause—  <b>Scrutiny of statutory instruments</b>  (1) A Parliamentary Committee shall determine the form and duration of parliamentary and public scrutiny for every statutory instrument proposed to be made under this Act.  (2) Where the relevant Committee decides that the statutory instrument will be subject to enhanced parliamentary scrutiny the Committee shall have the power—  (a) to require a draft of the proposed statutory instrument be laid before Parliament;  (b) to require the relevant Minister to provide further evidence or explanation as to the purpose and necessity of the proposed instrument;  (c) to make recommendations to the relevant Minister in relation to the text of the draft statutory instrument;

	<p>(d) to recommend to the House that “no further proceedings be taken” in relation to the draft statutory instrument.</p>
(3)	<p>Where an instrument is subject to enhanced scrutiny, the relevant Minister must have regard to any recommendations made by the Parliamentary Committee pursuant to subparagraph (c) above before laying a revised draft instrument before each House of Parliament.</p>
(4)	<p>Where an instrument is subject to public consultation, the relevant Minister must have regard to the results of the consultation before laying a revised draft instrument before each House of Parliament or making a Written Statement explaining why no revision is necessary.</p>

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## Endnotes

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<sup>1</sup> Legislating for the UK's Withdrawal from the EU, Cm 9446

<sup>2</sup> For more detailed analysis, see ClientEarth Technical Report, *The Withdrawal Bill: destination and journey*.

<https://www.documents.clientearth.org/library/download-info/13448/>

<sup>3</sup> See eg Article 17 Habitats Directive 92/43/EEC OJ L206/7; eg Article 16 of the Water Framework Directive 2000/60/EC OJ L327/1.

<sup>4</sup> See eg Article 27 Ambient Air Quality Directive 2008/50/EC OJ L152/1.

<sup>5</sup> See eg Article 10 Birds Directive 2009/147/EC OJ L20/7.

<sup>6</sup> Though it may be the case that no appropriate body currently exists, hence our concerns over the 'governance gap' see below.

<sup>7</sup> [1.12].

<sup>8</sup> See Richard Benwell, August 2017, 'Green Brexit: 1 out of 3 for environmental principles', WCL Blog, [www.wcl.org.uk/green-brexit-1-out-of-3-for-environmental-principles.asp](http://www.wcl.org.uk/green-brexit-1-out-of-3-for-environmental-principles.asp)

<sup>9</sup> See Greener UK, August 2017, 'The governance gap: why Brexit could weaken environmental protections' [http://greeneruk.org/resources/Greener\\_UK\\_Governance\\_Gap.pdf](http://greeneruk.org/resources/Greener_UK_Governance_Gap.pdf)

Greener UK is a group of 13 major environmental organisations, with a combined public membership of over eight million, united in the belief that leaving the EU is a pivotal moment to restore and enhance the UK's environment.

## GREENER UK

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