

## Committee stage of the EU (Withdrawal) Bill Briefing on amendments 41, 66, 112, 113 and 317

Days 4 and 5: 5 and 7 March 2018

### Enshrining the EU environmental principles in domestic law

#### Amendment 66

**Greener UK supports amendment 66** laid by Baroness Jones of Whitchurch, which would carry over key environmental principles contained in the EU Treaties.

Environmental principles, such as the precautionary principle and the polluter pays principle, must be applied by courts, businesses and government in their decision making. They form an essential component of environmental law, which necessarily must be able to look ahead to the long term and be flexible in its application.

These principles are not unique to EU law, they are principles of environmental law in general, and are also found in a number of international environmental treaties to which the UK is a signatory. This includes the Convention on Biological Diversity, the Convention on Climate Change and the Convention on the Law of the Sea. Currently, the UK gives effect to these obligations to the international community through its membership of the EU and, in particular, the appearance of these principles within the Treaty on the Functioning of the European Union (TFEU).

Environmental principles are key to the interpretation of EU law and should, therefore, be key to the interpretation of retained EU law as it becomes domestic law. If the UK government's stated aim of achieving equivalence on day one of Brexit is to be achieved, the environmental principles need to be a part of domestic law on day one and the public should be able to rely on them, the courts should apply them and public bodies should follow them, at the very least in respect to retained EU law.

**Greener UK is concerned that the bill does not adequately retain the three key roles of the environmental principles:** in interpreting the law, in guiding future decision making, and as a basis for legal challenge in court.

The limitation of relying exclusively on UK case law to retain these principles can be seen in a recent analysis by professor of environmental law at UCL, Richard Macrory. He notes that "when it comes to, say, the Habitats Regulations the UK courts will still be obliged to apply the interpretation of the precautionary principle as contained in Waddenzee". But this does not mean that the precautionary principle will necessarily apply more broadly, as it currently does.<sup>1</sup>

To retain the law we have, to leave the environment in a better state than we found it, and to be world leaders in high environmental standards, the UK must, therefore, specifically retain the environmental principles in law. This is to ensure that

polluters will be forced to pay for their polluting activities, dangerous chemicals posing risks to health are not authorised for use while their effects are not fully known, and environmental considerations are properly woven into decision making across government.

There was strong support during debates in the House of Commons for the environmental principles to be embedded in statute, not least for the UK to comply with its international obligations and because this was a more binding option than a national policy statement alone. We note that the Scottish government has also supported the need for the principles to be carried through into domestic law.<sup>2,3</sup>

During the Committee stage of the bill, Dominic Raab MP, when he was minister of state for courts and justice, stated that: “Leaving the EU will not diminish our commitment to environmental principles. Indeed, it is an opportunity to reinforce them”.<sup>4</sup>

The UK government has announced its intention to publish a new comprehensive national policy statement setting out the environmental principles which will underpin future policy making. Greener UK welcomes this, as we believe a policy statement on how the principles are to be implemented in practice by decision makers would help to guide their implementation and would increase awareness of their role and application.

The incorporation of the environmental principles within the EU (Withdrawal) Bill, supplemented by the introduction of a national policy statement, would enable the government to stay true to its pledge, expressed by Dominic Raab MP and cited above, to ensure that it does not diminish its commitment to the environmental principles and, moreover, that the principles are reinforced.

If this policy statement was devised along the lines of those introduced through the Planning Act 2008, then it would need to be approved by and laid before parliament, subject to full public consultation; and it would need to be durable whilst allowing for the natural evolution and development of policy guidance. We believe that there would be significant merit in this statement being prepared jointly by the UK and devolved governments to ensure that the principles are interpreted on a consistent basis across the UK. The UK Marine Policy Statement offers a model for how this might be done. It was jointly adopted by the secretary of state, Scottish ministers, Welsh ministers and the Department of the Environment in Northern Ireland and provides the high level policy context within which national and sub-national marine plans will be developed.<sup>5</sup>

## **Amendment 41**

The bill relies on the term “general principles of EU law” in its approach to saving essential overarching legal principles. However, there is no definitive list of principles, nor a clear definition.

Amendment 41 tabled by Lord Goldsmith, and co-signed by Baroness Bowles of Berkhamsted, aims to preserve important principles in the absence of a clear definition by broadening the range of reference for identifying principles, and specifying that the principles listed in TFEU Art 191 should be included. TFEU Art

191 includes essential principles of environmental law, so **Greener UK supports amendment 41**.

However, TFEU 191 does not include all of the important environmental principles (such as sustainable development). Furthermore, the application of general principles is limited in the bill: Schedule 1 limits legal action on the basis of general principles and there is no duty to apply them in future policy decisions. Therefore, we recommend a more explicit approach that sets out the environmental principles in law, as proposed by amendment 66.

## **Examples of why the environmental principles should be enshrined in law**

### **Stopping the decline of bees**

Since 1900, the UK has lost around 20 bee species, and a further 35 are at risk. Pesticides are thought to be playing a significant role in this decline.

EU laws governing the use of pesticides aim to ensure that all potential risks are investigated, understood and minimised, before new technologies that could have a negative impact on the environment are approved. Such laws were developed in response to mounting evidence of the environmental and toxicological effects of pesticides, such as DDT, and widespread public concern about improper use.

In 2013, there was clear scientific evidence that the pesticides known as neonicotinoids could harm bees. But evidence was less conclusive about population scale effects, and whether or not the levels bees might be exposed to in the wild could be causing their decline.

The precautionary principle means that the risk of threats to health or the environment is taken into account, even in the absence of full scientific certainty. At the time, the EU banned the use of neonicotinoids on flowering crops on the basis of the precautionary principle, as lack of risk to bees could not be proved.

There is now evidence that neonicotinoids do harm the overall performance of bee colonies, as well as individual bees, justifying a continuation of the neonicotinoids ban.

### **Ensuring that polluters pay**

The polluter pays principle states that the polluter should bear the expense of carrying out pollution prevention and control measures. The EU's Water Framework Directive, which drives the sustainable management of the UK's waterways, has led to great improvements in the quality of our drinking water. It is specifically based on this principle, as is the Environmental Liability Directive.

In accordance with the principle, environmental agencies in the UK impose fines on operators found to have caused pollution, and require them to repair any damage and invest in preventative measures.

Significant fines have been imposed on two water companies, one for pumping raw sewage into a river and another for a pollution incident that killed fish, birds and invertebrates. In addition, the companies were required to repair the damage

caused and make investments to reduce the risk of breaches in the future. This not only ensures that clean-up and prevention costs are borne by the operator, and not by the taxpayer, but also acts as a deterrent because avoiding pollution usually costs less than removing pollutants from the environment.

## **Filling the governance gap: the need for a new green watchdog to be in place by exit day**

### **Amendments 112 and 113**

Significant progress has been made in developing and improving environmental laws over the past 40 years. However, these 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 agreed to. Furthermore, robust enforcement mechanisms are needed for when environmental requirements and standards are not being met.

Greener UK has published a briefing on the governance gap which will be created when the UK leaves the EU.<sup>6</sup>

The UK government has accepted that this gap exists and has pledged to address it on several occasions. The Scottish government has also acknowledged that there is a governance gap and has requested the advice of the members of the Environment and Climate Change Roundtable to deliberate and provide views on addressing it.<sup>7</sup>

Environment secretary Rt Hon Michael Gove MP has indicated that Defra will publish a consultation early in 2018 on the scope, powers and functions of a new environmental watchdog.<sup>8</sup>

While we welcome this commitment to consult, consultations can often be delayed and, in some cases, do not materialise at all, nor are the outcomes following consultation guaranteed.

On 15 November 2017, during the Committee stage, Dominic Raab MP, when he was minister of state for courts and justice, reassured the House of Commons that the consultation “..is not just blue-sky thinking—it is coming imminently”. But it is now three months on and the consultation is yet to be published.<sup>9</sup>

The date of exit is approaching rapidly and is just one year and one month away. We note that the UK government has published a draft legal text relating to the implementation period, but uncertainty remains about whether there will be such a period, as it is subject to negotiation with the EU, and, if so, how long it would be.<sup>10</sup>

There is also significant pressure on the legislative timetable, with legislation in development on animal welfare, substantial bills promised on agriculture and fisheries and the prospect of other legislation (for example on ivory). There is no firm commitment or timetable from the government on its plans for the legislation that would be needed to establish the new watchdog.

In his oral evidence to the Select Committee on the Natural Environment and Rural Communities Act 2006, Environment Secretary Rt Hon Michael Gove MP was asked about his department's legislative priorities and programme and whether this would include an environmental protection bill to establish the new watchdog. He responded that "...the logic is that, exactly as Lord Cameron points out, there will need to be environmental legislation to make sure that the new environmental protection body that we envisage is set up on an appropriate footing. There are some other things that we have said in the 25 year environment plan and elsewhere that mean that at some point in this parliament—we would all prefer it to be sooner, rather than later—we will need a piece of environmental legislation." <sup>11</sup>

While his intent is both clear and welcome, the environment secretary is unable to provide any certainty that the new watchdog will be in place by exit day. Therefore, **Greener UK supports amendments 112 and 113** laid by Lord Krebs and co-signed by Baroness Jones of Whitchurch, Baroness Brown of Cambridge and Baroness Byford.

## Amendment 112

Amendment 112 would enshrine the UK government's stated intentions in respect of the EU environmental principles and the establishment of a new independent environmental watchdog. It sets out the minimum standards for consultation on these matters.

The amendment would ensure that this consultation, including the prospect of primary legislation, would be brought forward within a reasonable timescale (within one month of Royal Assent).

Given the lack of certainty on a transition period, this legislation must begin its parliamentary journey at the earliest opportunity. The amendment would make it more likely that new arrangements will be in place before exit day, which is vital to ensure that there are no gaps in the UK's environmental governance framework.

It would commit the UK government and devolved administrations to bringing forward proposals for the establishment of a new environmental watchdog with responsibility for, and appropriate powers to oversee the implementation of, compliance with and enforcement of environmental law, policy and principles by relevant public bodies (including ensuring an effective complaints mechanism for civil society). It would also require consultation on the incorporation of EU environmental principles in primary legislation as a basis for relevant decision making.

The amendment also requires the UK and devolved governments to consult jointly on proposals, reflecting the need for a body to be co-designed across the governments of the UK to ensure that proposals are truly "co-developed" and "jointly owned" in line with devolution settlements.

The four governments will need to work together to address the post-Brexit governance gap. There is currently a lack of clarity regarding the plans for how the UK and devolved governments will work together in this respect.

Our current understanding is that the proposed Defra consultation on environmental principles and governance will propose an England-only solution to the governance gap, with the devolved administrations free to make use of the proposed body, if they desire. This would be far from the joint approach that is required.

There are considerable advantages to establishing a joint body or set of joint institutions to address the post-Brexit governance gap across the four UK nations. We are concerned that an England-only approach could result in a lack of co-ordination and consistency across the UK, and the persistence of important gaps in environmental governance. A jointly agreed arrangement would be far more robust and effective than an uncoordinated approach.

We note that a similar amendment was supported by MPs from across the House of Commons and from all four nations of the UK reflecting a strong cross party consensus on the importance of ensuring the government delivers and acts on proposals for a new environmental watchdog as quickly as possible, to ensure that adequate arrangements are in place before exit day.<sup>12</sup>

## Amendment 113

Amendment 113 would ensure oversight of the transfer of functions from EU institutions to domestic institutions, by requiring the government to establish a publicly accessible register of environmental governance functions and powers exercised by EU institutions, and to make regulations that ensure all relevant environmental powers and functions are continued.

This would ensure transparency on the functions that need to be replicated or replaced, including through the establishment of a new watchdog.

The register would also enable the public to monitor and hold the government to account on its plans for making sure that robust arrangements will be in place on exit day to deliver its ambition for a world-leading environmental justice system.

A similar amendment in the House of Commons was supported by MPs from across the House of Commons and from all four nations of the UK. This reflected a strong cross party consensus on the need for robust, deliverable plans to ensure that the environmental governance gap that would arise upon departure from the EU is filled as quickly as possible.<sup>13</sup>

## Common frameworks for environmental protection

### Amendment 317

**Greener UK supports amendment 317** tabled by Lord Wigley. In the UK, environmental protection is a devolved matter. However, while the UK is an EU member state, most environmental law in the four countries of the UK is guided by common frameworks set at EU level. This amendment would require the four

governments to work together on proposals to establish minimum common environmental objectives and standards.

### **Why common frameworks are needed**

No area of policy will be more affected by the outcome of the common frameworks debate than the environment. According to analysis by the Institute for Government, there are more than 140 distinct policy areas where EU law intersects with devolved powers, with the greatest number of these relating to the environment. This is unsurprising, given that EU frameworks have been widely created for environmental policy (approximately 80 per cent of environmental laws in the UK, including in the devolved nations, have some basis in EU legislation) and the widely recognised importance of transboundary co-operation and common standards for the effective protection of the environment and the prevention of unfair regulatory competition.<sup>14</sup>

For the effective protection of the environment, there are strong reasons for seeking to maintain common standards across the four nations post-Brexit. Such frameworks would provide a set of minimum common standards and should be jointly agreed between the UK and devolved governments. This will be important in a range of areas, such as the conservation of wildlife on land and at sea, environmental assessment and the co-ordination of action to address air and water pollution.

### **Examples of common frameworks**

EU legislation relating to the natural environment, such as the Birds and Habitats Directives, currently helps to underpin effective environmental action by providing minimum common standards for site and species protection across the four nations. This facilitates the creation of a more ecologically coherent network of protected sites than would otherwise have been the case. Such an approach will still be needed for the UK outside the EU, helping to ensure that actions in one jurisdiction complement, and do not counteract, conservation outcomes across this biogeographical region. After all, neither wildlife nor the threats it faces (such as pollution and non-native species) respect borders, as Secretary of State for Exiting the European Union Rt Hon David Davis MP recognised in his speech on 20 February in Vienna. The principles justifying EU-level co-operation on such matters would seem to apply equally, if not more strongly, to intra-UK co-operation post-Brexit.<sup>15</sup>

Similarly, the common frameworks provided by EU legislation relating to the assessment of the likely significant environmental effects of plans, programmes and projects (the EIA and SEA directives) mean there are consistent mechanisms in place for assessing transboundary effects and allowing for public participation and transparency in decision making across the four nations.

Co-operation and joint agreement on common frameworks that provide minimum standards and shared high-level objectives is, therefore, needed. This should not be about stopping any nation from pursuing greater environmental ambition but about preventing unfair competition and a 'race to the bottom', ie the risk that one jurisdiction could seek to gain a short term competitive advantage by unilaterally lowering its environmental standards, with others then following suit.

### The role of the Joint Ministerial Committee

Most environmental issues are transboundary in nature and represent a shared concern across the four nations. In a sign of welcome progress, the UK and devolved governments reached an agreement in October 2017 – via the Joint Ministerial Committee (JMC) (EU Negotiations) – to develop and agree common frameworks in some of these areas post-Brexit so as to ensure the effective management of common resources that naturally cross boundaries between the four nations.<sup>16</sup>

However, recent JMC announcements suggest that common legislative frameworks may only survive in a minority of areas post-Brexit. In his most recent speech, Cabinet Office Minister Rt Hon David Lidington MP went as far as suggesting that “looking after and caring for” the natural environment would “very obviously” be an area that would require little to no UK-wide co-operation or involvement post-Brexit.<sup>17</sup>

We are concerned that the UK government’s immediate focus on securing devolved legislative consent for this bill risks the environment being treated as a bargaining chip in these negotiations. This is compounded by a lack of transparency and stakeholder consultation regarding both the ongoing JMC discussions and the basis on which decisions are being taken. There is a serious risk, therefore, that many of the existing common frameworks in place as a result of the UK’s membership of the EU could either be abandoned or dismantled without any public scrutiny or consultation.

For the sake of our shared environment, failure to recognise the importance of agreeing a set of common frameworks in these areas would be of great concern. We urgently need the UK and devolved governments to commit to work more openly and transparently together to secure the best possible system of environmental governance across all four nations following the UK’s exit from the EU. This should be informed by a robust assessment of the environmental implications and a transparent process that allows for public consultation and input from stakeholders across the UK.

Achieving this will require more than just an “ambitious environmental plan” for England, as referenced by Rt Hon David Davis MP in his recent speech. Indeed, despite a welcome commitment in the UK government’s recently published 25 year environment plan to working with the devolved administrations “to uphold environmental standards and go further” as we leave the EU, the plan did not set out any detail on how this will be achieved in practice. Not only could this significantly hamper the UK government’s ability to meet the ambitions set out in the plan, both domestically and as a credible ‘global champion’ on the international stage, it could also undermine the very foundations upon which future environmental action and a global ‘race to the top’ must be built, which Rt Hon David Davis MP said was the UK’s ambition in his recent speech. **While Greener UK welcomes the UK government’s acknowledgement of the role currently played by EU law in creating “a consistent approach” to protecting common resources across the four nations, clear proposals are urgently needed to explain what might replace common EU frameworks post-Brexit and how they might be developed jointly by the various governments of the UK.**

For further details on this topic, please see the Greener UK briefing on Brexit and devolution and a blog by Professor Colin Reid from the University of Dundee which answers six questions about common frameworks.<sup>18,19</sup>

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## Endnotes

- <sup>1</sup> R Macrory and J Thornton QC, 'Environmental principles: will they have a legal role after Brexit?' (2017) *Journal of Planning & Environmental Law*
- <sup>2</sup> [Hansard](#), Committee Day 2, 15 November 2017
- <sup>3</sup> Roseanna Cunningham MSP, 6 November 2017, [speech at EEB annual conference](#)
- <sup>4</sup> [Hansard](#), Committee Day 2, 15 November, Col 501
- <sup>5</sup> [www.gov.uk/government/publications/uk-marine-policy-statement](http://www.gov.uk/government/publications/uk-marine-policy-statement)
- <sup>6</sup> [http://greeneruk.org/resources/Greener\\_UK\\_Governance\\_Gap.pdf](http://greeneruk.org/resources/Greener_UK_Governance_Gap.pdf)
- <sup>7</sup> For example, Rt Hon Michael Gove MP, [oral evidence](#) to the Lords energy and environment committee, 1 November 2017.
- <sup>8</sup> Gov.uk, 13 November 2017, [opinion piece](#) by Rt Hon Michael Gove MP
- <sup>9</sup> Col 501, [Hansard](#) Committee Day 2, 15 November 2017
- <sup>10</sup> [www.gov.uk/government/publications/draft-text-for-discussion-implementation-period](http://www.gov.uk/government/publications/draft-text-for-discussion-implementation-period)
- <sup>11</sup> Rt Hon Michael Gove MP, 16 January 2018, [oral evidence](#) to the Select Committee on the Natural Environment and Rural Communities Act 2006
- <sup>12</sup> [New clause 18](#), tabled by Caroline Lucas MP at House of Commons Report and co-signed by MPs from all four nations.
- <sup>13</sup> [New clause 21](#), tabled by Kerry McCarthy MP at House of Commons Report and co-signed by MPs from all four nations.
- <sup>14</sup> [www.instituteforgovernment.org.uk/explainers/brexit-devolution-and-common-frameworks](http://www.instituteforgovernment.org.uk/explainers/brexit-devolution-and-common-frameworks)
- <sup>15</sup> Rt Hon David Davis MP, 20 February 2018, [speech](#) on Foundations of the Future Economic Partnership
- <sup>16</sup> [Joint Ministerial Committee \(EU negotiations\) Communiqué](#), 16 October 2017
- <sup>17</sup> [www.gov.uk/government/speeches/united-at-home-stronger-abroad](http://www.gov.uk/government/speeches/united-at-home-stronger-abroad)
- <sup>18</sup> [http://greeneruk.org/resources/Brexit\\_and\\_devolution.pdf](http://greeneruk.org/resources/Brexit_and_devolution.pdf)
- <sup>19</sup> [www.brexitenvironment.co.uk/2018/02/21/common-frameworks/](http://www.brexitenvironment.co.uk/2018/02/21/common-frameworks/)

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