Wildlife and Countryside LINK

Defra consultation on Environmental Principles and Governance after the United Kingdom leaves the European Union

Response by Wildlife and Countryside Link

2nd August 2018

1. Wildlife and Countryside Link is a coalition of 48 voluntary organisations concerned with the conservation and protection of wildlife and the countryside. Its members practice and advocate environmentally sensitive land management, and encourage respect for and enjoyment of natural landscapes and features, the historic and marine environment and biodiversity. Taken together its members have the support of over 8 million people in the UK and manage over 750,000 hectares of land. We welcome the opportunity to respond to this Defra consultation on environmental principles and governance. This document complements the response submitted by Greener UK, which we support.

   This response is supported by the following organisations:

ALERC
Amphibian and Reptile Conservation
Badger Trust
Bat Conservation Trust
Born Free Foundation
Buglife
Campaign for National Parks
Campaign to Protect Rural England
ClientEarth
Freshwater Habitats Trust
Friends of the Earth
Institute of Fisheries Management
Marine Conservation Society
National Trust
Open Spaces Society
People's Trust for Endangered Species
Plantlife
Rewilding Britain
Rivers Trust
RSPB
RSPCA
Salmon and Trout Conservation
Whale and Dolphin Conservation
Wildfowl and Wetlands Trust
Woodland Trust
WWF-UK

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

2. The environmental principles, objectives and rights listed at section 16 to the European Union Withdrawal Act 2018 (**"EUWA"**) are a good starting point. Those principles being:

i. the precautionary principle so far as relating to the environment,
ii. the principle of preventative action to avert environmental damage,
iii. the principle that environmental damage should as a priority be rectified at source,
iv. the polluter pays principle,
v. the principle of sustainable development,
vi. the principle that environmental protection requirements must be integrated into the definition and implementation of policies and activities,
vii. public access to environmental information,
viii. public participation in environmental decision-making, and
ix. access to justice in relation to environmental matters.

3. However, there are additional principles that we believe will be fundamental to facilitating the Government's ambition to being the first in a generation to leave the environment in a better state than it inherited it, including the non-regression principle. The non-regression principle provides that there should be no weakening of environmental standards in law or lowering of environmental ambition in policy-making. The principle of non-regression is an emerging principle of international law as acknowledged by the International Union for Conservation of Nature. The principle can also incorporate the idea of "progression". This is the idea that environmental standards should be continuously improving. The ever-improving five-yearly targets in the Climate Change Act 2008 are an example of the progression principle in practice. The "no deterioration" principle as given legal status in the Water Framework Directive [1] could also be included, as could the no-harm principle. 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) should also be included in the new Bill.

4. The latest State of Nature report, published in 2016 found that more than 10% of UK species are at risk of extinction (and nearly 60% have declined since 1970). The 2016 Living Planet report paints a similar picture at a global level. A massive step-change is required if the UK is to halt and reverse the loss of biodiversity, meaning there needs to be requirements to not only maintain but also improve standards of protection and efforts to restore. Our ambitions therefore should not be limited to simply maintaining the environmental principles that form part of EU law, but extended to include new principles that can put the UK at the forefront of environmental protection. If legislation includes definitions of the above principles, such definitions should be subject to public consultation.

Paragraph 40 of the consultation paper states: "…*it is important to carefully consider how we will take on responsibilities currently fulfilled by the European Commission. This includes the need to*

balance environmental priorities alongside other national priorities, such as economic competitiveness, prosperity and job creation to provide sustainable development overall". First and foremost, it is clear that the post-Brexit legal framework should protect international and current EU standards in line with the UK's political commitments. The "proportionality principle" is an element of human rights law and a current general principle of EU law (found in Article 5(4) of the Treaty on European Union (paras 41-42).However, the approach advocated in para 40 above is not the proportionality principle as currently recognised. Not only would this approach appear to have no legal provenance, the effect of it will be to considerably undermine the legal weight of the principles. Link would ask whether the Government has assessed how this approach will secure its stated long-term objective or promote sustainable development.

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

5. No.

6. The government's preferred approach is for a policy statement to only apply to central government, and even then, such application would be limited to policy making, excluding all other functions of government. Such a narrow scope would greatly reduce the current application of the environmental principles, which have three main roles. They are used to interpret EU law, challenge decisions in court, and guide decision making across government and other public bodies. The principles should apply to all relevant functions exercised by government, public bodies and bodies performing public functions. Numerous UK public bodies currently rely on the environmental principles to guide their decision-making thanks to their appearance in the EU treaties.

7. The environmental principles should apply to all public bodies and bodies performing public functions. For example, local planning authorities must be required to apply the principles when developing local plans and policies. Similarly, other bodies with responsibility for making regulatory decisions should be required to apply the principles as part of their decision making process. Public authorities also have scope to adopt their own policies outside of the remit of central government policy making. There would be a stark disparity if those operating at a local level, having a real impact on our environment, were not required to apply or consider the environmental principles.

8. The consultation document proposes that central government need only "have regard" to the principles policy statement. Such a duty is far too weak, as it would permit government to consistently prioritise other interests over the environment and merely give lip service to the environmental principles. The government would be able to depart from the environmental principles without needing to have compelling reasons for doing so. By requiring only 'regard' for the proposed policy statement, the proposal makes it too easy for Government to prioritise trade concerns and deregulatory pressures over the environment. There must at least be a duty on public bodies in the legislation to apply the environmental principles and act in accordance with the policy statement. The following are examples of more appropriate duties based on existing legislation:

- **Human Rights Act** s.6(1) – "It is unlawful for a public authority to act in a way which is incompatible with a Convention right"
- **Wellbeing of Future Generations Act (Wales) 2015 s3(2)(b)** – a public body must take all reasonable steps (in exercising its functions) to meet the "well-being objectives"
- **Equality Act 2010 s149**– a public body must, when exercising its functions, have due regard to the need to achieve specified equality objectives
- **Planning Act 2008 s104(3)-** Requiring decision-makers to act in accordance with a national policy statement

9. The consultation document states that the principles policy statement would not apply to individual regulatory decisions. We do not agree with this limit on the application of the policy statement. The environmental principles must be a part of the decision-making process of all public bodies and they should be a relevant consideration in individual decisions as well as in the setting of broader policy.

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)?

10. The bill must include a non-exhaustive list of the environmental principles to be addressed in the policy statement (option 1). This approach would be consistent with the requirement at section 16(1) (a) of the EUWA for the Secretary of State to publish a draft Bill consisting of a set of environmental principles. If the bill did not include a list of the principles, it would be at the government's complete discretion to decide what qualifies as an environmental principle and what principles they would like to apply or ignore. Under EU law, the principles are contained in treaties so have a level of permanence that enable and require officials to factor them into their long term planning. If the principles are not listed in the bill, subsequent governments could decide to include completely different environmental principles in their policy statements, removing the ability of the principles to influence long term planning in relation to the environment.

11a. The bill should also include a duty on all public bodies to apply the environmental principles. In this way, both the principles and duty would be in primary legislation, giving them the level of certainty and endurance that they currently enjoy. The government could then set out in its policy statement how it intends to apply the principles and comply with the duty contained in the primary legislation. There would also be a further duty with respect to the policy statement itself as detailed above.

11b. Furthermore, there should be nothing to stop the government including additional environmental principles in their policy statement that are not listed in the bill. This approach would

overcome some potential objections to option 1 that it stops the principles evolving or new principles being considered.

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

12. Yes. The Consultation Paper states that the Environmental Principles and Governance Bill is designed to create: "*…a new, world-leading, independent environmental watchdog to hold government to account on our environmental ambitions and obligations once we have left the EU*"… which will *"… set a gold standard for environmental protection*". Therefore, the new body should be expected to do the same if not a better job of protecting the environment than is currently done by the EU Commission, the Court of Justice of the European Union ("CJEU") and other EU institutions. Currently the proposals in the consultation do not even replicate all the functions of the EU Commission and the CJEU. Furthermore, where replacements are proposed, these often fail to adequately replicate the powers of the EU institutions. We expand on this below.

Information Gathering and Technical Input

13. If the Watchdog is to have a truly strategic approach to the implementation and enforcement of environmental law, it will need a robust scientific and technical basis against which informed decisions can be made, action progressed and progress measured.

14. To be truly strategic and effective, an enforcement system must be complemented by an informed and robust system of technical information gathering and reporting, thus enabling any new watchdog to: (i) assess overall compliance with environmental law; (ii) determine whether public complaints are one-off instances of non-compliance or indicative of an underlying problem with regard to implementation; (iii) identify problems and progress own-initiative legal action that is strategic, targeted and resource efficient; and (iv) report publicly on compliance with environmental law and how legal action is helping to achieve stated objectives.

15. The European Commission is currently supported in this strategic function by the network of Committees and scientific bodies. These functions must be replicated post-Brexit in order to ensure the new body can initiate informed, strategic enforcement action against public bodies of its own volition.

16. EU laws routinely require Member States to report on implementing measures and evaluate the impact of those measures on achieving the objective(s) of the law. The Commission is then required to prepare a composite report based on the information provided by the Member States. Directives also commonly require the establishment of a committee consisting of representatives of the Member States and chaired by a representative of the Commission. The objective of these so-called "Comitology" Committees is to assist the Commission in information gathering, reporting and identifying measures to be taken in order to achieve compliance with the objectives of the

Directive. By way of example, the relevant provisions in the Habitats and Species Directive can be found in Articles 17, 20 and 21 and in the Water Framework Directive, Articles 15, 18 and 21.

17. There were 31 active comitology committees in the environment sector in 2016 including the Committee on the Conservation of Natural Habitats and of Wild Fauna and Flora (HABITAT) and the Committee on the Marine Strategy Framework Directive [2]. The committees decide their operating procedures (based on standard committee rules of procedure) and meet several times a year, following which the Commission publishes the voting results and the summary record of the meeting in the comitology register [3].

18. The Commission is also assisted in its functions by "Expert Groups", which provide expertise to the Commission in preparing and implementing policy as well as delegated acts. Expert groups provide a forum for discussion on a given subject and are based on a specific mandate involving high-level input from a wide range of sources and stakeholders that takes the form of opinions, recommendations and reports. This input is not binding on the Commission.

19. While Comitology committees and expert groups exhibit numerous differences in their manner of operation (principally as either political or technical bodies), their functions are complementary. Together, they serve to support the Commission in the effective development, implementation and enforcement of environmental law.

20. In order for the new watchdog to operate effectively as an informed body, these functions must be replicated post-Brexit. The establishment of devolved and UK expert advisory functions would enable an effective UK-wide approach to the implementation and enforcement of key pieces of environmental legislation.

21. Young people are worthy of special mention as an interest group here. Harm to the environment can have a disproportionate impact on children. As such, it is important that environmental policy take account of the interests of future generations. As the environmental leaders of tomorrow, the interests of young people from all backgrounds must be placed at the heart of advisory structures for the new governance system, in order for the Government to leave the environment in a better state than it inherited it.

Range and Strength of Enforcement powers

22. We are concerned that the government's proposals for the watchdog in respect of the enforcement of environmental law are remarkably weak and narrow. Not only is the remit of the new body potentially limited to central government departments, its powers are also limited to providing non-binding advisory notices. In this context, the Consultation paper refers to similar powers of the Equality and Human Rights Commission ("**EHRC"**) and the Information Commissioner's Office ("**ICO"**) to issue notices in their areas of responsibility (para 103). Interestingly, we note that these are the <u>weakest</u> enforcement powers enjoyed by these bodies -

the EHRC can institute legal proceedings directly and intervene in legal proceedings brought by other parties.

Section 16(1) (d) of the EUWA provides that the new body must have the power to commence legal proceedings. While this is a welcome development, the power to pursue enforcement action should be extended to cover (in)actions by all public bodies (not just Ministers of the Crown).

23. At present, the Commission can issue a letter of formal notice to a Member State, followed by a reasoned opinion giving the member state a fixed time to comply. The Commission can then refer cases to the CJEU, which can make judgments about whether a Member State has complied with EU environmental law and impose fines. If the new watchdog is only able to issue advisory notices to government our environmental oversight and enforcement will be ineffectual and incapable of providing equivalence with the present arrangements within the EU.

24. If the government wants the new body to be world leading it must have real enforcement powers including the ability to start legal proceedings against public bodies when necessary. The consultation raises the idea of the watchdog issuing binding notices whilst giving no further details on how they would be binding. If such notices could be issued detailing the steps a public body must carry out to remedy existing breaches of environmental law, and can then be enforced in court if such steps are not taken, binding notices would be a useful tool for the new watchdog.

25. The consultation also raises the idea of the watchdog entering into undertakings with public bodies in breach of environmental law (in the form of civil sanctions, which apply equally to government bodies and other regulated parties). Such undertakings could include agreements on compliance and restoration of damage. However, undertakings are only of value if - when they are not complied with - they can be enforced, including through the courts if necessary. The consultation does not give the new watchdog the ability to commence legal proceedings. In relation to court, the watchdog's ability appears limited to intervening in third party cases, thus continuing with the current reliance on those third parties taking such cases. If the watchdog is to have the teeth it needs to ensure the government and public bodies comply with their environmental obligations on leaving the EU, it needs the ability to refer cases to court of its own volition (in addition to the need to enforce binding notices and civil undertakings).

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

26. We broadly agree with the proposed objectives for the establishment of a new environmental body, but, as highlighted above, we disagree with its remit being limited to central government. The EU Commission takes actions against member states, rather than individual regulatory bodies within member states, because it is charged with ensuring the coherent application of EU law across the EU and ensuring harmonisation between member states. The same argument cannot be used to limit the remit of the new domestic watchdog to central government only. In the EU context, it is

the duty of the UK government to enact EU law, but in the domestic context it is the duty of the UK government and all public bodies to comply with the law as laid down by Parliament. The new watchdog should therefore be able to investigate and take enforcement action against all public bodies, just as comparable domestic bodies such as the EHRC and the ICO can. We also suggest that it would be ineffective and undesirable for the new body to only have the power to hold central government to account for the failures of other public bodies, especially when many have stand-alone responsibilities with no recourse back to government departments.

27. The legal status and resourcing of the watchdog are also crucial to its effective functioning and ensuring it is independent in line with the objectives. Firstly, the status of the new body should be permanently assured. In 2012, over 100 non-departmental public bodies were abolished, despite widespread public opposition. These bodies included (amongst others of environmental importance) the Sustainable Development Commission and the Royal Commission on Environmental Pollution. It is therefore important to ensure that the existence and operation of the new body is not susceptible to the whim of Government. We refer, for example, to the Press Recognition Body ("PRP"), a body established by Royal Charter. This ensures that it remains wholly independent of any other body or influence and that it is also very difficult to dissolve. Essentially, board members can only be removed by the unanimous agreement of the other board members. The Royal Charter itself, which gives the board members that security of tenure, can only be amended by a two thirds majority of each of the House of Commons, the House of Lords and the Scottish Parliament, and with the unanimous agreement of the Board itself. We recommend the new body be established in a similarly robust manner.

28. Secondly, the new body should be in receipt of adequate ring-fenced funding. We again refer to the PRP, which received guaranteed funding from the Treasury for the first three years of its operation (and, crucially, the Treasury had no control over how the PRP spent that money). The National Audit Office's funding model, where it receives funding directly from Parliament, is another model which could be used here. Finally, the new body should have (or have access to) a range of experts with different specialisms.

29. The phrasing of the current objective (f) for the watchdog to "*operate in a clear, proportionate and transparent way in the public interest, recognising that it is necessary to balance environmental protection against other priorities*" is of some concern. The consultation places heavy focus on 'proportionality'. This is concerning, as it potentially compromises the extent to which environmental law will be implemented. Breaches of environmental law are not currently, and should not be, assessed against domestic policy interests. At EU level, the proportionality principle has been utilised as a tool to prioritise environmental objectives, rather than relegate them to a secondary concern. This is demonstrated well in the Wallonia Waste case [4], where the principle of 'rectification at source' trumped free movement principles in the interest of environmental protection. The explicit exclusion of matters in the consultation concerning climate change, national security and fiscal security, highlights a misapplication of the proportionality

principle that we currently benefit from under EU law.

Question 6. Should the new body have functions to scrutinise and advise the government in relation to extant environmental law?

30. Yes – the new body should be able to scrutinise the Government's and other public bodies' compliance with and application of all environmental law, not just EU-derived environmental law. However, the main function of the new body must be to enforce and ensure the enforcement by all public bodies of all environmental law when necessary. To that end, it would be helpful for the new body to issue general advice on methods of compliance with environmental law. For example, the Commission routinely publishes guidance on the implementation of various provisions of EU law, much of which contain helpful practical steps and case studies to aid compliance (we would refer, in particular to guidance on the EIA Directive, Habitats and Birds Directives and the Water and Marine Strategy Framework Directives). As we understand it, the production of such guidance is overseen by the Comitology committees, thus helping to ensure that it ultimately reflects EU-wide issues and solutions. We therefore agree that the publication of general guidance could be an important role for the new watchdog.

Question 7. Should the new body be able to scrutinise, advise and report on the delivery of key environmental policies, such as the 25 Year Environment Plan?

31. Yes - as stated above, the primary role of the new body must be to enforce environmental law and any advisory role must complement this.

32. It should be a function of the new body to scrutinise environmental policies to ensure they comply with the government's environmental obligations. However, outside of such legal obligations, there is a potential risk that the new body could be politicised if it plays a role in forming and advising on the delivery of government policy. One approach to avoid a potential conflict would be to give environmental policies, such as the 25 Year Environment Plan, a legal grounding. The ambitions set out in the 25 Year Environment Plan should be revisited to allow for the development of more detailed, ambitious plans which could then be legislated for in a new Environment Act. A new Environment Act should contain legally binding objectives or targets for the restoration of nature and our environment, and set out a requirement and method for the development of new and ambitious legally binding SMART targets to be established in secondary legislation. In this way, the new body could advise government on how to deliver its policy objectives in a way that complies with environmental law and seeks to achieve the legally binding targets.

33. As we approach the next meeting of the Convention on Biological Diversity in 2020, a new Environment Act setting out ambitious and measurable goals for nature's recovery and a healthy environment will enable the government to show leadership and set the global agenda for environmental protection. Such an act would also demonstrate that the UK will continue to adhere to our international environmental obligations and will not regress in our environmental standards.

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?

34. Yes - Members of the public can currently write to the Commission through its website to make a complaint about alleged breaches of EU law. The procedure is free of charge and the Commission will investigate the complaint and, where it has merit, may pursue it without the complainant having any financial exposure or obligation to resource it. In contrast, the only domestic mechanism for the public to hold government and public bodies to account is judicial review ("JR"). For the reasons set out below in our response to question 9, reliance on JR is entirely inadequate as a replacement for the current EU complaints mechanism. In order for the new body to be world leading it must have the ability to receive citizens' complaints and pursue them as it deems appropriate, alongside the ability to progress enforcement of its own volition.

35. As well as receiving complaints from the public, the body should also work with complainants and other stakeholders to develop solutions to those problems it is investigating. By involving those affected in its decision-making, it will be transparent and identify solutions that are more robust, effective and well-rounded. However, if at any stage an advisory role conflicts with the new body's enforcement role, the enforcement role must always take priority.

36. The remit and powers must extend to receiving complaints, not just about government's breaches of environmental law, but all public bodies. Any concern that receiving complaints relating to all public bodies would expand the workload of the new body to an unmanageable degree could be addressed by giving the new body the power to establish its own sifting procedure by which it identifies the most significant complaints and pursues them, whilst accepting that it cannot act on 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?

37. As addressed above, advisory notices alone will be insufficient to enable the new body to hold government and other public bodies to account. Binding notices could offer a solution if they can be enforced in court. Key to the new body having the power it needs to protect the environment is the ability for it to commence legal proceedings. However, the Government appears to be proposing in the consultation that the public will assume the responsibility (and cost) of ensuring compliance with environmental law in the absence of any further action on the part of the new body. Not only is this flawed in principle, the mechanism by which the public is expected to perform this function is blunt in itself. Section 16 of the EUWA now ensures that the new body will have the power to commence legal proceedings, but the ability of the new body to exercise such power must not be curtailed.

As noted above, an escalating system of advisory and binding notices will be needed for the watchdog to be effective. These should be enforceable before the courts and set out the steps required for public authorities to comply with their legal obligations. The reason this is needed is because existing processes are inadequate, as detailed below.

38. There should be an appeal process in relation to the issuing by the new body of advice, formal notices and enforcement measures. This would limit the potential for mistakes and would ensure compliance with Article 6(1) ECHR and corresponding provisions of the HRA 1998. The right of appeal should be limited to the recipient and those who can demonstrate a "sufficient interest" in the matter to which the appeal relates (thereby providing similar standing as occurs in JR).

39. As mentioned above, the main existing domestic legal mechanism for action against government bodies is JR. The Government claims in the Consultation that JR can be "*a fast, effective and powerful way to convince a public body to reconsider a decision or take action it should be taking*". Whilst JR can be an effective mechanism, it suffers from significant flaws and has been systematically undermined in recent years. Our concerns are outlined below:

- **Intensity of Review** – The CJEU applies a proportionality test in environmental cases [5]. The intensity with which it is employed varies depending on whether the national measure interferes with a freedom guaranteed by an EU treaty, relies on derogation from an EU treaty, or simply implements EU law.

  JR in the UK is rarely concerned with the "merits" of a decision, or whether the public body has made the "right" decision - the only question before the court is whether the public body has acted unlawfully in accordance with established legal principles. The only review of the "merits" of a decision that can currently take place is to consider whether the decision was "*Wednesbury* unreasonable". This is a very high threshold to reach - essentially a court will not intervene and set aside an administrative decision unless it is so outrageous as to be perverse. There is no special provision in the common law for environmental cases – the courts apply the same threshold throughout. The consequence of this limitation is that challenges that do proceed rely almost wholly on procedural grounds. This renders JR a blunt and less effective instrument, as the decision-maker can simply remit the decision back to the relevant committee and make the same decision again with the procedural irregularities rectified.

  The judiciary has been asked to consider whether *Wednesbury* is the appropriate standard of review in numerous environmental cases in recent years. However, the courts have consistently held that *Wednesbury* is the correct standard of review. In December 2017, a number of environmental NGOs and a private law firm submitted a Communication to the Aarhus Convention Compliance Committee alleging that the UK is in breach of the relevant provisions of the Aarhus Convention for a failure to provide a review of procedural and

substantive legality. The Communication was declared admissible in March and the UK's written response is expected in August

- **Costs** – Changes to the Aarhus costs regime in 2017 have removed certainty for claimants with regard to adverse costs liability in environmental cases. Claimants must now provide a schedule of their financial resources when applying for JR. On the basis of this information, defendants can apply for the "default caps" of £5,000 (individuals) and £10,000 (all other cases) to be varied. While the court must ultimately ensure that costs are not "prohibitively expensive" for the claimant, the fact that the cap may be increased will, in our view, have a "chilling" effect on potential claimants. Successful claimants can also only recover up to £35,000 of their legal costs as a result of the "reciprocal cap", which can make cases "too expensive to win". Ironically, this was the case in a recent JR brought by the RSPB, Friends of the Earth and Client Earth challenging the new Aarhus costs regime – the claimants were successful but their lawyers were unable to recover their full costs because of the reciprocal cap. The Ministry of Justice (MoJ) introduced these changes in the face of overwhelming public and Parliamentary opposition and irrespective of the fact that environmental cases only constitute around 1% of JRs taken (approx. 150 of some 15,000+ cases annually [6]).

  Interestingly, the approach to costs in the UK courts differs markedly from the approach in the CJEU. The Court takes the view that as the European institutions are already funded by the public pursue, costs recovery is, in effect, duplication. As such, unsuccessful applicants are not expected to pay the EU institution's legal costs - the only costs payable are the travel and subsistence costs of EU legal staff attending the hearing.

- **Remedies –** Fines in the CJEU are genuinely dissuasive, routinely extending (for non-compliance) to a lump sum payment and daily penalties. For example, a failure to comply with judgments concerning the implementation of the Urban Waste Water Directive in Belgium recently resulted in a lump sum fine of €15,000,000 and daily penalties of €62,000. There are also opportunities to be creative and innovative with remedies (e.g. restoration orders, personal accountability or a committee overseeing compliance). Finally, for all environmental cases, interim relief (injunctions) should not require a "cross-undertaking in damages" before being granted.

- **Changes to the JR regime**– there have been a number of other unhelpful changes to JR generally in recent years including:

  - **Oral renewal** - as of 2013, there is no oral renewal for claims deemed "totally without merit" (this applied to some 18% of JR applications [7] in 2017);
  - **Criminal Justice and Courts Act 2015** – changes introduced under the Act include the "Significant difference test" (s.84), in which the court can refuse an application for JR where it considers that the outcome for the applicant would not have been substantially

different if the conduct complained of had not occurred and costs orders against interveners (s.87);

- **Time limits** - there is now a reduced (and very challenging) time limit for challenging decisions under the Planning Acts (6 weeks);
- **Court fees** – the Admin court fee has doubled in recent years to just under £1,000. Fees for the Supreme Court are in the order of £5,000;
- **Legal aid** – whilst theoretically available in environmental cases, there have been further reductions (NGOs do not qualify in any event) and, when awarded, a Community Contribution in the order of several thousands of pounds is usually required.

40. Any new "gold standard" environmental watchdog must be able to refer cases to court to achieve parity with EU complaints mechanism. Ensuing judicial processes should be strengthened to ensure full compliance with Article 9 of the Aarhus Convention, including:

- The intensity of JR should be reconsidered to ensure a review of procedural and substantive legality as required by the Aarhus Convention. Proportionality is one possibility - but they may be others. The use of technical experts to advise the judiciary (as in Sweden) may be helpful;
- The courts should be able to award dissuasive and innovative remedies;
- Third party interveners should not be at risk of costs;
- The costs regime should be revisited to restore certainty in respect of adverse costs liability, court fees should be reduced and the reciprocal cap should be abolished – there is no basis for it in the Aarhus Convention; and
- The six-week deadline in planning cases should be reviewed in order to ensure fairness to claimants.

Finally, any such review of JR could also consider whether environmental cases would be best heard in the Administrative Court (as now) or whether an environmental court or tribunal with bespoke rules may be preferable. There are now some 1,500 environmental courts and tribunals in existence globally, providing considerable experience from which information could be drawn.

41. The UK is already in non- compliance with Article 9(4) of the Aarhus Convention and has still failed to comprehensively address Decision VI/8k of the Meeting of the Parties to the Aarhus Convention. For some, review in the European Court via the public complaints mechanism is the only mechanism by which they can achieve access to environmental justice. As such, the Government's proposals as set out in the Consultation Paper would move us further away from compliance with the Aarhus Convention.

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?

42. If the new watchdog is to be truly world leading it needs the powers to ensure environmental law is complied with at all levels of government and in all public bodies. It should therefore be able to carry out investigations and accept complaints in relation to breaches of environmental law by all public bodies and bodies performing public functions. To ensure its workload is not too large, the new watchdog should have the discretion to decide which breaches to take action in relation to, taking into account their significance, the consequence of the breach, and remedial action taken and bearing in mind the overall objective of ensuring compliance with environmental law.

43. The Government's preferred approach in the consultation is that the watchdog's remit would be limited to reviewing the actions of central government departments and this matches the minimum requirement for the remit of the new body under the EUWA. The consultation states that the watchdog could indirectly act in relation to other public bodies by requiring the central government to take action requiring such bodies to remedy any breaches of environmental law that exist. Such an approach is far too narrow and convoluted (and as mentioned above we think will be ineffective and undesirable) and will lead to the watchdog being ineffective in many areas. The watchdog should have the ability to investigate compliance by public bodies and bodies performing public functions, not just central government. It is bodies such as the Environment Agency, Natural England, National Park Authorities and local authorities, amongst others, that apply environmental legislation, so if the watchdog is to ensure that our environmental laws are followed, it is important that they fall within its jurisdiction. If the government's preferred approach is followed, the watchdog would need to rely on central government to force other public bodies to remedy their breaches (and associated additional responsibilities and requirements would need to be placed on already stretched government departments), rather than being able to take action to remedy breaches directly itself.

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?

44. No. The primary function of the new body must be to enforce environmental law, and international environmental agreements should fall within the remit of the new body. Where an international agreement is binding and contains a framework for the enforcement of the obligations within, the new body should have the power to make a complaint to the relevant committee of the multilateral environmental agreement. Regardless of whether such international agreements are binding or not, the new body should have the power to make recommendations to government on compliance with international environmental law. Where the UK's international environmental obligations have been incorporated into domestic legislation, such domestic legislation must be enforceable by the new body. For the sake of clarity, the new body should also include oversight of domestic non-EU derived environmental law.

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

45. No. The new watchdog should be able to enforce all environmental law, including the government's obligations under the Climate Change Act ("CCA"). The Committee on Climate Change ("CCC") advises the government on the levels carbon budgets should be set at, but it has no enforcement powers. Such an enforcement role should sit with the new watchdog. This would complement the role of the CCC, but not replace it: the new body should not have advisory functions with respect to the CCA. At the moment, if the government is not complying with its obligations under the Climate Change Act, the onus falls on civil society to take legal action. The purpose of the new watchdog is to ensure environmental law is followed, and remove some of the burdens from civil society, so there is no good reason why climate change should be excluded from the remit of the new watchdog.

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

46. Planning has a significant impact on our landscapes and environment. Planning policy sets the direction of travel for development, for example, the new NPPF's emphasis on house building. Each individual decision has an incremental impact on the environment. As such, the new body must have a role in ensuring Government and public bodies are accountable for schemes and plans, which by their very nature are the largest and /or potentially most harmful, and where it is essential that their potential impacts are properly understood and assessed.

Importantly, we do not expect the new body to replicate existing processes and responsibilities within the planning system. However, it is essential that the new body has a role to play in the application of environmental policy and law within the planning system, and can hold Government and public bodies to account when there are failures.

The new body's role should include being able to review, and if necessary, challenge decisions where they do not comply with environmental law, or where the decision-makers do not apply the environmental principles. For example, decisions which would set a potentially damaging precedent or where there has been systemic breaches of environmental law and policy. We would not expect the new body to routinely review planning decisions. However, the new body should have the power to take targeted action, working closely with the Planning Inspectorate and others. This power should mirror the EU Commission's complaint regime and complement the Secretary of State's call in process when significant planning decisions have a detrimental impact on the environment, or where future planning strategy would be in breach of environmental law.

If the new body has no role in planning decisions, then the only recourse available would be JR and statutory challenge. This is not comparable to the current role of the EU Commission complaint regime and ultimately recourse to the European Court of Justice, which includes the power to carry out a more detailed review of decisions and their compatibility with environmental legislation.

The new body should also be able to advise on planning policy to ensure that it complies with the government's environmental obligations and principles.

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

47. It is unlikely that a bill limited to the establishment of a new watchdog and incorporating the environmental principles into primary legislation could make all the legal changes necessary to achieve the ambition of improving the environment for future generations. This is because the new watchdog will only be able to enforce and apply existing legislation. New legislation is needed to ensure the government meets the ambitions its set out in the 25 Year Plan for the environment and fully complies with its international commitments such as in the Aarhus Convention, the Convention on Biological Diversity and the Sustainable Development Goals. The 25 Year Environment Plan has no legislative underpinning so whilst the watchdog could scrutinise the application of the 25 Year Plan, it could not require the government to follow through with its proposals.

48. Legislation building on and improving the ambitions of the 25 Year Plan and embedding its ethos in the planning system would bring it within the remit of the watchdog's enforcement powers which would be a positive step towards achieving the government's ambition to leave the environment in a better state for future generations. This legislation, a new Environment Act, must include ambitious, measurable and legally binding goals for nature's recovery to ensure that the natural environment is healthy, resilient and sustainable for the benefit of people, plants and wildlife. In particular, we would expect that new legislation would build on the obligations and objectives already enshrined in domestic legislation, developing the successes of the 'outcome-focused' approach of EU laws such as the Habitats and Species Directive (the duty to achieve "favourable conservation status" for listed habitats and species, also found in Article 1(c) of the Bonn Convention), and the Water Framework Directive (the duty to achieve "good ecological status" in respect of water bodies). We are pleased that on 18 July the Prime Minister announced that her Government would bring forward the first Environment Bill in over 20 years. It must include a process and timescale for establishing legally binding SMART targets in secondary legislation in order to provide a pathway to restoring the environment. It must also ensure that the UK's impact on the global environment is positive. A new Environment Act must also empower people to enforce environmental law and force government to take its environmental obligations seriously, and establish new duties that transform the environment from a box-ticking exercise to an integral part of public and private decision-making.

Devolution

49. Along with our sister Scottish, Welsh and Northern Ireland Environment Links, in summary our concerns are:

50. The lack of any meaningful consultation so far between the four administrations on both filling the governance gap and the importance of principles, despite those needs being recognised by Westminster as well as the Welsh and Scottish Governments.

51. To ensure compliance with the devolution settlements, as well as the different legal regimes and systems in Scotland and Northern Ireland, those discussions across the UK are urgently needed. Any pan-UK proposals must be co-designed and co-developed.

52. Importantly, there needs to be consideration and a coming together of all UK governments on the required environmental outcomes and more official acknowledgement of transboundary issues, as well as a need to cooperate in other areas of importance so that agreement can be reached on what is required for the continued protection and conservation of our environment.

53. We are greatly concerned that there has been no truly intergovernmental processes or equal-basis engagement. For instance, Defra appears not to have shared the principles and governance consultation with devolved administrations before publishing it.

54. Co-operation between the four governments is a long established practice and requirement.

55. However, it appears that in relation to future governance and principles arrangements in this consultation, Defra has simply pushed ahead with its own plans, merely inviting the other countries to join in rather than working with them to shape a joint approach.

For more information, please contact:

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[1] Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy

[2] Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive)

[3] The comitology register contains a list of all comitology committees, as well as background information and documents relating to the work of each committee

[4] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61990CJ0002&from=EN

[5] See Jacobs, F. (2006) *The Role of the European Court of Justice in the Protection of the Environment*. Journal of Environmental Law (2006) Vol 18 No 2, 185–205.

[6] Taken from information obtained from the Ministry of Justice under EIRs 2004 and Ministry of Justice Civil Justice Statistics Quarterly, England and Wales, October to December 2017 (provisional) – see here

[7] *Ibid*