Wildlife and Countryside Link response to the consultation on the Duty for non-economic regulators to have regard to growth

1. Introduction

Wildlife and Countryside Link (Link) brings together 41 voluntary organisations concerned with the conservation and protection of wildlife, countryside and the marine environment. Our members practise 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 our members have the support of over eight million people in the UK and manage over 750,000 hectares of land.[1]

This response is supported by the following 16 organisations:

- Amphibian and Reptile Conservation
- Angling Trust
- Badger Trust
- Bat Conservation Society
- Buglife – The Invertebrate Conservation Society
- Friends of the Earth
- International Fund for Animal Welfare
- MARINElife
- Mammal Society
- National Trust
- Ramblers
- Royal Society for the Protection of Birds
- The Wildlife Trusts
- Wildfowl and Wetlands Trust
- Woodland Trust
- WWF-UK

2. Executive summary

- We fundamentally disagree with the proposal for a growth duty.
- We strongly support the need for effective, proportionate regulation.
- Non-economic regulators make an important contribution to prosperity in terms of the protection of the natural world upon which the economy and well-being ultimately depend.
- Regulations are essential in meeting the UK's legal obligations to the natural environment, and also provide significant benefits for business, the environment and wider society. Environmental regulation has a benefit to cost ratio of at least 2.4:1, while for biodiversity-related regulations this ratio is almost 9:1.
- Environmental regulation is not a brake on economic growth, but can in fact drive innovation, reduce risks, create jobs and growth, create new business opportunities and boost the UK's international competitiveness.
- We do not believe the proposed duty would be able to increase economic growth, given the likely unforeseen consequences in terms of additional burdens on regulators and the paucity of the evidence on which the proposal is based.
- There is no indication within the consultation that Government has considered alternative solutions, despite the fact that *Reducing Regulation Made Simple* states that the Government will 'Introduce new regulation only as a last resort.'

[1] Wildlife and Countryside Link is a registered charity (No. 1107460) and a company limited by guarantee in England and Wales (No.3889519).

- Overall, the proposal highlights how the Government is missing the opportunity to value proper and effective environmental regulation, which helps good businesses to thrive as part of, not separate from, sustainable development.

3. General comments

We strongly support the need for effective, proportionate regulation, as witnessed by our engagement with the Red Tape Challenge and the Habitats Review.[2] We also support appropriate economic growth as an important component of sustainable development.

The regulators with whom we are involved – including English Heritage, the Environment Agency, the Food and Environment Research Agency, the Forestry Commission, the Marine Management Organisation and Natural England – do excellent work in fulfilling their statutory purposes, which include (in some cases primarily) the protection of nature. The consultation document suggests that some non-economic regulators are failing to prioritise prosperity. We would argue that, in fact, the work of many of these regulators represents an important contribution to prosperity of the most fundamental kind: the protection of the natural world upon which the economy and well-being ultimately depends. As the Natural Capital Committee (NCC) report, *The State of Natural Capital*, notes, 'In order to promote sustainable growth, all forms of capital (natural, human, social and manufactured) need to be properly maintained and where appropriate, enhanced. Only in this way will future generations be able to enjoy the opportunities that we do now.'[3]

Regulations are an essential policy tool for achieving protection of the natural environment and meeting the UK's legal obligations under EU Directives and international conventions. Few, if any, major environmental improvements in the UK have been achieved in the absence of regulation. However, recent debates around regulation in the UK have focussed almost exclusively on the costs it places on business, while ignoring the evidence of the benefits of regulation for business, the environment and wider society. This consultation is no exception. The purpose of better regulation is to maximize the net benefits to society, not minimise the costs to business.

The evidence shows that environmental regulation is not a brake on economic growth, a burden on British business or a barrier to international competitiveness. In fact, there is evidence that environmental regulation can drive innovation, reduce risks, create jobs and growth, create new business opportunities and boost the UK's international competitiveness.[4] Regulations can deliver real cost savings to business and industry at the same time as protecting the natural capital upon which our long-term prosperity ultimately depends. A study on the 'jobs versus the environment' debate found that environmental regulation costs do not have a statistically significant effect on employment and concluded that they could find no evidence of a trade-off between jobs and the environment.[5]

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[2] Link secured places on the sounding boards for the Red Tape Challenges themes on Environmental regulations and marine and freshwater; Link engaged closely with the Review of the Implementation of the Habitats and Wild Birds Directives, and submitted a response to the consultation: www.wcl.org.uk/docs/link_response_to_nature_directives_060212.pdf. Link members have engaged with most or all of the initiatives that have sprung from the review.

[3] Natural Capital Committee (2013) *The State of Natural Capital: Towards a framework for measurement and valuation*, www.defra.gov.uk/naturalcapitalcommittee/files/State-of-Natural-Capital-Report-2013.pdf.

[4] For example, see HM Government Low Carbon Construction: Innovation & Growth Team (2010) *HM Government Review on Low Carbon Construction*.

[5] Cole, M. A. and R. J. R. Elliott (2007) "Do Environmental Regulations Cost Jobs? An Industry-Level Analysis of the UK." The B.E. Journal of Economic Analysis & Policy 7(1); Rayment, M., E. Pirgmaier, et al. (2009) *The economic benefits of environmental policy - Final Report*, Institute for Environmental Studies.

With regard to the environment, regulation actually has a benefit to cost ratio of at least 2.4:1, while for biodiversity-related regulations this ratio is almost 9:1.[6] These findings are underlined by the ground-breaking 2011 UK National Ecosystems Assessment, which clearly highlighted:

- the wide variety of significant benefits provided by the natural environment in terms of economic prosperity, human health and well-being;
- the risks posed to the delivery of these benefits through inadequate protection and management of the natural environment; and, in particular,
- the importance of regulation in safeguarding and enhancing the delivery of key services.[7]

We fundamentally disagree with the proposal for a growth duty, because in failing to take account of the benefits of existing regulation it threatens to damage environmental protection by conflicting with regulators' existing primary purposes. In addition, it is dangerously confused about what a growth duty might look like. The document claims that its main objective is 'to make it clear that regulators can *and should* be mindful of the economic consequences of their actions' (our italics). It then uses a variety of inconsistent terms and potentially conflicting notions to discuss such a duty. There is real confusion between 'prosperity', 'economic growth', 'economic consequences' and between being 'mindful of the economic consequences of their actions' and 'promoting economic progress'.

More broadly, there is a good deal of confusion around the terms 'promoting economic progress' and 'having regard to' or 'taking account of' considerations in relation to the economic impacts of regulatory activities. While we accept that non-economic regulators should <u>consider</u> the economic impacts of their actions, we do not believe that non-economic regulators should actively <u>promote</u> growth where this risks running counter to their core or primary remit to protect the public interest and the wider environment. We note that 'to have regard to' suggests a subsidiary concern to be taken into account whilst exercising the main function. On the other hand, the idea that non-economic regulators should have 'a clear objective to promote economic progress' (paragraph 2.1) suggests a somewhat more serious risk.

In fact, we question whether the proposal would actually be able to increase economic growth, given the likely unforeseen consequences in terms of additional burdens on regulators, and the paucity of the evidence on which the proposal is based. The studies presented are over-reliant on views from some parts of the business community, and fail to take account of the benefits of environmental regulation. We do not accept that 'there is a strong body of evidence that suggests that non-economic regulators are not consistently achieving both protection and prosperity in the way they operate.'[8]

4. Consultation questions

Question 1: Should primary legislation be used to introduce a duty for regulators to have regard to growth and the economic impact of their actions?
No. We believe that introducing a duty for non-economic regulators to have regard to growth and the economic impact of their actions is neither necessary nor effective as a mechanism to support the appropriate economic growth needed as part of sustainable development. Moreover, significant

[6] Defra (2011) *The Costs and Benefits of Defra's Regulatory Stock: Emerging Findings From Defra's Regulation Assessment*, www.gov.uk/government/uploads/system/uploads/attachment_data/file/69226/pb13623-costs-benefits-defra-regulatory-stock110816.pdf.

[7] UK National Ecosystem Assessment (2011) *The UK National Ecosystem Assessment: Synthesis of the Key Findings*, http://uknea.unep-wcmc.org/Resources/tabid/82/Default.aspx.

[8] Frontier Economics (2012) *The impact of regulation on growth*, www.gov.uk/government/uploads/system/uploads/attachment_data/file/32107/12-821-impact-of-regulation-on-growth.pdf. A report prepared for BIS.

potential consequences go unidentified in the consultation, and the rationale and evidence presented do not form a robust case for such a duty.

The following sections outline our concerns regarding the proposal for a growth duty in more detail.

a. Regulators' existing duties render a growth duty unnecessary

The Environment Agency is a good example of a non-economic regulator that already has a number of overlapping duties relating to the economy, which together render an additional growth duty unnecessary. The Environment Agency's primary duty is 'so to protect or enhance the environment, taken as a whole, as to make the contribution towards attaining the objective of achieving sustainable development'[9]; the Government defines sustainable development as including 'stimulating economic growth and tackling the deficit.'[10] In addition, the Environment Agency has a duty to take costs into account.

In fact, there is evidence to demonstrate that the regulatory powers held by the Environment Agency result in low levels of compliance. For example, almost one half of farmers surveyed by the National Farmers Union (NFU) do not comply with nitrate vulnerable zone regulations, and of the 74 pollution incidents identified during catchment walkovers within the ten Water Framework Directive pilot catchments in 2012, none have resulted in enforcement action.[11]

Similarly, Natural England's purpose is 'to ensure that the natural environment is conserved, enhanced and managed for the benefit of present and future generations, *thereby* contributing to sustainable development' (our italics).[12] The purpose makes it clear that Natural England is already obliged to consider (or have regard to) sustainable development in carrying out its statutory duties, and that its most meaningful contribution to sustainable development is the protection, enhancement and management of the natural environment. We strongly believe that while Natural England should be expected to have regard to economic and social objectives, they should not be primary objectives.

A 2009 review of Natural England's regulatory performance against the Hampton principles, and Macrory characteristics of effective inspection and enforcement, concluded that Natural England 'demonstrates good compliance with the Hampton criteria in many areas, and has made good steps recently to strengthen its regulatory performance which are now bearing fruit.'[13]

We also note that, under the current Regulator's Compliance Code, regulators are required to 'consider the impact that their regulatory interventions may have on economic progress... [and] should only adopt a particular approach if the benefits justify the costs and it entails the minimum burden compatible with achieving their objectives' (where costs and benefits include economic, social and environmental costs and benefits).[14]

b. The consultation fails to recognise the benefits of regulation

Regulations provide a wide range of benefits to businesses, including supporting competitive markets, ensuring a level playing field, building investor confidence and stimulating innovation. We agree with the assessment of the Local Better Regulation Office that 'good regulatory delivery can

[9] Environment Act 1995, Part 1, Chapter 1, Section 4(1), www.legislation.gov.uk/ukpga/1995/25/section/4.
[10] Defra (2012) 'The Coalition Government's Vision for Sustainable Development', http://sd.defra.gov.uk/gov/vision/.
[11] National Farmers Union (2011) NFU Diary NVZ Survey; Environment Agency response to The Angling Trust, RSPB and WWF Information Request, 24 May 2012.
[12] Natural Environment and Rural Communities Act 2006, Part 1, Chapter 1, Section 2 (1), www.legislation.gov.uk/ukpga/2006/16/section/2.
[13] BIS and BRE (2009) *Natural England: a Hampton Implementation Review Report,* www.bis.gov.uk/files/file52316.pdf.
[14] http://www.bis.gov.uk/files/file45019.pdf

also be good for business' and can contribute significantly to sustainable growth, in particular by promoting a level playing field and providing businesses with the confidence to invest, grow and create new jobs.[15]

For example, several high-end retailers have independently started to charge for plastic bags in the absence of government intervention, but argue that legislation is still required to ensure that changes are met across the board.[16] Similarly, mandatory carbon reporting for businesses has been welcomed; of the 210 companies that Defra consulted, '73% favoured regulation of some form as it introduces a level playing field.'[17] And a joint statement by the Seabed Users Development Group, the Marine Conservation Society, RSPB, The Wildlife Trusts and WWF has demonstrated that businesses are not opposed to new regulations, but rather seek certainty.[18]

Research from the Organisation for Economic Cooperation and Development (OECD) demonstrates that a reliance on perception surveys tends to lead to an over-focus on costs and burdens, and a lack of attention on the benefits of regulations.[19] This tendency is supported by a 2009 Better Regulation Executive (BRE) survey, which shows the considerable 'perception-reality' gap in the UK. Similarly, the OECD suggests that there may be a considerable disparity between perceptions of regulatory quality and their actual measurable results. Interestingly, those respondents to the 2012 Business Perceptions Survey who identified themselves as 'not informed' about regulation were more likely to state that there was 'too much regulation', in comparison to those who described themselves as 'informed'. Concerns about over-regulation may be as much a product of businesses failing to understand regulations as regulators' inattention to economic growth.

Evidence also suggests that businesses systematically overestimate the costs of regulation. For example, a systematic case study of the costs to business of EU environmental legislation found that ex-ante cost estimates are often twice as large as the ex-post results.[20] This again suggests that it is risky to rely on evidence from businesses alone.

In fact, the UK is widely regarded as having one of the most favourable regulatory environments for doing business in the world.[21] As such, the benefits of a growth duty in the UK are likely to be relatively limited, according to the Frontier Economics Report commissioned by the BRE.[22] The benefits to growth in reducing the level of regulation are larger for highly regulated countries and diminishing with lower levels of existing regulation. As the UK is among the most deregulated countries in the world, any additional impacts are therefore likely to be limited. The costs of environmental regulations are typically a small fraction of industry turnover. For example, the direct

[15] LBRO (2012) *Regulation and Growth*, www.bis.gov.uk/assets/brdo/docs/publications-2012/12-688-regulation-and-growth.pdf.
[16] Vaughan, A. (2012). Marks & Spencer green chief attacks government's 'uncertain' policy. The Guardian. London.
[17] Parliamentary Office of Science and Technology (2013) *Reporting Greenhouse Gas Emissions*, www.parliament.uk/briefing-papers/POST-PN-428.pd.
[18] Seabed Users Development Group, the Marine Conservation Society, RSPB, The Wildlife Trusts and WWF (2012) *Joint statement on marine conservation*, www.wildlifetrusts.org/sites/default/files/joint_sudg_engo_statement.pdf.
[19] OECD (2012), *Measuring Regulatory Performance: A Practitioner's Guide to Perception Surveys*.
[20] Oosterhuis, F. (2006) *Ex-post estimates of costs to business of EU environmental legislation, Institute for Environmental Studies*.
[21] The International Bank for Reconstruction and Development / The World Bank (2012) *Doing business in a more transparent world*, www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB12-FullReport.pdf.
[22] Frontier Economics (2012).

cost of Defra's regulations account for 0.2% of annual manufacturing industry turnover and 0.1% of annual construction industry turnover.[23]

The 2012 Business Perceptions Survey found that the greatest challenge to running a business was attracting and retaining customers (54%) followed by access to finance (15%). In other words, it is the tough economic climate and problems in gaining access to credit that are holding back business growth.

We know – in our role as businesses, as well as charities – that non-economic regulators are often already working with businesses to support effective understanding and implementation of the regulations for which they are responsible. As noted in the consultation, 'businesses do recognise compliance with regulation as important to their business,'[24] and indeed, the Business Perception Survey shows that overall the proportion of businesses who agree that the level of regulation in the UK is an obstacle to their businesses' success is falling. The survey also found that 40% of businesses felt that the assistance provided by regulators helped their business, and that 84% of businesses thought that the role of regulators was to enforce regulations and to provide advice rather than to enforce rules and regulations only.

The over-reliance on business views is matched by a lack of awareness of others' views. There is a much wider range of stakeholders who would be closely affected by a growth duty than the consultation acknowledges – including local authorities and the voluntary sector. We also note that this proposal has not been discussed with another vital group of stakeholders: remarkably, non-economic regulators themselves appear not to have been consulted.

Of course, there is always room for improvement in how regulators carry out their functions. Where compliance is a concern, the answer is an appropriate degree of streamlining, a focus on efficiency and ensuring that regulators can make regulations both accessible and comprehensible. If it were the case that non-economic regulators did not understand the sectors that they regulate, staff should undertake appropriate training and improve relationships with relevant sectors.[25] The evidence does not, however, suggest that placing a duty on non-economic regulators to promote economic growth will address the problem of businesses' (particularly small businesses') understanding and compliance with regulations.

The literature review carried out for this consultation also indicates that the positive impacts of regulations are not always captured in existing measures of economic growth. In this vein, the recent findings of the NCC clearly point out that 'the amount and quality of our natural capital in part determines future prospects for growth and wellbeing yet it is almost wholly omitted from key statistics such as national income.'[26] Given that natural capital is largely omitted from national economic indicators (which fail to take account of changes in the natural capital asset base), it seems misguided to attempt to measure the growth impact of policies that aim to safeguard natural capital using such metrics (which allow an economy to 'run down its assets yet, at the same time, record high levels of GDP growth').[27] According to the NCC, if growth were properly measured, 'there is no inherent incompatibility between preserving and enhancing natural capital and economic growth.' The NCC also notes that the recorded GDP growth rate overstates the sustainable growth

[23] Defra (2011).
[24] BIS/ BRDO (2013) *Non-economic regulators: duty to have regard to growth*, p.14
[25] The consultation notes that only 20% of businesses believe that regulators understand their business well enough to regulate them (paragraph 3.10). However, this statistic – drawn from the Business Perception Survey – actually relates to government and local government: 20% of respondents 'agreed that "The government/ local government understands business well enough to regulate"'.[25] This general statement cannot be extrapolated solely to regulators, let alone non-economic regulators.
[26] Natural Capital Committee (2013), p.7.
[27] Natural Capital Committee (2013), p.40.

rate, and that ‘there is a danger that short-term decisions based solely on what is currently measured by national accounts may prove to be costly in the long-term.’[28]

The evidence that exists indicates that our natural capital, which in part determines future prospects for growth, are in decline, and that the rate at which we are consuming our natural capital is unprecedented. Without a clear understanding of what economic growth is (including all of the ‘five capitals’, not concentrating exclusively on the financial aspects), poor decisions are inevitable.

c. The case for a growth duty is confused

The chain of reasoning presented in the consultation is flawed. Paragraphs 1.8 – 1.10 give two different rationales for the failure of regulators to promote growth:

- that regulators don’t promote prosperity and therefore don’t work with businesses, which we would dispute; and
- that regulators don’t have a statutory duty that allows them to consider growth.

These rationales clearly conflict, and therefore do not add up to an adequate case for a growth duty. Similarly, in paragraph 1.13 the consultation gives an example of the Environment Agency running a Regulated Business Forum. But since they are doing that without the support of a growth duty, it is not clear how a growth duty would support other regulators to undertake similar initiatives.

The scope of the proposed duty is extremely wide: it is proposed that it would be used across all non-economic regulators, from the Homes and Communities Agency to Architects Registration Board. Non-economic regulators vary very widely in purpose and form, and engage with such a range of sectors and markets, making this a very blunt tool for a very delicate and complex task.

Furthermore, the consultation also notes that, ‘the impact of regulatory changes largely depends on the way in which they are communicated and delivered on the ground’, indicating that it is not so much a problem of regulation as opposed to how it is passed on to the businesses and that guidance and support would help businesses rather than a growth duty (paragraph 3.4).

d. The evidence does not suggest that the intended outcome will be achieved

The evidence presented by the consultation does not support the proposal: paragraph 4.1 states, ‘we do not currently have sufficient evidence to support hard analysis of the scale of likely positive impact on growth of the growth duty.’ This proposal should not therefore be presented as being able to support economic growth.

Moreover, the evidence that *is* presented is not robust. It incorrectly suggests that there is a strong link between increasing economic growth and reductions in regulation. We strongly contest the statement that ‘there is a strong body of evidence that suggests that non-economic regulators are not consistently achieving both protection and prosperity in the way they operate’ (paragraph 1.8), and the strength of the evidence base suggesting a negative relationship between regulation and economic growth.

The consultation also fails to take account of the distinction between environmental and other kinds of regulation. The literature review of the impact of regulations on growth[29] is not particularly relevant to those non-economic regulators that deal primarily with environmental regulations, as the scope of the literature review was limited regarding the relationship between environmental regulation and growth. As the review noted, ‘The BRE limited the scope of the research by excluding financial regulation and indicating that environmental regulation is less of a priority as the Department for Environment, Food and Rural Affairs (Defra) has commissioned a research project that deals specifically with environmental regulation and growth.’ Even so, the conclusion on

[28] Natural Capital Committee (2013), p.41.
[29] Frontier Economics (2012).

environmental regulation was that 'the empirical evidence appears to be mixed and the outcome depends on the regulatory design and type of regulation.'

We note a previous Defra review which concluded that, although there is some evidence of near-term trade-offs between environmental regulation and growth 'these effects have typically been found to be small or even insignificant.'[30] In particular, 'empirical analyses have found environmental regulation to have a minor adverse impact, if any, on productivity... no survey has found large negative effects of environmental regulation on overall productivity, either in the short or in the long run' (p.37). We await with interest the conclusions of the current Defra review of environmental regulation and growth.

We note that the Business Perceptions Survey did not specifically cover environmental regulation. The overall objective of the survey was to determine businesses' views of regulation both in general and in specific regulatory areas. In terms of specific areas, these consisted of company law, employment law, health and safety law, planning law, food safety, fire safety, consumer protection, and licensing.[31] According to the technical report, 'businesses were asked to answer most questions in relation to a specific area of law.'[32] Many of the findings reported in the consultation document in relation to business perceptions of regulation apply only to specific areas of regulation and do not encompass environmental regulations. This includes the conclusion that businesses 'spend a significant amount of time and money on complying with regulations' (paragraph 3.6). Therefore, we question the relevance of this evidence to those non-economic regulators that are primarily concerned with environmental regulations, an area not specifically covered by this survey.

We also note that the extent to which the findings of the literature review relate to administrative costs is unclear (i.e. the cost to businesses associated with information obligations such as filling in forms and keeping records) as opposed to compliance or 'policy' costs (i.e. the substantive costs of achieving regulatory outcomes).

Question 2: Is there an alternative means by which these objectives, described in paragraphs 2.1 to 2.6 above, could be achieved?
We believe that the rationale of paragraphs 2.1 to 2.6 is confused. There are multiple different analyses of the problem, which suggest that non-economic regulators are:
- uncertain as to whether they can take account of growth (2.1);
- not sufficiently prioritising growth (2.1);
- not 'mindful of the economic consequences of their actions' (which is not the same as supporting economic growth (2.2);
- not supporting 'business growth' (2.4); and
- not acting proportionately in regard to economic growth (2.5).

These are all different concerns, which require different solutions.

If non-economic regulators are uncertain as to the extent of their *existing* powers, then formal guidance is all that is needed from government. Alternatively, as paragraph 2.6 notes, a power to consider economic growth 'would enable regulators to consider growth.' If regulators are indeed only uncertain, why would it be necessary to 'compel' them to have regard to growth via a duty? The fact that Government is consulting on the implementation of a duty suggests that it is keen to compel consideration of growth as a policy decision. This is different again from the third suggested problem, that non-economic regulators are poorly serving their business customers. Improving the business experience of regulation is mainly concerned with providing an efficient, reliable and

[30] Everett T., Ishwaran M., Ansaloni G. P. and Rubin A. (2010) *Economic growth and the environment*, www.defra.gov.uk/publications/files/pb13390-economic-growth-100305.pdf, p.10.
[31] IFF Research (2012).
[32] IFF Research (2012).

knowledgeable service, which has much to do with resources, training and culture within non-economic regulators, and little to do with whether or not they are promoting economic growth. As the consultation notes, businesses themselves recognise that 'the impact of regulatory changes largely depends on the way in which they are communicated and delivered on the ground.'[33]

We would argue that paragraphs 2.1 to 2.6 do not add up to the case for a growth duty, but instead to a case for resources and direction to allow regulators to provide an efficient, reliable and knowledgeable service. This requires resources and training to develop understanding of and positive relationships with the businesses that non-economic regulators deal with. There is no indication within the consultation that Government has considered these alternative solutions, despite the fact that *Reducing Regulation Made Simple* states that the Government will 'Introduce new regulation only as a last resort.'[34]

Question 3: Do you agree that the duty should be complementary to existing duties?
We do not believe it is possible for the duty to be complementary to existing duties. As noted in paragraph 2.5, the duty to protect could and would conflict with a straightforward duty to promote economic growth ('the need to protect may conflict dangerously with supporting growth'). That clash is all the more probable because the growth duty is likely to be prioritised by Government; as the foreword states, 'The Government's priority is to promote growth in the economy.'

The duty would not even be internally consistent, since there is no clarity on what 'growth' means; a short term increase in a business's monetary activity, which comes at the cost of depleting the natural capital upon which future prosperity depends, simultaneously increases and decreases 'growth'.

In functional terms, we believe that the potential conflict between existing duties and a growth duty would create needless confusion and delay. And there is the distinct possibility that the decisions of regulators will be more vulnerable to judicial review, particularly where there is a potential conflict between the exercise of existing statutory duties and any new growth duty. At the end of the day this will make regulators less efficient and therefore, ironically, increase burdens on businesses.

The post-implementation review of the Regulators' Compliance Code has found that regulators agree. They see supporting economic growth as a secondary consideration, with most seeing protection as their primary statutory function. We think that this is how it should be: protection is fundamental to future prosperity and is not inconsistent with pursuit of sustainable economic activity or growth.

Question 5: Do you think that guidance in how to implement the proposed growth duty would be useful? If yes, please provide examples of what it should cover.
We are opposed to a growth duty on non-economic regulators. However, should such a duty be imposed, guidance on implementation would be necessary, and would need to be subject to further consultation.

We would want any guidance to clarify how a growth duty would relate to current duties, and how to overcome implementation issues. In particular, it is not clear how the inevitable conflicts that are likely to arise between promoting growth and safeguarding the environment should be dealt with by regulators required to give both equal consideration. According to the Frontier Economics Report commissioned by the BRE, the relationship between regulation and growth is complex and context-specific. In relation to environmental regulation specifically, 'the impact... on growth depends on the

[33] BIS/ BRDO (2013) *Non-economic regulators: duty to have regard to growth*, p.14.
[34] HM Government (2010) *Reducing regulation made simple: less regulation, better regulation and regulation as a last resort*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31626/10-1155-reducing-regulation-made-simple.pdf.

regulatory design and the specific context.'[35] Similarly, a 2010 review concluded that 'the relationship between economic growth and the environment is complex and multi-dimensional.'[36]

Due to the wide range of factors influencing the economy, and the lack of understanding regarding some of the underlying mechanisms, it would also be extremely difficult to determine the impacts of specific regulatory interventions on the wider economy as a whole. In terms of 'promoting growth', we firmly believe that regulators need to consider the impact of their actions from the viewpoint of the economy as a whole, rather than in terms of specific businesses, regions, or sectors. In addition, we know that many of the benefits from environmental regulation may be non-market, and therefore not reflected in conventional measures of productivity (as discussed on p.4).

Question 6: Do you agree that the measurement and monitoring mechanisms proposed above, allied to those of the revised Regulators' Compliance Code, would be adequate for this purpose? If not, please provide details.
We do not believe that the measurement and monitoring mechanisms proposed would be adequate.

The publication of service standards would not align with the aim or rationale for the duty, and it would therefore be impossible to determine whether the duty had been effective. In order to do so it would be necessary to monitor the impact of regulators' decisions on the economic growth of affected sectors. However, this would inevitably require extra resources from regulators and potentially also businesses, and would thus increase overall costs and burdens.

Question 7: Do you agree that the duty should in principle apply to all non-economic regulators?
Please see our answer to question 1. On the basis of our experience of the function and operation of English Heritage, the Environment Agency, the Food and Environment Research Agency, the Forestry Commission, the Marine Management Organisation and Natural England, we not do agree that there should be a duty, or that it should apply to all non-economic regulators.

In terms of the sector-specific implications, we note, for example, the environmental evidence in relation to the existence of critical thresholds below which non-linear changes may occur.[37] It is not clear how a growth duty would be able to deal with such situations. There is increasing evidence that we may be approaching or exceeding a range of the thresholds.

Question 9: Do you feel that a growth duty would reduce costs to business and remove or address barriers to growth?
We do not; quite the contrary in fact. As outlined in our response to questions 6 and 11, we believe a duty on non-economic regulators to promote economic growth would be likely to increase costs to businesses. We also believe that it would fail to address barriers to growth, as outlined in our response to question 1.

Since the consultation provides no evidence that a growth duty would reduce costs to business or remove/address barriers to growth, we would also argue that this regulation is contrary to Government's position on reducing regulation which states,

> 'Regulation can appear to be a solution with relatively low costs for government itself. It can seem the most familiar and lowest risk option available to policy-makers to address a problem.

[35] Frontier Economics (2012).
[36] Everett T., Ishwaran M., Ansaloni G. P. and Rubin A. (2010).
[37] Swift, T. L., & Hannon, S. J. (2010) "Critical thresholds associated with habitat loss: a review of the concepts, evidence, and applications", *Biological Reviews*, *85*(1), 35-53; Scheffer, M. et al. (2001) "Catastrophic shifts in ecosystems", *Nature* 413: 591–596.

> 'But the reality is that regulation is never cost-free, either for government or for those whose behaviour is being regulated. It can be ineffective in achieving its intended outcomes if its effects on the system as a whole have not been properly considered. If the details of its proposed implementation have not been thought through at the outset, including the costs on the economy and the potential impact of enforcement, the burden of regulation can be much higher than necessary. In fact, hastily conceived regulation may prove to be unenforceable and could, in some cases, be more harmful than doing nothing.'[38]

As recommended by the Hampton Review (2005), we agree that there *is* scope for regulatory reform aimed at reducing the administrative cost to business of regulatory compliance through the avoidance of duplication and unnecessary regulatory complexity, and through exploiting smarter means of data capture and transfer. However, we do not believe that a growth duty is the appropriate mechanism for dealing with these costs.

Question 10: How would you envisage a regulator's actions changing as a result of a growth duty? Please consider this in light of evidence presented above, and/or with reference to other situations where regulator actions impacted a company or industry's ability to grow. Where possible, provide a monetary indication of likely impact of a successfully operating growth duty on a company or industry

As noted elsewhere, we believe that a growth duty would add only confusion and delay to the operation of non-economic regulators. In fact, adding a growth duty to non-economic regulators it is likely to reduce customer service and satisfaction by introducing conflict with other duties, such as the Environment Agency's duty to protect the environment, or Health and Safety Executive's duty to regulate health and safety effectively; both of these duties are vitally important for sustainable economic growth.

Conflicts of this kind could mean that a growth duty, as currently proposed, would make it harder for non-economic regulators to refuse environmentally-damaging development, including those that threaten nationally important wildlife sites – even if the overall societal benefits of such a refusal are greater than the development. This arises because the proposed duty does not adequately reflect evidence about the economic value of the natural environment and the need to value it accordingly in decision making. In addition, it is important to note that 'the impacts of regulatory interventions are not limited to geographical areas but can be felt by businesses and citizens at local and national level. Many outcomes require regulators to work in a joined up way across the country, to protect national assets that underpin conditions for sustainable economic growth.'[39]

An example of the potential conflict that could arise is illustrated by the case of the Isle of Lewis in the Outer Hebrides, where proposals for the development of a large wind farm in 2004 and 2006, which were supported by the local council and businesses, and which were estimated to bring significant economic benefits to the local area, were rejected on environmental grounds. It was judged that the primary purpose of the scheme was <u>not</u> to bring local economic development to the western isles; rather, it was considered first and foremost to be a proposal designed to supply electricity to the grid. On that basis, it was concluded that it was appropriate to consider alternative solutions available across Scotland as a whole that would not have such significant adverse environmental impacts.

Examples in relation to sites designated under the EU Habitats Directive also illustrate the need for robust statutory protection measures. In the case of Lappel Bank, the intertidal mudflats supporting a number of important bird species were excluded by the UK Government from the Medway Estuary and Marshes Special Protected Area (SPA) for economic reasons. The decision was challenged and subsequently found to be unlawful. The proceedings were referred to the European Court of

[38] HM Government (2010) *Reducing regulation made simple.*
[39] Defra (2010).

Justice (ECJ), which confirmed the principle that sites that qualify as SPAs must be classified on their scientific merits and economic reasons cannot be taken into account at the designation stage.

This is not to say that issues around economic costs should never be considered. Nevertheless, there is an ongoing debate as to what represents reasonable cost between alternative solutions. There are cases where it is indeed one of development versus the natural (and cultural) heritage. An example is the A303 Stonehenge Tunnel, where Ministers concluded that the cost of a bored tunnel to protect the World Heritage Site and SPA by removing the effects of the road and traffic from the core of the site was excessive. Given that proposals for an overground road were deemed unacceptable due to significant environmental constraints, this could be considered a missed opportunity to deliver a project that would have enhanced a World Heritage Site, and a major tourist/economic asset to the UK, whilst contributing to landscape-scale conservation and safeguarding/ protecting the SPA from the irreversible destruction that alternative options (e.g. an overground road) would cause.

In relation to independence, given the current Government's stated priority of growth, the independence of regulators such as Natural England, who are required to take a more long-term view, could be compromised. In terms of the risks around short-termism, we note the advice of the Local Better Regulation Office (LBRO), who state that 'any near-term costs of implementing environmental policy must be viewed in the context of the costs of not taking action, that is, compared to what would occur under a 'business-as-usual' scenario. In the long-term, the cost to growth of acting now to ensure sustainable and efficient use of natural assets is likely to be smaller than the costs of inaction.'[40]

Question 11: Is there any evidence that this will add significant burdens to regulators and why?
Yes. The consultation document itself suggests that the likely conflict between the growth duty and regulators' other primary duties, and the monitoring regime that would be required, would add significant burdens to regulators, and therefore to the businesses which this consultation seeks to support. It is noted throughout the 'reducing regulation' literature that regulation brings a cost to business. We would also argue that there is a long-term cost arising from conflict with regulators' existing duties that will result in a decrease in performance and associated economic losses.

The consultation document suggests that the Department for Business, Innovation and Skills (BIS) and the Better Regulation Delivery Office (BRDO) have not consulted non-economic regulators, nor have they attempted to quantify the burdens on regulators: paragraph 4.2 states, 'the statutory duty itself will not lead to any additional administrative burden on regulators', but in the very next paragraph it notes, 'we have not quantified the short term costs…which may be required.'

In all likelihood, an additional duty is likely to result in additional costs for regulators.

Wildlife and Countryside Link
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[40] LBRO (2012).