

Government proposals for a new environmental watchdog and its proposals to bring environmental principles into UK law after leaving the EU

**Written evidence for the Environmental Audit Committee
by Wildlife and Countryside Link**

June 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 submit evidence to the Environmental Audit Committee's inquiry into the government's consultation on environmental principles and governance. This evidence complements the response submitted by Greener UK, which we support.

This response is supported by the following organisations:

A Rocha
Amphibian and Reptile Conservation
Badger Trust
Bat Conservation Trust
Butterfly Conservation
Campaign for National Parks
Campaign to Protect Rural England
ClientEarth
Environmental Investigation Agency
Freshwater Habitats Trust
Friends of the Earth
Institute of Fisheries Management
Marine Conservation Society
Plantlife
Rewilding Britain
Rivers Trust
RSPB
RSPCA
Salmon and Trout Conservation
The Wildlife Trusts
Whale and Dolphin Conservation
Wildfowl and Wetlands Trust
Wildlife Gardening Forum
Woodland Trust
WWF-UK

Do the proposals in the Government's consultation meet the ambition set out in the 25 Year Plan to consult on "a new, world-leading, independent, statutory body to give the environment a voice, championing and upholding environmental standards as we leave the European Union"? If not, what more needs to be done?

2. No. 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 a better job of protecting the environment than currently done by the EU Commission, the Court of Justice of the European Union (CJEU) and other EU institutions.
3. Currently the proposals in the consultation do not even replicate all the functions of the EU Commission and the CJEU and with so much detail lacking, it is hard to know whether even for functions they do propose replicating, they will be sufficient. We expand on these below.

Monitoring and reporting

4. Under the majority of EU environmental laws, Member States are required to submit implementation reports to the Commission, setting out how they are complying with and implementing EU environmental law. The Commission can then use such reports to assess whether Member States are complying with their obligations, and if not, take necessary action. The consultation suggests that the government may replace requirements in EU environmental law to report on their implementation with requirements for the Secretary of State to publish implementation reports and data. Such an approach would be welcomed, but it is important that the reports include the necessary scientific and technical information to enable a new watchdog to assess whether the government is fully complying with its legal environmental obligations and, if necessary, provide the evidence necessary to begin enforcement action. The watchdog should also have the power to instruct the government and public bodies on what should be included in such reports.

Investigating/remit

5. The EU Commission can investigate any form of alleged non-compliance with EU law. It is important that the new watchdog have the ability to carry out its own investigations into non-compliance with environmental law, and to receive and follow through with complaints from civil society, NGOs and charities.
6. 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. 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 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 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.

Enforcement

7. 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 potentially limited to providing non-binding advisory notices.
8. 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.
9. 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.
10. The consultation also raises the idea of the watchdog entering into undertakings with public bodies in breach of environmental law. 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 binding notices and undertakings are to give the watchdog the teeth it needs to ensure the government and public bodies comply with their environmental obligations once the UK leaves the EU, it needs the ability to commence legal proceedings to enforce such notices and undertakings when necessary.

11. The legal status and resourcing of the watchdog are also crucial to its effective functioning. The body should be hard to dismantle, in receipt of adequate ring-fenced funding and have (or have access to) a range of experts with different specialisms.

Will a Governance and Principles Bill make all of the legal changes necessary to achieve the ambition of improving the environment for future generations? Are other legal changes required to improve the environment and if so, what interaction will there be with the new governance and principles regime, and is it possible for them to be designed separately?

12. 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. As it cannot enforce policy, it cannot ensure the government meets the ambitions it set out in the 25 Year Plan for the environment. 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.
13. Legislation underpinning the 25 Year Plan 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 must include ambitious and measurable goals for nature's recovery and a healthy environment

What are the risks of ongoing uncertainty about governance and principles while other major decisions are being made, e.g. on the Withdrawal Agreement and the Trade Bill?

14. During debates in the House of Commons over the environmental principles and governance, Oliver Letwin MP said that the EU (Withdrawal) Bill ("EUWB") was not the appropriate place to address such issues as they would be addressed in separate legislation that was to be consulted on. DEFRA's current consultation is therefore intended to allay any concerns over why governance and principles were not addressed in the EUWB. It does not do this successfully.
15. The EUWB is supposed to achieve equivalence with current EU standards. As set out above, the government's preferred approach to governance falls well short of the environmental regulatory regime enjoyed as a member of the EU. Similarly, the government's preferred approach in relation to the environmental principles falls well short of their current application in the UK as a member of the EU. Such concerns are addressed below.
16. As a result of these shortcomings, Wildlife and Countryside Link will continue to insist that environmental governance in the UK is at least as good as that currently provided by the EU Institutions and seek to ensure that the environmental principles are properly enshrined in primary legislation and are applicable to all relevant public bodies.

Are the proposals in the Government’s consultation adequate to meet the enforcement, governance and other gaps in environmental protection left by leaving the European Union? Are there any aspects in which they offer stronger environmental protection than existing arrangements? If not, what more needs to be done and by when?

17. No. As addressed above, the watchdog’s remit is unduly narrow and its inability to commence legal proceedings means it has no real teeth. Instead, the Government appears to be proposing 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. There is also a lack of detail about how the independence of the body will be secured.
18. The main existing domestic legal mechanism for action against government bodies is Judicial Review (JR). The Government claims 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 cases¹. 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.

Judicial Review 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

¹ 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.

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 ClientEarth 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 annually²).

Interestingly, the approach to costs in the UK courts differs markedly from the approach in the CJEU, where unsuccessful applicants are not expected to pay the EU institution's legal costs on the basis that the Community institutions are already funded by the public purse. 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 applications³ 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

² 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](#)

³ *Ibid*

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.

19. Another “gap” is the loss of the CJEU as a supreme authority to which preliminary references can be made under Article 267 TFEU. In the absence of this function, it would at least be helpful if the intensity of review and decision-making in UK courts could incorporate some of the more progressive features of the CJEU as noted above.

20. The UK is already in non-compliance with Article 9(4) of the Convention and with Decision VI/8k of the Meeting of the Parties to the Aarhus Convention. The Government’s proposals for principles and governance would move us further away from compliance with the Aarhus Convention.

21. Any new “gold standard” environmental watchdog must be able to refer cases to court to at least 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 there 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.

22. Finally, any 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.

Do the proposals in the Government’s consultation set the basis for an appropriate relationship between the proposed body and other statutory bodies (for example, the Environment Agency, Committee on Climate Change, National Audit Office, regulators like Ofwat etc.), Parliament and the devolved institutions? If not, what needs to change?

23. 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.

Whether the proposals in the consultation on incorporating environmental principles into UK law are sufficient to replicate or provide a stronger level of environmental protection than the existing arrangements? If not, what needs to change?

24. The consultation sets out two options for a policy statement on environmental principles. Both are clearly weaker than current Treaty obligations and are therefore unacceptable to us. Having said that, the first option, in which the principles are set out in primary legislation, is to be preferred. This is to ensure the principles have the permanence needed to provide the long-term influence over the environment that is required beyond the 5 yearly cycles of Parliament and should ensure that principles such as Sustainable Development are enshrined in law. However, in both options, the government's preferred approach for the scope and application of the policy statement is far too narrow. The current proposal would only apply the policy statement to central government policy making. The environmental principles should apply across all public bodies and the duties of public bodies in relation to the environmental principles should be included in primary legislation. The standard of duty should also be stronger than the 'have regard' standard suggested in the consultation, which has been shown to provide, at times, such a weak duty as to be meaningless. Such duties should be enforceable in court by the new watchdog.

25. In addition, there is no mention in the consultation paper of important environmental principles such as animal sentience, the right to environmental information, or the right of access to environmental justice. 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.

Is there sound logic behind the decision to exclude climate change from the remit of the new body? Does this risk leaving the enforcement of climate change law weaker than the rest of environmental law?

26. No. The new watchdog should be able to enforce all environmental law, including the government's obligations under the Climate Change Act. 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. 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.

What would be the benefits and weaknesses of a UK-wide approach? Has there been sufficient collaboration between HMG and the devolved administrations on this matter, and are the right processes in place to agree the most environmentally rational settlement?

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

The lack of any meaningful consultation so far between the four governments 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 Parliaments.

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 needed. Any pan-UK proposals must be co-designed and co-developed.

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. Any pan-UK design should also take into account the need to have strong cross-border co-operation and aim to ensure that the island of Ireland continues to be treated as a single biogeographic unit. It should also prioritise guarding against the risk of cross-border divergence and the potential environmental impacts that would bring.

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.

Co-operation between the four governments is a long established practice and requirement. For example although marine planning is a complicated area of devolved and reserved powers, the four governments were all able to agree, and jointly sign up to, the UK Marine Strategy⁴. The Strategy provides common definitions, targets and indicators of Good Environmental Status (GES), while allowing each country the freedom to meet these targets in their own waters, in their own way, as necessary. They are also signed up to the UK Marine Policy Statement⁵ under the separate 'Marine Acts' that provides the framework for marine planning. We recommend that any new legislation extends this requirement by obliging all public bodies taking decisions that could affect the marine environment to show how these decisions support GES. Common Frameworks and the UK marine plan, as required in the separate Marine Acts.

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.

⁴ <https://www.gov.uk/government/publications/marine-strategy-part-one-uk-initial-assessment-and-good-environmental-status>

⁵ <https://www.gov.uk/government/publications/uk-marine-policy-statement>

For more information, please contact:

Dan Pescod – dan@wcl.org.uk – Head of Policy and Campaigns, Wildlife and Countryside Link

Matthew Stanton – mstanton@wwf.org.uk – Chair, Wildlife and Countryside Link Legal Strategy Group