INTRODUCTION

1. WWF-UK is one of the largest and most experienced independent conservation organisations, with 5 million supporters and a global network active in over 90 countries. Our mission is to stop the degradation of the planet’s natural environment and to build a future in which people can live in harmony with nature.

2. WWF-UK welcomes the opportunity to submit evidence to the House of Lords Constitution Committee, as we have concerns that delegated powers could be used to unpick various obligations in a number of environmental laws once the United Kingdom has left the European Union. Our response has been assisted by information provided by George Peretz QC, Monckton Chambers.

SUMMARY

3. The Great Repeal Bill (GRB), announced by the Government in early October 2016, will, after the UK has triggered Article 50, repeal the European Communities Act 1972 and, once the UK has left the EU, convert existing EU law into domestic law where possible. The Government has stated that the GRB will delegate statutory powers to enable Ministers to make changes, by secondary legislation, to give effect to the outcome of the negotiations with the EU “as they proceed”. On the date the GRB is introduced, it is unlikely that the Government will know the outcome of its negotiations with the EU.

4. Ministers have indicated that approximately a third of the over 800 pieces of EU environmental legislation will be difficult to transpose into UK law. Transposition is likely to be complex and time-consuming. WWF-UK will look to the Government to ensure that environmental protections are not weakened, either during the process of leaving the EU or after, and to provide the opportunity for full parliamentary scrutiny of the UK’s future environmental legislation.

5. In view of the enormous scope of EU environmental law that must be transposed, some of it with complex compliance mechanisms which need to be transposed so they are workable in a UK setting, WWF-UK considers it important that the GRB ensures that the legislation has adequate and sufficient mechanisms in place to remain effective. We fear that new legislation may be hurriedly, and inadequately, rushed into statute with the presumption that future unpicking could be done by Ministers, with reduced parliamentary participation and/or scrutiny. This concern holds both for newly

---

1 Gov.uk, ‘Government announces end of European Communities Act’, 2 October 2016
2 Rt Hon Andrea Leadsom MP, Q327, House of Commons Environmental Audit Committee, The Future of the Natural Environment after the EU Referendum Sixth Report of Session 2016–17 para 32
3 Environmental Audit Committee, Ibid., para 34
transposed EU law, and for environmental directives already enacted by secondary legislation (newly vulnerable in the absence of EU obligations).

6. In particular, delegated legislation should not be granted to Ministers so that they obtain unacceptable discretion to rewrite the statute book, without adequate parliamentary scrutiny and control over the process. WWF-UK considers such an approach would be deeply undemocratic, especially when dealing with the vast range of environmental protection measures, many of which contain rights of participation for citizens to protect both the environment and people’s well-being.

7. This submission does not address all inquiry questions, but instead concentrates upon ‘Brexit’-related issues. Specifically WWF-UK addresses the below questions:

Q12. To what extent, in Brexit-related primary legislation, might the use of secondary legislation be necessary or justified to convert the ‘acquis’ (the body of existing EU law) into British law?

Q13. Do you envisage that any changes will be required to procedures related to the delegation of powers or secondary legislation, to cope with the legislation likely to be required as a result of Brexit?

Context of EU environmental laws: Institutional Arrangements – monitoring, enforcement and creation of a public body

8. The Commission and the European Court of Justice (ECJ) play a key role in the enforcement of EU environmental law. Many EU directives include an active and continuing role for the European Commission, on matters such as approving time extensions, derogations, implementing measures and reporting obligations. The Commission has the power to bring infraction proceedings in the ECJ against Member States that fail to implement their obligations under EU law, essentially a key part of the architecture of enforcement of EU environmental law. Furthermore, EU environmental law has the ability to override contrary national law; for example, Natura 2000 sites (specially protected areas) have to be maintained and cannot be overridden by, for example, planning decisions or private legislation.

9. WWF-UK struggles to see how the above elements will be transposed into national law. Indeed, within the UK constitutional framework, it may be difficult to devise a way of protecting environmental rules against encroachment via primary legislation of the UK Parliament.

---

5 See Water Framework Directive (WFD), which requires Member States to achieve good surface water status, good ecological potential and good groundwater status. The WFD sets targets and deadlines to that end, principally by reference to river basin districts. Article 4(1) of the WFD sets out the specific environmental objectives to be achieved for each category of water body. The Commission has to assess the progress in the implementation of the WFD in certain intervals and to inform the European Parliament, the Council and the public about the results of its assessments (see Article 18). The rest of Article 4 provides for derogations, extensions of deadlines and relaxation of objectives, subject to the conditions in Article 4(7) being met.

6 Case C-355/90 Commission v Spain [1993] ECR I-4221 (finding that Spain had failed to implement the Birds Directive by failing to designate an area as a “special protection area”).
10. Without the supervisory role of the Commission (approval of measures taken by national authorities, the granting of derogations, and bringing forward infraction proceedings before the ECJ, to name a few), it is difficult to see how many of the implemented EU environmental laws will function ‘in toto’. Many will remain only partially functional, such as the Natura 2000 sites, or the targets and deadlines established by EU Environmental Directives such as the Water Framework Directive or the Nitrates Directive. The GRB may consider the need to introduce legislation that deals specifically with these particular compliance issues. For instance, one way could be the replication of some of these functions through an existing or new national regulatory body with appropriate powers. WWF-UK has advocated in the past the need for an Office of Environmental Responsibility. However, in order for such a body to have equivalence with existing EU compliance mechanisms it would need powers to block ministerial decisions by refusing to allow derogations from legal obligations contained within Statute or secondary legislation. There would also need to be a body with power over devolved Governments, and this would require constitutional conventions and legislative consent motions passed by the devolved legislatures in order to function.

11. WWF-UK believes therefore that, in the environmental context, the GRB will need to include powers to introduce stronger compliance mechanisms than the UK currently has in force. A range of options could be considered here, but at a minimum the creation of a public body with an entrenched arms-length relationship with Ministers may be necessary. Crucially, any such new public body would need to be given powers (along with environmental NGOs and private citizens) to take legal action in the courts when it considered that government was not complying with environmental legislation. Moreover, we believe that there needs to be urgent consideration of strengthening existing accountability/compliance mechanisms such as judicial review. For instance, to achieve a similar level of existing EU compliance for environmental protection measures, we consider that the courts would need powers to make findings of fact and to set aside government decisions on a “merits” basis.

12. However, whatever model or mechanism Parliament chooses, WWF-UK supports the statement made by The UK Environmental Law Association that “levels of environmental protection, and the ability of citizens to participate in environmental decisions and take action in the courts where necessary, must not be diminished by any future changes to domestic legislation following Brexit.”

Q12. To what extent, in Brexit-related primary legislation, might the use of secondary legislation be necessary or justified to convert the ‘acquis’ (the body of existing EU law) into British law?

---

13. In answer to the specific question above WWF-UK considers that the Government will need to seek powers to transpose EU law by way of statutory instrument, which will include the power to legislate where such EU law cannot readily be transposed.

14. The GRB may opt for provisions that allow for the amendment of primary legislation by statutory instrument (powers often referred to as Henry VIII clauses). We note that such clauses have often been criticised due to the lack of parliamentary scrutiny associated with their use. However, we also accept the sheer scale of the legislative task facing the Government, and that it may be unrealistic to insist that every piece of transposition is done by primary legislation. We therefore consider that it will be necessary to find a procedure that enables proper scrutiny and accountability while enabling this significant legislative task to be achieved.

15. We have concerns that the GRB could replicate in principle the effect of the originally drafted Legislative and Regulatory Reform Bill 2006, which met with considerable hostility from several parliamentary committees.

16. We note in particular that the House of Lords Constitution Committee HL 194 of 2005-06 observed that:

[32] ..There are several good reasons for special caution about [Henry VIII clauses]. One is that they risk undermining the legislative supremacy of Parliament...

[33] ..that parliamentary scrutiny of ministerial orders is less rigorous than scrutiny meted out to legislative proposals that are contained in bills, yet in this case the Minister will be amending or repealing primary legislation.

17. In particular, we note that the House of Lords Constitution Committee was alert to the fact that delegated powers allow the executive branch of government to set aside or amend primary legislation previously consented to by Parliament. It stated that the ‘practical necessity for such an arrangement must be matched by clearly limited powers, to be exercised for specific purposes, and to be subject to adequate parliamentary oversight (including veto) to guard against inappropriate use of such powers’.

18. In our opinion these views must be carefully considered and taken into account in the drawing up of delegated powers for the purposes of the GRB. In the context of environmental legislation, therefore, it is particularly important that, where existing EU laws have been implemented into UK laws (either by way of primary or secondary

---

8 The Rt. Hon Lord Judge, Ceding Power to the Executive; the Resurrection of Henry VIII The Rt. Hon Lord Judge 12 April 2016, King’s College London “…proliferation of clauses like these will have the inevitable consequence of yet further damaging the sovereignty of Parliament, and increasing yet further the authority of the executive over the legislature... Henry VIII clauses should be confined to the dustbin of history.”


10 Ibid, para 33

11 Ibid, para 34
legislation), these are in the main amended or repealed only by Parliament, or only after sufficient parliamentary scrutiny has been provided. It must only be in exceptional and limited circumstances that Henry VIII clauses are used to amend existing environmental legislation or that transposed by way of the GRB in secondary legislation.

19. The views provided by Dr Paul Daly on this matter may be worth further exploration by the Committee. Dr Daly has put forward the suggestion of an EU Law Impact Assessment, which would, ‘“lay out the new measure and its likely effect in practice, in particular how the new UK law would deviate from EU law. Such assessments could be reviewed by a parliamentary committee, which could then recommend whether or not the measure ought to require legislation. In other words, permission from the committee would be a condition precedent to an exercise of the power contained in the Henry VIII clause. We might further imagine that the pre-condition could function on something of a sliding scale, requiring legislation at one extremity and simply allowing for the possibility of a measure being disallowed at the other extremity.”’

20. Alternatively, another approach could be to build on current procedures by using the negative and affirmative procedures as set out in the Statutory Instruments Act 1946. An enhanced/super-affirmative procedure is used in the Legislative and Regulatory Reform Act 2006. However, research has shown that a super-affirmative procedure does not provide an appropriate model.

21. In the words of Joel Blackwell of the Hansard Society: ‘It can take between 11 and 18 months to complete a Legislative Reform Order, negating the advantages of legislating with speed and flexibility rather than putting the matters on the face of the Bill. As a result, only 31 Legislative Reform Orders have been laid since the legislation received Royal Assent in 2006. Given the scale of the legislative exercise now facing Parliament as a result of Brexit, it is hard to imagine that this route will therefore offer a viable solution to the problem. But at present, the only alternatives are the less stringent processes afforded to powers subject to the negative or affirmative scrutiny procedures both of which generally favour the executive. In short, neither scrutiny approach is satisfactory at the best of times, but it will certainly not meet the needs of the Brexit legislative overhaul.’

22. The research goes further and suggests how the problems with the super-affirmative approach could be addressed for the GRB. It suggests the bill might contain a new variation of enhanced procedures for delegated legislation, and that it could be an opportunity for a full overhaul of how Parliament scrutinises secondary legislation.

Q13. Do you envisage that any changes will be required to procedures related to the delegation of powers or secondary legislation, to cope with the legislation likely to be required as a result of Brexit?

23. We recognise that the GRB may move quickly into Parliament for detailed scrutiny following the Queen’s Speech expected in the spring. However, in our view, given its importance, we consider that there is a powerful case for it to be given pre-legislative scrutiny. According to the Cabinet Office Guide to Making Legislation (2015), the default position should be that bills will be published in draft prior to formal introduction.

24. Parliamentary pre-legislative scrutiny can be carried out by a variety of types of committees, and members of the public may also be invited to comment. The House of Commons Modernisation Committee found that pre-legislative scrutiny is ‘right in principle.’ In particular, it allows backbenchers of all parties, and the Opposition, to have a real input into the form of the legislation.

25. In the words of that Committee: [20]...It opens Parliament up to those outside affected by legislation. At the same time such pre-legislative scrutiny can be of real benefit to the Government. It could, and indeed should, lead to less time being needed at later stages of the legislative process; the use of the Chair’s powers of selection would naturally reflect the extent and nature of previous scrutiny and debate. Above all, it should lead to better legislation and less likelihood of subsequent amending legislation.15

26. In addition, the involvement of select committees in secondary legislation could be considered. The Joint Committee on Statutory Instruments currently carries out a formal check on whether a Minister’s powers are being carried out in accordance with the provisions of the enabling Act. However, the House of Lords Secondary Legislation Scrutiny Committee (previously the Merits of Statutory Instruments Committee) is empowered to undertake a more substantive review. Currently, its powers are limited in that a negative report has no legal or formal parliamentary consequences. This provision could be amended by way of exception to deal with the important aspects of the GRB.

27. This Committee might want to consider whether it is necessary to go even further than above and suggest that a new committee of each House dealing exclusively with GRB secondary legislation is warranted due to the volume, complexity and controversy of the ensuing secondary legislation. Such a committee could be divided into specialisms and be given the task of examining secondary legislation affecting environmental law, employment law, competition law etc. The committee could have powers to approve, amend or block statutory instruments or to refer them to the whole House for approval – such measures would ensure the proper level of scrutiny, clarity and procedure needed in order to uphold environmental protections.

28. As mentioned above, the main procedures for approving secondary legislation are the negative and affirmative procedures under the Statutory Instruments Act 1946. However, both these procedures produce a weak level of scrutiny and are rarely used by Parliament.16

---

14 House of Commons, Modernisation of the House of Commons Select Committee, First Report, The legislative process, HC 190, 29th July 1997, para 20
15 Ibid,
29. In general there is no provision for the amendment of secondary legislation\textsuperscript{17}, but there is no reason why Parliament could not include such a provision in the GRB. It is usual for instruments that are subject to parliamentary procedures to be determined by the parent Act. WWF-UK is informed that there is no reason in principle why Parliament could not, in exercising its supremacy, include unprecedented means for scrutinising secondary legislation in the GRB.

30. We have referred earlier to the possibility of including ‘enhanced’ affirmative procedures/super-affirmative procedures as an alternative process and set out a critique of this measure above. However, for completeness we note that there are several existing statutory instruments that include such procedures. [See list in Annex 1]

31. This type of procedure usually contains the following features: 1) requirement for a proposed order to be laid before Parliament (possibly following public consultation) for scrutiny by committees of both Houses; 2) report by each committee on the proposal, which may recommend amendments; 3) an opportunity for the Government to amend the order in the light of that scrutiny; 4) the laying of a draft order for further scrutiny, followed by approval by both Houses.

32. The importance of affirmative procedures has been previously highlighted by the House of Lords Constitution Committee which, in its 6th Report, criticised the lack of any super-affirmative procedure regarding the Public Bodies Bill, and stated that the lack of a requirement on Ministers to consult with interested or affected persons before an order is made was an ‘unacceptable omission’\textsuperscript{18}.

Conclusion

33. WWF-UK considers that the approach to delegated legislation in such an important piece of legislation as the GRB must be a cautious one.

34. The use of so called Henry VIII clauses should be sparing and limited to specific contexts. In particular, delegated legislation should not be granted to Ministers so that they obtain unacceptable discretion to rewrite the statute book, without adequate parliamentary scrutiny and control over the process. WWF-UK considers such an approach would be deeply undemocratic, especially when dealing with the vast range of environmental protection measures, many of which contain rights of participation for citizens to protect both the environment and people’s well-being.

35. Finally, we have set out our view that, while recognising the likely parliamentary timetable to come, it would be desirable for there to be pre-legislative scrutiny of the GRB, and consideration of introducing a process of secondary legislative scrutiny. In

\textsuperscript{17} See exception to the general rule in the Civil Contingencies Act 2004
\textsuperscript{18} House of Lords, Select Committee on the Constitution, 6th Report of Session 2010–11 Public Bodies Bill [HLS1] para 7
view of the substantial changes to our environmental landscape that the GRB will entail, we would urge the Committee to give detailed consideration to possible new processes.
ANNEX

Acts which provide for an ‘enhanced’ affirmative procedure/ super-affirmative procedure

1. There are 11 Acts which are currently strengthened by an enhanced affirmative scrutiny procedures:
   a. Northern Ireland Act 1998 (section 85)
   b. Human Rights Act 1998 (Schedule 2)
   c. Local Government Act 1999 (section 17)
   d. Local Government Act 2000 (section 9)
   e. Local Government Act 2003 (section 98)
   f. Fire and Rescue Services Act 2004 (section 5E) (as inserted by the Localism Act 2011)
   g. Legislative and Regulatory Reform Act 2006 (sections 12 to 19)
   h. Local Transport Act 2008 (section 102)
   i. Public Bodies Act 2011 (section 11)
   j. Localism Act 2011 (section 7)
   k. Localism Act 2011 (section 19)

January 2017