Written evidence submitted by the Brexit and Environment Network

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Executive Summary
The Government’s proposals to create a world-leading statutory body are limited in a number of ways:
- The enforcement powers proposed are a long way short of those currently vested in the European Commission and the Court of Justice of the European Union (CJEU).
- The planned use of advisory notices as the principal means of securing compliance is inadequate.
- The exclusion of climate change policies from the new body does run the risk of weaker enforcement for climate policies.
- The adoption of a bill that includes the environmental principles is preferable to one that does not.
- Any statement of environmental principles must also include the commitment currently enshrined in the Article 3 of the Treaty on European Union to pursue a high level of protection of the environment, which can act as a guiding principle informing the interpretation and application of other environmental principles.
- The proposed geographical scope of the body (restricted to England) raises the prospect of diverging standards and principles being applied across the UK.
- There are clear environmental benefits to a UK-wide approach, as the environment does not respect political borders. However, there is a range of political obstacles to developing a cross-national environmental strategy.

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?

1. The proposals in the consultation go some way to delivering the commitment made in the 25 Year Environment Plan to create a new environmental watchdog. However, as with the 25 Year Environment Plan, there are uncertainties and gaps and some issues that must be addressed before the watchdog could be considered world leading (see Jordan et al. 2018 for detail on the issues with the 25 Year Environment Plan).

2. There is a lack of detail about how this new body will uphold environmental standards. The consultation states that the body will be empowered to investigate complaints of governmental failure to deliver on environmental legislation and that it can make recommendations: it is envisaged that these recommendations will be so ‘strongly persuasive’ that they are therefore likely
to be implemented (para. 91, Department for Environment Food and Rural Affairs [DEFRA], 2018a).

3. The body will be able to issue advisory notices, to which the Government will respond, and again it is anticipated that these will be acted upon. It is also suggested that binding notices can be issued as a last resort. Only Government authorities will be subject to the jurisdiction of the new body, not third parties, which will remain subject to the regulatory oversight of bodies such as the Environment Agency and Natural England.

4. Under the current EU system the Commission can investigate complaints against both Government and third parties. It can also refer national governments to court where they can be fined. The proposals contained within the consultation therefore fall short compared to the protections currently provided. The new body also does not seem to have the right to initiate its own investigations, but rather will only respond to complaints or Government requests.

5. The powers envisaged in the consultation document are consequently limited and will not act as a replacement for the current enforcement regime and seem overly reliant upon the assumption that Government will be persuaded by strong argument and advisory notices to change its behaviour. Yet if we look to the example of the Climate Change Committee we can see the limits of persuasion in prompting Government action: two recent Climate Change Committee reports note the Government is not on track to meet the targets in its fourth and fifth carbon budgets (Climate Change Committee 2016; 2017), yet there is limited evidence that these reports have changed Government behaviour. The reliance upon voluntary compliance suggests either a naive optimism about Government responsiveness to criticism or, more cynically, an unwillingness to submit Government to meaningful independent scrutiny and enforcement mechanisms.

6. The new body must operate in a transparent manner. It should therefore be required to report regularly on its work and, specifically, on the number and nature of complaints received, what has happened in response to them and the basis on which matters have been chosen for more formal action. As with the current EU bodies, we envisage that the new body will be able to use direct communication and informal highlighting of issues to ensure that many problems are dealt with quickly and easily by the authorities concerned, without invoking formal procedures, but there should be transparency about such activity.

7. The on-going uncertainty about how this new body will relate to the devolved administrations (DAs) and whether the DAs will adopt a similar approach on principles raises the prospect of divergence and incoherence in the implementation of environmental policy across the UK.

8. Divergence is not necessarily problematic if it stems from some policies being more ambitious. For example, Scotland and Wales currently have more ambitious climate policies than England, although Northern Ireland (NI) has no specific climate change act.

9. However, divergence may become problematic if there is race to the bottom in some parts of the UK. For example, the use of different interpretations of the precautionary principle could be problematic where there is scope for Scotland
and Wales to adopt a more restrictive interpretation of the principle than that preferred in England or vice versa. To avoid this outcome close and genuine consultation with the devolved nations about the content of the national policy statement and an exploration of whether different interpretations can coexist without restricting trade is advisable.

**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?**

10. The Government rightly notes that there is potential conflict of interest and overlap across a range of bodies and seeks to define the parameters of the various relationships, mainly by limiting the powers of this new body to reduce overlap and maintain a 'strategic focus'. The consultation suggests (DEFRA 2018a, para 117a) that the new body be responsible for holding the Government to account, which in turn can hold arms length bodies (ALBs), such as the Forestry Commission, Ofwat, the Environment Agency, Natural England and the Marine Management Organisation, and Local Authorities (LAs), to account and avoid overlap with the jurisdiction of *inter alia* the Parliamentary and Health Service Ombudsman (PHSO) and the Local Government and Social Care Ombudsman (LGSCO). Broadly speaking this system does correspond to the current model.

11. However, the proposed system also limits the scope of the new body to investigate environmental complaints about Local Authorities and ALBs, despite the fact that these organisations are largely responsible for the delivery and implementation of environmental policy. Moreover, failures of implementation at the local level may stem from problems higher up the policy chain, either in the way government has framed advice to ALBs or due to lack of resources. A presumption in favour of the Government's preferred model, but with scope for the new body to investigate compelling cases involving ALBs or LAs in consultation with other bodies, would provide a more flexible approach.

12. When it comes to the UK Parliament the body will report to Parliament and, under some circumstances, be able to require Government to make a statement to Parliament. It is anticipated that the body be accountable to Parliament, which may also wish to have the right to ask the body to undertake work. Parliament should also be charged with ensuring that the body has the resources provided on a secure basis to ensure that it can fulfil its role.

13. It is unclear what the relationship will be between this new body and the DAs, or their legislative chambers. In the case of NI this new body could be particularly significant as there is no independent environment agency in NI, with those functions performed by Department for Agriculture, Environment and Rural Affairs (DAERA).

14. Amendments adopted to the Scottish Continuity Bill commit Scotland to have regard to environmental principles and animal welfare (Scottish Parliament 2018). Similarly, whilst the Welsh Assembly Government did not adopt amendments on environmental principles to its Law Derived from the European Union (Wales) Bill (National Assembly for Wales 2018a), the Welsh Assembly Government has committed to 'take the first proper legislative opportunity to
enshrine the environmental principles into law and close the governance gap’ (National Assembly for Wales 2018b), possibly through enhancing the powers of the Welsh Future Generations Commissioner. Therefore Scotland and Wales have expressed a commitment to maintain a high level of environmental protection and are keen to observe key environmental principles.

15. For NI, the break-down of devolution and the non-establishment of official direct rule means there are currently no ministers, either devolved or via direct rule, to provide political cover and legitimacy to either follow Scotland and Wales, opt-in to the DEFRA scheme or adopt another alternative.

16. Whether a decision is made to have a pan-UK body or to have separate bodies there will need to be coordination to ensure coherent environmental governance across the UK. There should be scope for Scotland, Wales and NI to refer complaints to the new body if action taken by the UK government has had negative environmental consequences within devolved territories.

17. If it is decided to have a pan-UK body then it should be accountable to the devolved legislatures as well as the UK Parliament. Under these conditions it would make sense to have a pan-UK parliamentary committee composed of members from each of the chambers’ environment committees to act as an oversight body.

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?

18. Currently all environmental policy adopted by the EU is informed by the principles articulated in the EU Treaties, and these principles have been invoked in legal action. Some of these principles are included in EU legislation and will therefore be copied over into retained EU law. Some principles have been included in EU legal actions and CJEU judgements and therefore under the terms of the EUWB can inform future legal action.

19. However, there will still be a governance gap compared to current provision, as the principles included in the Treaties will not be copied over. The Government proposes to address this gap through a national policy statement and suggests two possible approaches:
   a. Bringing forward primary legislation that sets out the environmental principles and requires the Government to come forward with a policy statement on how those principles will be applied and interpreted
   b. Bringing forward a bill that requires the Government to come forward with a policy statement spelling out the environmental principles and their application and interpretation.

20. The Government suggests that option (a) would show that the UK is strongly committed to an environmental agenda and would make it harder for future governments to change the commitment to well-established environmental principles. But it also suggests that option (b) would offer greater flexibility for Ministers to adopt different principles in their policy statement as scientific knowledge and understanding of the nature of the environmental challenges facing this country and the wider world evolves.
21. It seems unlikely that the principles will change but the way in which they are applied and interpreted might, which tilts the balance in favour of option (a). It is unclear whether the policy statement for either option would be published at the same time as the bill. Clarity is needed on this question. It would be advantageous for the policy statement to be published at the same time as the bill (also see para 27 below).

22. Having a clear statement of how the principles will be applied and interpreted is an innovation compared to the EU where principles are articulated in the Treaties but without clear definition, with the CJEU left to interpret them in the context of legal action. The exception here is the precautionary principle, which has a clear definition of its application, spelled out in a Commission Communication (European Commission 2000).

23. However, one clear gap in the discussion of principles in the consultation document concerns the protection principle. All EU legislation and the interpretation of environmental principles are informed by the overriding commitment to pursue a high level of environmental protection under Article 3 of the Treaty on European Union. In the list of environmental principles provided in the consultation document there is no mention of this overriding protection principle (Annex A, DEFRA 2018a). For the proposed UK-based environmental principles to be meaningful they must be contextualised within a wider commitment to protect the environment to a high standard.

24. For the polluter pays principle, in addition to an articulation of what the principle means, a clear indication in the accompanying policy statement of the level of payment is required. A key challenge for some market-based instruments, such as the Emissions Trading Scheme, is that if the market price of the relevant substance (e.g., carbon) falls too low, there is no incentive for polluters to clean up their operations. Consequently any policy statement should take into account the behaviour that the principles are supposed to encourage and ensure that the statement requires policy instruments to be appropriately calibrated (i.e., that the level at which the polluter pays should be set high enough to make polluting behaviour economically disadvantageous). Including an overarching protection principle will provide justification for providing such detail in the policy statement.

25. The Government also discusses the proportionality principle (see para 41 DEFRA 2018a), which is a general principle of EU Law under Article 5(4) of the Treaty on European Union. The classic example of the application of the proportionality principle in EU environmental policy was expressed through the Danish Bottle Ruling (Case 302/86), where the CJEU found that the Danish Government could adopt environmental policies that limited trade but that the policy should be proportionate to the aim pursued (i.e., protection of the environment). In this case the Court suggested that the Danish Government could retain the new recycling rules that had prompted the action but needed to reform them as they were disproportionate in their effects upon trade. Hence the proportionality principle can be used to determine whether policies are appropriately framed to meet their aims.

26. However, the wording of the Government’s consultation and the linking of the proportionality principle to a discussion of balancing the environment against other priorities suggests that the Government views the environment as in
competition with economic growth and housing (see paras 40, 83, 87, DEFRA 2018a). This interpretation of environmental policy goals being in competition with economic and housing goals is inconsistent with the general tenor of the clean growth strategy (Department for Business, Energy and Industrial strategy [DBEIS] 2017) and fails to take account of the synergies between environmental policy and other sectors. The suggested tension with the priority for new housing is also hard to reconcile with the “embedding of an ‘environmental net gain’ principle for development, including housing and infrastructure” which is a feature of the 25 Year Environment Plan (DEFRA 2018b p. 31). Any inclusion of the proportionality principle and discussion of balance will therefore require appropriate framing that avoids the implication that the environment is in competition with other policies.

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

27. The Trade Bill and, most importantly, post Brexit trade agreements will define the parameters of any future environmental ambition. It would be helpful to have the principles clearly defined prior to the adoption of the Trade Bill. There are on-going risks that environmental standards will be sacrificed to secure trade deals. If the Government is genuinely committed to maintaining and enhancing standards to deliver a green Brexit then adopting a clear statement of environmental principles as early as possible would provide a context within which the Trade Bill can operate. Doing so may also address the concerns raised by the House of Lords that led to the adoption of amendments on environmental principles to the Withdrawal Bill.

28. Uncertainty about principles, notably the polluter pays principle, also matter for the Agriculture Bill. As DEFRA aims to move towards a public payment for public goods approach, it is critical that the standard baseline – under which the polluter pays principle applies - is set out clearly and at a high enough level to ensure that actions with negative impacts on the environment do not receive public support (Gravey et al. 2016).

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?

29. It is unclear why the Government has made this decision. While the Climate Change Act has put in place a set of ‘robust mechanisms’ (DEFRA 2018a, para 127) to regulate climate change policies, the Climate Change Committee (CCC) is limited to issuing reports with no enforcement capacity (see para 5 above). Therefore excluding climate change from the remit of this new body does raise the risk of weaker enforcement for climate change policies. Moreover, policies on environment and climate change often overlap, e.g. ozone-depleting substances are also implicated in climate change. It should be possible for this new body to coordinate with the CCC to ensure that all environmental legislation is subject to the same standards and enforcement regime. Indeed the new body could use CCC reports to press the Government to take the necessary actions to meet its commitments under the CCA. A member of the CCC could be an ex officio member of the new body to ensure effective coordination.
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?

30. There are clear environmental benefits to a UK-wide approach, as the environment does not respect political borders. However, the relationship between the devolved governments and the UK government is currently characterised by a profound lack of trust.

31. Scotland and Wales are currently more ambitious than England and Northern Ireland on environmental matters, and therefore need to decide whether they would rather set out and enforce their policies independently (at the risk of facing negative transboundary impacts, if England and/or Northern Ireland were to start a regulatory race to the bottom) or would rather maintain a seat at the table and the ability to influence UK-wide policy. But it is noteworthy that neither Scotland nor Wales feels sufficiently heard in the current institutional set-up.

32. The Joint Ministerial Committee (JMC) is not fit for purpose – until the last year it rarely met and provides limited time and opportunity for the devolved governments to input their views. The UK government sets the agenda and there is a complete lack of transparency around how the JMC operates.

33. The statement on the 25 Year Environment Plan and the consultation on the Governance and Principles Bill appear to have been made with limited involvement or consideration of the devolved nations. For the relationship to be improved it would be helpful for more notice to be given to the DAs of upcoming policy pronouncements and for there to be a genuinely consultative policy space created to think through the best way to manage future cross-UK environmental policy. The EAC is well placed to create this space by reaching out to other environment committees in the devolved legislatures.

References


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