Written evidence submitted by ClientEarth (GRB 08)

ClientEarth is a non-profit environmental law organisation. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

A - Executive summary

1. It is likely that the Great Repeal Bill will have to bestow some powers on ministers in order to be able to legislate quickly enough to prevent ‘black holes’ in UK environmental legislation arising when the UK leaves the EU.

2. The aim of the Great Repeal Bill is to retain consistency on the legal rules that apply. In order to achieve this, Government powers should be confined to making technical amendments to existing UK law. Any substantive amendments must be subject to a proper Parliamentary process and not become effective before the UK leaves the EU.

3. A careful phased approach will be needed in order to retain the legal landscape. It is thus crucial that any ministerial powers are precisely defined and clearly limited by the GRB both in terms of which powers ministers can exercise and when they can exercise them.

B - Introduction

4. A stated aim of the ‘Great Repeal Bill’ (GRB) is to preserve EU law where it stands at the moment before the UK leaves the EU.¹ Setting out a correct procedure for doing this is crucial to environmental law, since around 80% of UK environmental legislation is currently shaped by the EU.² The longer-term future of environmental law in the UK will need to be addressed in more detail in the future. However, at this stage, the aim is to retain the status quo and this submission highlights potential issues and gives suggestions with that in mind. In particular, it identifies that the powers bestowed by the GRB on the Government must be clearly limited both in terms of substantive scope and temporal application. In addition, the GRB must have clear provisions to ensure that future substantive changes to environmental law will not be possible without the proper involvement of Parliament.

5. EU environmental law of relevance to the UK covers a wide range of issues including nature, pollution standards, food and farming, fisheries, waste, climate and energy so the scale of the task of ensuring that all the relevant EU legal rules in this area continue to apply when we leave the EU should not be underestimated. The GRB must ensure that the UK’s current environmental laws, policies, protections and standards are retained.

6. The powers and procedures that are set out in the GRB will lay the groundwork for retaining EU-derived environmental law, and must prevent Government powers from diminishing the protections that we all currently enjoy. The GRB should ensure that EU-derived law continues to be meaningful and effective after Brexit Day, while making it clear that existing law in the environmental field is safeguarded by a proper democratic process. Otherwise, after the UK leaves the EU, fundamental environmental protections could be at risk of being undermined without proper Parliamentary scrutiny. As such, a carefully phased approach of ministerial powers and Parliamentary processes will be required.

C - Environmental law - a case apart?

¹ ‘The United Kingdom’s exit from and new partnership with the European Union’ Cm 9417 (February 2017), 10.
² https://www.ukela.org/content/page/5859/Brexit%20Climate%20and%20Energy%20WP.pdf
7. Because of the breadth of topics covered by EU law, the GRB will impact a wide range of legal issues. But there are good reasons why environmental protections should be dealt with as a special case to be accorded a high level of scrutiny and safeguards. While in some policy areas, public opinion is fundamentally divided about the benefits of the status quo, there is strong public support\(^3\) for retaining or building on the existing environmental standards. This is an area of consensus with the Scottish\(^4\) and Welsh\(^5\) Governments calling for the environmental standards to be retained, while the UK Government made a manifesto commitment to be “the first generation to leave the natural environment of England in a better state than that in which we found it.”\(^6\) Achieving this commitment is dependent on the GRB properly retaining existing environmental legal standards.

8. Environmental protections are designed inter alia to prevent environmental damage and drive change for a sustainable future. Reductions in protections in the short-term could have long-term, far-reaching impacts that would be difficult to reverse. Environmental impacts can have serious consequences in many areas. For example, ClientEarth is currently using EU air quality law as a tool to hold the Government to account and protect public health in the UK. Furthermore, EU institutions currently provide essential oversight and enforcement for environmental law. For example, authorisation of chemicals is a constantly changing area that relies on a specialised EU agency – the European Chemicals Agency.

9. Environmental protection is a public good and there is a clear need for public scrutiny and involvement in the design, implementation and enforcement of environmental law. Because of the innate value of the environment and the long-term impact of failures to protect the environment, environmental law should not be subject to change without Parliamentary scrutiny. Consistency and certainty will be important, not only from an environmental protection perspective, but also for business and trade.

**D - Retaining environmental law**

10. In the UK, EU-derived environmental law is currently found in both Acts of Parliament and Statutory Instruments (SIs). Amending these two different types of legislation requires different procedures. In particular, SIs ('secondary legislation') can normally be amended or repealed by Government ministers, whereas Acts ('primary legislation') can normally only be amended via a process of Parliamentary scrutiny. As a first step, the GRB will ensure that all SIs transposing EU law are saved (ie are not repealed). The GRB should also provide proper safeguards against environmental laws being weakened by executive action (ie without proper Parliamentary scrutiny) in the future by converting EU-derived SIs into primary legislation once the UK has left the EU (see [19]-[22]).

11. UK environmental law is also composed of instruments that do not currently appear directly within UK law. For example, EU Regulations and Decisions, which are ‘directly applicable’. The GRB will have to make clear how these laws (which comprise a considerable proportion of UK law) will be retained in order to meet the GRB’s aim of preserving legal rules. This could be done by appending them to the GRB itself, or through the bestowing of relevant powers on ministers to create new SIs that replicate the Regulations in the UK context (these would be later converted into primary legislation on Brexit Day).

\(^3\) YouGov polls have shown that 83% of people think Britain should pass new laws providing better or the same protection for wild areas and that 65% of people support a new Clean Air Act.


\(^6\) [https://www.conservatives.com/manifesto](https://www.conservatives.com/manifesto)
12. In both cases of pre-existing SIs and Acts transposing EU Directives and new SIs replicating EU Regulations, some technical amendments (for example regarding some cross-references to EU Institutions and Instruments, see [23]-[31]) will be needed to ensure that UK environmental law continues to be coherent and meaningful as standalone law. Some EU-derived legislation may be relatively easy to retain where there is only a need for purely technical amendments. But the Government has indicated that around one third\(^7\) of an estimated 1100 pieces\(^8\) of EU environmental legislation will be difficult to retain in UK law.

13. There is a need to legislate quickly to avoid legal black-holes (such as a failure to render EU Regulations meaningful in domestic law or a lost ability to establish Special Areas of Conservation) and a need for Parliamentary scrutiny to ensure standards are retained following Brexit. In order to move fast enough, it is likely that the GRB will need to give ministers some powers for making technical amendments to existing legislation. However, the GRB must make it clear that existing environmental law can only be substantively amended or repealed by Parliament.

14. To aid in this process, the Government should as a matter of urgency publish a list of EU-derived environmental legislation identifying where technical amendments will need to be made as well as those areas that will require extra legislation in order to retain legal rules once the UK has left the EU.

15. The GRB has been described as a “giant Henry VIII Clause”.\(^9\) A Henry VIII clause is a provision that allows the Government to amend or repeal a law after it has become an Act of Parliament. This type of provision can enable primary legislation to be amended or repealed by subordinate legislation without parliamentary scrutiny. Any executive powers contained in the GRB must be precisely defined and clearly limited to only allow amendments for the purpose of retaining the legal landscape. If Henry VIII or similar powers are to be used to amend any environmental laws, then they must be clearly restricted to technical amendments (ie those allowing the law to function practically outside the EU, such as replacing references to EU Institutions or Instruments where necessary, see [23]-[31]).

16. These technical amendments must only come into force on Brexit Day (as otherwise the UK will potentially be in breach of EU law), although they must be prepared by ministers beforehand. Executive powers to prepare technical amendments to SIs and Acts should be designed to lapse on Brexit Day and ministers should have an obligation to have completed these technical amendments by Brexit Day in order to prevent legal ‘black holes’ and in order for these changes to be made whilst the instruments remain SIs. In the event that any such amendments have not been made in time, the GRB should provide that the relevant provisions must continue to be interpreted as far as possible in the same way as they were whilst the UK was a member of the EU.

17. The GRB should make clear that any changes to environmental law that significantly alter its original scope, or intended purpose, must be made by primary legislation, giving a proper role to Parliament as the sovereign law maker to prevent deeply undemocratic alterations to law. In addition, equivalent oversight and safeguarding processes must be ensured within devolved legislatures where relevant.

---

\(^7\) https://www.publications.parliament.uk/pa/cm201617/cmselect/cmenvaud/599/59906.htm#_idTextAnchor017
\(^9\) https://www.monckton.com/the-great-repeal-bill-a-giant-henry-viii-clause/
18. Procedures that could be required by the GRB in order to ensure that any ministerial powers are effecting technical amendments, and thus safeguard EU-derived legislation from alterations that would substantively alter the legal landscape, include: (i) treating saved SIs as primary legislation – such law could only be amended by further primary legislation; (ii) requiring the use of a strengthened scrutiny procedure for amendments to SIs, requiring the formal approval of both Houses of Parliament; (iii) establishing parliamentary committee(s) with the powers to oversee and review any amendments made by ministers under the GRB to ensure that they do not substantively alter the law. These procedures would also be strengthened by a blanket provision that all EU-derived law must continue to be interpreted in line with the intention of the underlying Directive/Regulation. The same process need not apply in every instance. In the event that a minister wishes to amend legislation, some instruments could be dealt with on a fast-track basis via a committee, while other instruments could need new primary legislation, for example. Some areas of legislation should be subjected to greater Parliamentary scrutiny, such as those that are particularly complex or sensitive. Adequate scrutiny procedures will require increased Parliamentary resources simply to manage the levels of work required.

E - Future environmental law

19. Once the UK has left the EU, the GRB should convert all EU-derived secondary legislation into primary legislation, which is only subject to amendment or repeal by Parliament. Furthermore, the GRB should contain an obligation for non-regression regarding environmental standards. However, the GRB must also not hamper future environmental protection.

20. Environmental law is constantly evolving due to its relationship with developing scientific knowledge and understanding of threats to ecological health. For example, in many areas, legislation refers to dynamic lists that are periodically updated. After the UK has left the EU, there will be ongoing changes and developments in EU law to reflect such developments. Therefore, arrangements will be needed to ensure UK legislation continues to effectively protect the environment by at least keeping up-to-date with the latest standards. The GRB should contain provisions that clarify how EU-derived legislation can continue to be updated to ensure proper protection of the environment and people’s health. To that end, the GRB could include precisely defined clearly and limited executive powers to amend EU-derived law to reflect post-Brexit changes in the EU law it was based on (including rulings and interpretations of the CJEU and technical/legislative amendments) as long as these do not lower standards for environmental protection and public health. This will assist in retaining market access and ongoing collaboration with the EU in policy areas of mutual interest.

21. Henry VIII powers to make substantive amendments to these pieces of primary legislation could be included in the GRB in order to keep UK environmental law up-to-date, but they must be restricted to amendments that both (a) maintain equivalence with changes in EU standards and (b) are in line with the non-regression principle. Note that this does not preclude the possibility of other future (non-regressive) amendments to environmental law through primary legislation.

22. There is thus a need to take great care over both which powers ministers can exercise and when they can exercise them in order to ensure UK environmental law continues to be both functional and fit for purpose.

F - Technical amendments

23. The notion of when an amendment is a technical one and when it is a substantive one must be clearly and precisely defined. In this regard, two categories of amendments can be considered.

24. Firstly, cross-references to EU legislation may sometimes be amended without any substantive changes. When a UK instrument simply refers to an EU instrument for definitional purposes, such provisions could either be maintained as they are, or the relevant definition could be transplanted into UK law. If the transplantation option is taken, it is even more crucial that SIs are converted into primary legislation on Brexit Day to safeguard these definitions from unscrutinised amendment.

25. However, when a UK instrument refers to provisions, obligations, or requirements of a Directive, more care will be needed. Consider the following three examples:

   a. "The regulator must exercise its relevant functions so as to ensure compliance with the following provisions of the Landfill Directive ..." (Environmental Permitting (England and Wales) Regulations 2016, Schedule 10(5))

   b. "For the purposes of implementing any obligations of the United Kingdom under Directive 2008/50/EC ..." (Air Quality Standards Regulations 2010, s31(1))

   c. "The Secretary of State ... must exercise their functions ... so as to secure compliance with the requirements of the Directive." (Marine Strategy Regulations 2010, s4(1))

26. In some such cases, amendments will need to be made in order to ensure that the GRB "preserve[s] EU law where it stands at the moment before we leave the EU". However, these are more nuanced than purely definitional amendments, and so require a greater level of care and of scrutiny.

27. Secondly, references to EU institutions and agencies may need to be amended. This is especially important for environmental law because without proper governance and enforcement mechanisms at UK level, rules may become practically unenforceable.

28. Replacing the EU oversight and enforcement framework on a domestic level will be a complex, time-consuming and resource intensive process but it will be crucial for standards to be retained and respected. Procedures for establishing institutions to replace existing governance and enforcement mechanisms need adequate scrutiny to ensure they will be effective.

29. The GRB must ensure that prior to Brexit, EU institutions and their roles that will need to be replaced post-Brexit are identified and replaced, if necessary by UK institutions. The possibility of retaining links with EU institutions should also be explored. Given the timeframe for Article 50 and the proposed effect of the GRB, it seems prudent to ensure that the UK legislation is in some way linked to the relevant specialised EU agencies and institutions insofar as that is possible, unless there is an obvious and adequately resourced UK agency that would be able to fill the gap.

11 supra n1.
30. The GRB should make clear that any amendments transferring oversight and enforcement powers to UK agencies should be subject to a review within a specified time-limit involving full Parliamentary scrutiny to ensure that any future institutional framework has adequate powers and resources to fulfil the tasks currently undertaken by EU agencies and institutions.

31. Ultimately, at least one new regulatory body will be needed if the same standard of legal protection is to be retained once the UK has left the EU.

G - Principles

32. Certain overarching principles of EU environmental law are established by the EU Treaties but not necessarily currently reflected in UK law. These include the precautionary principle, the principle that preventive action should be taken, environmental damage should as a priority be rectified at source and that the polluter should pay, and that environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities.

33. These principles have been central in securing significant environmental improvements over the past 40 years. They form a key part of existing UK law and so must be retained by the GRB.

34. These guiding principles should therefore be specifically set out in the GRB. Any future primary or secondary legislation (including that flowing from the GRB) must be designed and interpreted in line with them.

H - Interpretive aids such as case law and preambles

35. Existing UK law is currently shaped by judgments and interpretations of the CJEU. In order to preserve EU law on Brexit Day, these judgments and interpretations must be expressly continued in UK law by the GRB. Failing to do so would cause legal uncertainty and potentially weaken standards of environmental protection. It is unclear whether executive powers will be required to implement this, or if this can be achieved via a broad provision within the GRB itself.

36. In addition, the preambles to existing EU Directives and Regulations form an essential part of the law as they serve as integral components of the UK’s purposive approach to interpretation of legislation. However, they are not normally directly transposed into UK law. The GRB should make clear that any EU-derived UK law continues to be interpreted bearing in mind its entire context and purpose, which includes the preambles of relevant Directives and Regulations.

37. The GRB could also make clear what the legal status of future CJEU judgments will be. Although it is clear that these will no longer legally bind the UK, it may be prudent to place an obligation on ministers, courts or other public bodies to consider any such rulings in their own interpretation in order to provide certainty and alignment with the UK’s nearest trading partners and ecological neighbours.

I - Non-statutory transposition

38. An additional area of concern is that EU law is sometimes transposed into UK law in non-statutory ways. Article 288 of the TFEU allows national authorities to decide on the choice of form and methods by which the binding result of Directives are achieved. In the UK, whilst most EU environmental directives are transposed by Acts of Parliament and SIs, some important provisions are transposed by non-statutory means. For example, the Civil Procedure Rules (which can be made and altered by the Civil Procedure Rules Committee) are used to transpose access to justice requirements set out in the Environmental Impact Assessment Directive and the Industrial Emissions Directive (IED). Other requirements are transposed by guidance, for example the application of the IED to small waste oil burners. Directions under section 40(2) of the Environment Act 1995 are used to transpose for example the Groundwater Directive. Care must be taken to ensure that equivalent scrutiny is applied to any amendments to measures such as these, which transpose important elements of EU environmental law.

J - Devolution and scrutiny

39. Retention of EU-derived environmental law will raise complex issues in the context of the devolved nations. These are devolved areas of competence although they have been dominated by EU legislation over the past 40 years with little scope for divergence. It has been pointed out that, in the case of Scotland, for example, this would mean that Westminster legislation on these matters through the GRB would require the legislative consent of the Scottish Parliament under the Sewel Convention at the very least for democratic legitimacy.13

40. This will also be an issue for the British Crown Dependencies and Overseas Territories, the majority of which are not currently in the EU but will be affected by the UK withdrawal from the EU, not least in the area of environmental protection. Often UK legislation includes provisions for law to be extended in part or wholly to Overseas Territories and Crown Dependencies by Order of the Queen in Council. This is a procedure with minimal scrutiny. While the GRB itself may need to be extended in certain areas to maintain the status quo, it should be clear that no future changes in the framework affecting those territories will be made without active consultation and approval by them.

K - Conclusion

41. Environmental law deserves special attention in the GRB because of its long-term impact, public importance and the way it is intertwined with EU law in form and in practice. The procedural framework set out in the GRB will have significant implications for legal certainty for environmental law and so also for the health of our ecosystems and societies.

42. Any powers in the GRB must be clearly limited in terms of both substantive scope and temporal application. Any amendments to environmental law made prior to the UK leaving the EU based on powers contained in the GRB must be technical – they must only have effect insofar as they allow the UK to maintain the status quo. Any subsequent GRB powers allowing ministers to make substantive amendments to UK environmental law after Brexit via secondary legislation must also be clearly limited: they should be limited to amendments

that both (a) maintain equivalence with changes in EU standards and (b) are in line with the non-regression principle.

43. In addition to retaining written legislation (both directly and indirectly applicable), preserving EU law also requires that guiding principles of EU law be clearly embedded in the GRB and that existing CJEU jurisprudence and preambular material is likewise retained.

44. The scale and complexity of retaining EU-derived law in this area means considerable resources will be needed to ensure adequate scrutiny within the necessary timeframe. In order to address this problem, the Government should as a matter of urgency publish a list of EU-derived environmental legislation identifying where technical amendments will need to be made as well as those areas that will require extra legislation in order to retain legal rules once the UK has left the EU. Different procedural frameworks may apply according to the ease of retention and the level of sensitivity of particular pieces of legislation. A balance needs to be struck between the need to work quickly to avoid legal black-holes following withdrawal from the EU and the importance of adequate scrutiny in this sensitive area.

February 2017