Department
for Environment
Food & Rural Affairs

Environmental Principles and Governance after the United Kingdom leaves the European Union

Consultation on environmental principles and accountability for the environment

May 2018

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Foreword

It is this government’s ambition to ensure we leave our environment in a better state than we inherited it.

It's our aim not just to protect and conserve but to enhance and restore habitats and landscapes. It's our mission to have purer rivers, cleaner air and healthier oceans. It's our responsibility to put in place the protections and incentives which will make Britain, and the world, cleaner and greener for the next generation.

As we leave the EU there is an opportunity for Britain to shape new environmental policies which will better protect the natural world. We can replace the Common Agricultural Policy and the Common Fisheries Policy with new approaches which put the environment first.

But while we shape new policies to enhance our environment further, we must also protect those gains which have been made over the last forty years.

For many who care deeply about the environment, and have fought for its protection over several decades, our membership of the European Union (EU) has coincided with increased awareness of environmental concerns and improved mechanisms to safeguard the natural world.

And some have expressed fears that these gains could be put at risk by leaving the EU.

We want to ensure that the new mechanisms we put in place as we leave the EU don't just maintain, but strengthen protection for the environment.

As a baseline the EU (Withdrawal) Bill, will convert existing EU environmental law into UK law.

In addition, we have also published our 25 Year Environment Plan, which sets out the scale of our future ambitions.

The plan outlines this government’s intention to enhance our environment by replenishing depleted soil, planting trees, supporting wetlands and peatlands, ridding our seas and rivers of rubbish, reducing greenhouse gas emissions, cleansing the air of pollutants, developing cleaner, more sustainable energy and protecting threatened species and habitats. It also outlines an approach to agriculture, forestry, land use and fishing that puts the environment first.

And to ensure that both existing protections and new ambitions are underpinned by a strong statutory foundation we are consulting on new legislation.

Our new 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. The role which has been played in the past by the EU Commission and courts should be filled now by a UK body embedded in the UK's parliamentary democracy.

This consultation asks how we can make sure our new watchdog works most effectively. How should environmental principles be embedded into law? How should public policy-

making and delivery be scrutinised? What functions and powers should the new environmental watchdog have to oversee environmental law and policy?

While this consultation relates only to environmental governance in England, we will continue to work closely with the devolved administrations on common frameworks. This consultation does not pre-judge any of these discussions.

Leaving the EU marks a new chapter for the UK. We have an opportunity to take back control of our laws, including on environmental governance, and to set a gold standard for environmental protection. I look forward to the debate which will this consultation is designed to generate.

The Rt Hon Michael Gove, MP

Secretary of State for Environment, Food and Rural Affairs

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Introduction

Our ambition for an improved environment, driven by principles and firm governance

1. This government has pledged that we will be the first generation to leave the environment in a better state than that in which we inherited it. To this end the government has published its flagship 25 Year Environment Plan[1] for England – an ambitious blueprint for a new approach to managing our environment.

2. A new statutory policy statement on environmental principles and an independent, statutory environmental watchdog will help to deliver the vision of the 25 Year Environment Plan and ensure our country is a world leader in environmental protection once we leave the EU.

3. The new statutory policy statement on environmental principles and the new environmental body will be created through an Environmental Principles and Governance Bill. We will publish a draft Environmental Principles and Governance Bill in the autumn of 2018, with the introduction of a Bill early in the second session of this Parliament. This new piece of primary legislation will mark the beginning of a new era for our environment.

Environmental principles

4. We believe it will be beneficial to underpin environmental regulation and policy-making with a clear set of principles. Environmental principles are a specific set of principles which have been used to guide and shape modern environmental law. They are reflected in international instruments such as Agenda 21, a non-binding action plan of the United Nations with regard to sustainable development, and the Convention on Biological Diversity. Environmental principles are also set out in the EU Treaties as the basis for EU environmental law.

5. Whilst these principles are central to government policy, at a national level we do not currently set them down in one place, or define their role in policy-making or delivery. So, as we leave the EU, we will create a new statutory statement of the environmental principles which will guide us, drawing on the current international and

[1] https://www.gov.uk/government/publications/25-year-environment-plan.

EU environmental principles. It will remain government's responsibility to set policy within the framework of these principles.

6. Part 1 of this consultation document examines the status and effect of environmental principles in international and EU law and considers how to incorporate principles into our policy and legal framework. It considers how environmental principles should be approached in the domestic context through a new, statutory policy statement covering their application.

Accountability for the environment

7. Under current EU environmental governance arrangements, the European Commission monitors the implementation of EU environmental law and, where necessary, brings cases to enforce it in the Court of Justice of the European Union (CJEU). The CJEU provides rulings on the interpretation of EU environmental law to ensure it is applied correctly by Member States. Once we leave the EU, and regardless of the nature of the future relationship we negotiate, we will no longer be a party to the EU Treaties or under the direct jurisdiction of the CJEU (see Table 1 in Part 2 of this document for further detail).

8. It is, and it will remain, the role of Parliament, including Select Committees, to hold the executive to account and scrutinise its effectiveness. Parliament passes legislation and is ultimately accountable to the electorate. We also have a strong legal framework for environmental protection, including the implementation of environmental laws by regulatory authorities and their enforcement through the courts. The courts can also review the actions of government and its delivery bodies.

9. These domestic mechanisms will remain in place on our departure from the EU. However without further action, accountability for the environment will change once we leave the EU, regardless of the future relationship we negotiate with it. This consultation explores the functions of a new, independent, statutory environmental body to hold government to account on the environment and support our longer term objective for this, to be the first generation to leave the environment in a better state than that in which we inherited it. The role which the new body fulfils will also take account of the future relationship we negotiate with the EU on environmental matters.

10. Part 2 of this consultation document examines in more depth the proposal to create a new body to hold government to account on the environment. It considers the functions a new body could have to fulfil this role and addresses a number of questions around its remit, scope and nature.

Wider environmental governance

11. Part 3 of the consultation document sets out the government's wider picture of overall governance on the environment in England. This is intended to put the creation of the statutory statement of environmental principles and the new environmental body into a broader context. In particular, Part 3 seeks to make clear what environmental roles could be carried out by the new body, subject to the outcomes of this consultation, and what roles will continue to be carried out by the government or other public bodies. The latter include, for example, government and Parliament's responsibility for developing environmental policy and law, and the functions of responsible authorities such as the Environment Agency and Natural England in helping to deliver these measures on the ground.

Geographic coverage and devolution

12. Our starting point is that the statutory statement of environmental principles and the environmental body should cover England and environmental matters that are not devolved. This consultation therefore relates only to areas for which the UK government is responsible.

13. The statutory statement of environmental principles and the new body could, subject to the ongoing framework discussions with the devolved administrations, apply more widely across the UK. The environment does not respect boundaries, and we believe a joined up approach would be beneficial. If the devolved administrations would like to address the issues in this consultation jointly, we would welcome the opportunity to co-design the proposals for the new environmental body and principles with them to ensure they work more widely across the UK, taking account of the different government and legal systems in the home nations.

14. We will discuss with the devolved administrations the possibility of shared environmental principles and whether they wish to be covered by the new body (as already happens with the Committee on Climate Change (CCC), for instance). Alternatively they may wish to create their own national arrangements (just as there are Children's Commissioners for each home nation, for example). This consultation is without prejudice to ongoing framework discussions. Although it relates only to environmental governance in England and non-devolved matters, we welcome the widest possible engagement and the consultation is therefore open to anyone who wishes to respond.

Responding to the consultation

15. The issues addressed in this consultation are fundamental. They address important matters concerning the underpinning principles and governance of our future

environmental law and policy. We are consulting widely before bringing forward final proposals in these areas. We want to hear from as many people and organisations as possible – from businesses, NGOs, the fishing, farming and forestry sectors, civil society, and others.

16. Many of the questions posed in this consultation are open ones. We encourage respondents to provide not just their opinions but also the supporting facts and reasoning to inform the evidence base for the development of final proposals. Respondents do not have to answer all the questions and so can choose those of specific interest. Questions to which you do not wish to respond can be left blank.

17. **Response due date:** This consultation will close at 12:00 on 2 August 2018.

18. **How to respond:** Please respond via citizen space. The consultation is accessible at the following link: https://consult.defra.gov.uk/eu/environmental-principles-and-governance.

19. You can also respond by post to:

    Environmental Governance Consultation
    Environmental Regulations EU Exit Team
    Department for Environment, Food and Rural Affairs
    Ground Floor, Seacole Block,
    2 Marsham Street
    London
    SW1P 4DF

Part 1: Environmental principles

Principles in international law

20. There is no single agreed definition of environmental principles. However, a number of internationally recognised principles have been developed that help shape environmental policy around the world. Examples include the precautionary principle and the polluter pays principle. These, and further illustrative examples of environmental principles are outlined in Annex A.

21. An important milestone was the Rio Declaration on Environment and Development. This was a political declaration produced at the 1992 United Nations "Conference on Environment and Development" (UNCED), informally known as the Earth Summit. The Rio Declaration consisted of 27 principles intended to guide countries in future sustainable development. The UK was one of over 170 signatories. The Earth Summit also opened for signature important legally binding agreements which put these principles into practice. These were the United Nations' Framework Convention on Climate Change, the Convention on Biological Diversity, and the Convention to Combat Desertification.

22. These principles have featured in subsequent international environmental agreements to which the UK is a party. For example, Principle 15 of the Rio Declaration includes the ideas behind the precautionary principle. Agreements that apply this principle and to which the UK is a party include the OSPAR Convention on the protection of the marine environment and the Gothenburg Protocol on air pollution.

Principles in European Union law and policy

23. Environmental principles also form part of the Treaty on the Functioning of the European Union (TFEU). These are framed in the EU Treaties as general objectives for the EU, rather than having a direct, binding effect on the delivery of EU measures by the Member States. They underpin the development of policy and legislation by the EU institutions, requiring the EU to take account of and ensure that its environment policy incorporates consideration of these principles throughout the policy and law-making process. For example, Article 11 of the TFEU requires the integration of environmental protection into the definition and implementation of the EU's policies and activities with a view to promoting sustainable development. Similarly, Article 191(2) of the TFEU requires EU environmental policy to be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

24. These principles feed through into EU legislation. For example, the precautionary principle is included in the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) Regulation (1907/2006) and the Invasive Alien Species Regulation (1143/2014). Similarly, the polluter pays principle is referred to in the Water Framework Directive (2000/60/EC) – as well as in the regulations that transpose it into domestic law[2].

Principles in national law and policy

25. We remain committed to internationally recognised environmental principles, as set out in the 1992 Rio Declaration and the many multilateral environmental agreements to which the UK is a party.

26. Where environmental principles are contained in specific pieces of EU legislation, these will be maintained as part of our domestic legal framework through the retention of EU law under the EU (Withdrawal) Bill. Any question as to the interpretation of retained EU law will be determined by UK courts in accordance with relevant pre-exit CJEU case law and general principles, subject to the other exceptions and restrictions within the Bill. For example, CJEU case law on chemicals, waste and habitats includes judgments on the application of the precautionary principle to those areas. This will therefore be preserved by the Bill.

27. Environmental principles are also included in some pieces of domestic legislation. For example, the Natural Environment and Rural Communities Act 2006 includes requirements on how Natural England should contribute to sustainable development. The Environment Act 1995 similarly does so for the Environment Agency.

Statement of environmental principles

28. Environmental principles are central to government policy, but they are not set out in one place. The Secretary of State for the Environment, Food and Rural Affairs therefore announced on 12 November 2017 our intention to create a new, comprehensive policy statement setting out the environmental principles which will guide our environmental policy-making and legislation, in a similar way to existing EU principles. As we leave the EU, we need to carefully consider how these principles will inform our ongoing commitment to protect our environment and there are different options for their legislative basis.

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[2] The Water Environment (Water Framework Directive) (England and Wales) Regulations 2017 – S.I. 2017/407.

29. One option is to set out the environmental principles in new primary legislation – the Environmental Principles and Governance Bill – which would at the same time require government to come forward with a policy statement on how the principles should be interpreted and applied. Another option is for the Bill to require government to come forward with a policy statement on environmental principles and how they should be interpreted and applied, without the Bill itself listing the principles.

30. To provide democratic accountability, Parliament would need to scrutinise the statutory policy statement. This would simultaneously provide certainty for business around how environmental principles will be applied domestically. We will publish a draft Environmental Principles and Governance Bill in the autumn of 2018, then introduce a Bill early in the second session of this Parliament. This new piece of legislation and policy statement will guide successful and sustainable policy-making.

31. As explained above, there is no single, agreed definition of environmental principles. This consultation is seeking initial views on which principles to include. These will inform the drafting of the new Environmental Principles and Governance Bill and the new comprehensive statutory policy statement. Some examples of possible environmental principles are outlined in Annex A.

Question 1: Which environmental principles do you consider as the most important to underpin future policy-making?

Legal basis and intended effect

32. There are two main options. In the first option (Option 1), the environmental principles would be listed in the Environmental Principles and Governance Bill, with a statutory policy statement under that legislation to explain how they should be interpreted and applied.

33. In more detail, under Option 1, the Environmental Principles and Governance Bill would include:

    a. a set of environmental principles (see Annex A for details of some widely referred to principles) (this would not be included under Option 2);

    b. a requirement on government to publish a policy statement explaining how specified environmental principles should be interpreted and applied;

    c. a requirement for government to have regard to the statutory policy statement on environmental principles in their policies and carrying out their relevant functions; and

    d. powers for the new environmental body discussed in Part 2 to provide oversight of application of the statutory policy statement by government.

34. In the second option (Option 2), the principles would be set out and explained in a statutory policy statement issued under primary legislation. Unlike, Option 1, the Environmental Principles and Governance Bill itself would not list the principles.

35. In more detail, under Option 2, the Environmental Principles and Governance Bill would include:

    a. a requirement for government to publish a policy statement explaining how environmental principles (as set out in the policy statement) should be interpreted and applied;

    b. a requirement for government to have regard to the statutory policy statement on environmental principles in developing and implementing their policies; and

    c. powers for the new environmental body discussed in Part 2 to provide oversight of application of the statutory policy statement by government.

36. For both options, it is important that the policy statement is informed by the latest scientific and legal knowledge, and that it has wide support. We will therefore include requirements in legislation that the government must:

    a. consult on the draft statement and future changes to it; and

    b. present the draft statement to Parliament for scrutiny.

37. Application of environmental principles has evolved over time as scientific knowledge about the environment improves. In addition, case law and international law on what the principles mean and how they are applied is also continually developing. Under Option 1, therefore, the Environmental Principles and Governance Bill would list the principles while the statutory policy statement would set out the detailed descriptions of the principles and their application. In this way, the government would be able to regularly review the statement and update it promptly in response to new scientific or legal information, as necessary. As the environmental principles would be listed in legislation, removal or significant change to the definition of any particular principle would require further legislation.

38. To further assist in responding rapidly to the latest scientific and legal knowledge, Option 2 would be to not list the environmental principles in the Environmental Principles and Governance Bill. The principles would instead be set out only in the statutory policy statement. This would offer more flexibility to keep the list of principles up to date responding to the latest scientific and economic developments. Other aspects of this option would be the same as those described in points b, c and d of paragraph 33 above.

39. Including the principles in primary legislation (Option 1) would show that the UK is strongly committed to leaving the environment in a better state than that in which we inherited it. It would also make sure that future governments do not change this commitment to well-established environmental principles without reference to Parliament. On the other hand, not listing the principles (Option 2) 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.

40. The Environmental Principles and Governance Bill will offer new opportunities to protect, maintain and enhance our environment. As we work towards final policy proposals, it is important to carefully consider how we will take on responsibilities currently fulfilled by the European Commission. This includes the need to balance environmental priorities alongside other national priorities, such as economic competitiveness, prosperity and job creation to provide sustainable development overall.

41. In developing and drafting the policy statement, therefore, government would need to ensure that it is proportionate and appropriate to the broad nature of HMG policy-making. In this context, the government would apply the principle of proportionality to ensure the content and form of government action in relation to the environmental principles is in keeping with the aim pursued. This proportionality principle is a current general principle of EU law and is found in Article 5(4) of the Treaty on European Union. The application of the policy statement would exclude certain areas, such as national security and fiscal processes including Finance Acts. As is the case with the EU principles, it would not extend to individual regulatory decisions or administrative actions by government or its delivery bodies.

42. Lastly, the Environmental Principles and Governance Bill, for both Option 1 and 2, would give the new environmental body (discussed in Part 2) functions that relate to the policy statement. These functions would include scrutinising how government has had regard to the policy statement on environmental principles, periodically advising departments on possible improvements and, if necessary, taking action to ensure that the legal requirement for government to have regard to the statement has been met.

Question 2: Do you agree with these proposals for a statutory policy statement on environmental principles (this applies to both Options 1 and 2)?

Question 3: Should the Environmental Principles and Governance Bill list the environmental principles that the statement must cover (Option 1) or should the principles only be set out in the policy statement (Option 2)?

Geographic application of the principles

43. Our starting point is that the new statement of environmental principles should cover England and environmental areas that are the responsibility of the UK government. We are, however, discussing the scope of the statement with the devolved administrations. One of the key questions, which we are exploring with them, is whether they wish to take a different or similar approach. If the devolved administrations would like to address the issues in this consultation jointly, we would welcome the opportunity to co-design the proposals for the environmental principles with them to ensure they work more widely across the UK, taking account of the different government and legal systems in the home nations. We will, of course, continue to respect each of the devolution settlements, in line with our manifesto commitment that no decision-making that has been devolved will be taken back to Westminster.

Part 2: Accountability for the environment

Introduction

44. This part of the consultation document assesses the need and options for the creation of a new body to hold government to account on the environment. It considers how to do this as part of a governance framework to support our long term aims in the 25 Year Environment Plan – for example, to help the natural world regain and retain good health, deliver cleaner air and water, protect threatened species and provide richer wildlife habitats. It looks at the existing protections provided to the environment in England by domestic organisations and mechanisms, as well as the arrangements and controls that currently apply as a result of our EU membership. On this basis it identifies the specific functions that could be allocated to the new environmental body to support effective environmental governance once the UK has left the EU. It also raises a number of questions about the new body's scope, remit and powers in response to which we would welcome consultees' views.

45. The new body will therefore help realise the government's goal that this should be the first generation to leave the environment in a better state than that in which we inherited it, and for our country to be recognised as the leading global champion of a greener, healthier, more sustainable future for the next generation.

Current EU and national arrangements

EU environmental oversight and enforcement functions

46. Until we leave the EU, the UK will remain a full member with all rights and obligations of EU membership continuing to apply. The current environmental oversight and enforcement arrangements that apply in this respect are summarised below and described in further detail in Annex B. The precise arrangements that will apply in the future remain a matter for the negotiations.

European Commission

47. The European Commission oversees Member States' implementation of EU environmental law. It does this using information in submissions and reports from Member States, its own assessments and those of other EU bodies including the European Environment Agency (EEA). It also maintains a service through its website whereby individuals and organisations can lodge complaints, free of charge, about alleged breaches of EU law. The Commission can take action if it considers that EU law is not being properly implemented in a Member State. If necessary it can refer

the case to the CJEU (see paragraph 50 below). It can also ask the CJEU to order interim measures before judgment is given.

European Environment Agency

48. The EEA is tasked with providing sound, independent information on the environment. It operates as a major information source for those involved in developing, adopting, implementing and evaluating environmental policy. This includes producing and publishing independent assessments of progress[3] in the implementation of the EU's environmental action programmes, which are the guiding frameworks for EU environmental policy.[4]

European Parliament

49. EU citizens can petition the European Parliament over concerns about the application of EU law which affect them directly[5]. The European Parliament cannot refer perceived infringements to the CJEU, but it can ask the Commission to investigate petitions on its behalf.

Court of Justice of the European Union

50. The CJEU interprets EU law to make sure it is applied consistently in all EU countries. Where the Commission, or in rare cases another Member State, refers a matter to it, the CJEU makes judgments about whether a Member State has complied with EU environmental law. If the Member State is found to be at fault, it must put things right in accordance with the decision of the CJEU, or risk a second case being brought, which may result in a fine.

Existing national mechanisms for environmental accountability

51. The UK already benefits from a vibrant democracy and robust legal systems which allow individuals and Parliaments to hold government and public bodies to account. It

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[3] See for example https://www.eea.europa.eu/publications/environmental-indicator-report-2017.

[4] The current (7th) environmental action programme adopted in Decision 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 sets out a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet' – http://ec.europa.eu/environment/action-programme/.

[5] The right of citizens to petition the European Parliament is provided for in Article 227 of the Treaty on the Functioning of the European Union.

is, and it will remain, the role of Parliament, including Select Committees, to hold the executive to account. Parliament passes legislation and is ultimately accountable to the electorate. That will not change on our departure from the EU. We also have strong legal frameworks for enforcing environmental protections and these will continue. This includes significant provision for responsible authorities to apply and enforce environmental law.

52. EU mechanisms provide significant environmental governance, oversight and scrutiny. We can assess the extent of our overall current environmental governance, considering how far our existing domestic arrangements can provide environmental oversight and scrutiny mechanisms no less rigorous than those of the EU.

53. Current national bodies and arrangements relevant to environmental governance in England are summarised below (paragraphs 54-71) and described in further detail in Annex C. Determination of the functions, remit and scope of the new environmental body will need to take account of and work with the existing domestic environmental infrastructure, creating a more cohesive and holistic governance framework. We can also consider models and examples from other areas. Annex D summarises oversight and accountability bodies that operate in England in different policy areas including the Equality and Human Rights Commission (EHRC) and the Information Commissioner's Office (ICO). Annex E looks at institutional arrangements that have been developed internationally and in other countries to support environmental governance and accountability.

Committees in Parliament

54. **House of Commons' Environment, Food and Rural Affairs (EFRA) Committee:** The EFRA Committee examines the expenditure, administration and policy of the Department for Environment, Food and Rural Affairs (Defra) and its arm's length bodies (ALBs).

55. **House of Commons' Environmental Audit Committee (EAC):** The EAC considers the extent to which the policies and programmes of government departments and non-departmental public bodies (NDPBs) contribute to environmental protection and sustainable development.

56. **House of Lords' EU Energy and Environment Sub-Committee:** This Sub-Committee of the EU Committee of the House of Lords scrutinises government's policies and actions in respect of the EU and seeks to influence policy and legislative proposals of the EU institutions.

57. **House of Lords' Select Committee on the Natural Environment and Rural Communities (NERC) Act 2006:** This is a relatively new Committee, established in June 2017 to consider and report on the NERC Act.

National Audit Office (NAO)

58. The NAO works on behalf of Parliament and is overseen by the House of Commons' Public Accounts Committee. The NAO audits the financial statements of all central government departments, agencies and other public bodies, and reports the results to Parliament. In addition to financial auditing, the NAO conducts other activities such as local audits, investigations and support to Parliament including the EAC. It has undertaken several environmental investigations that have looked at functions of authorities such as Defra and its ALBs.

Advisory Committees

59. **Natural Capital Committee (NCC):** The NCC is a non-statutory body which was set up to provide independent advice to government on the state of England's natural capital. It now focuses primarily on helping the government develop its 25 Year Environment Plan.

60. **Joint Nature Conservation Committee (JNCC):** JNCC advises the UK government and devolved administrations on UK-wide and international nature conservation. Unlike the NCC, JNCC is an executive NDPB with statutory functions. It therefore has a similar status to Natural England and the Environment Agency (though without the regulatory functions of those two bodies).

61. **The Committee on Climate Change (CCC) and the Adaptation Sub-Committee (ASC)**: The CCC is an independent, statutory body established under the Climate Change Act 2008 to advise the UK government and devolved administrations on emissions targets and report to Parliament on progress made in reducing greenhouse gas emissions and preparing for climate change. The ASC, which is part of the CCC, was also established under the Climate Change Act 2008 to support the CCC in advising and reporting on progress in adaptation.

Regulatory bodies, complaint mechanisms and appeals

62. There are a number of public authorities with responsibility for applying and enforcing environmental laws. Third parties who are dissatisfied with the application of environmental law can, in the first instance, complain to the responsible authorities charged with implementing it. The Regulators' Code[6] provides a clear, principles-based framework for how regulators should operate in this respect. Those who are regulated by delivery bodies under environmental legislation also have the right to appeal against certain decisions by the responsible authority.

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[6] See https://www.gov.uk/government/publications/regulators-code. This has statutory effect under the Legislative and Regulatory Reform Act 2006.

Ombudsmen

63. **Parliamentary and Health Service Ombudsman (PHSO):** The PHSO entails two distinct offices fulfilled by the same person in England. The Parliamentary Ombudsman addresses complaints of maladministration against government departments (including Defra and its ALBs) and certain other public bodies. The Health Service Ombudsman investigates complaints against health service bodies.

64. **Local Government and Social Care Ombudsman (LGSCO):** The LGSCO investigates complaints of maladministration against local authorities and certain other public bodies.

65. The PHSO and the LGSCO can only launch an investigation where a complaint meets certain conditions. If they find a complainant has suffered injustice through maladministration they can recommend actions to put things right, although they cannot compel an authority to comply.

Judicial review

66. The main existing domestic legal mechanism for action against government bodies is judicial review. This enables decisions and actions (or omissions) of public authorities to be challenged through the courts.

67. The grounds of judicial review include illegality, procedural unfairness, unreasonableness or irrationality, and claims that a decision is incompatible with EU law. Remedies include an order quashing the decision, a mandatory injunction or a declaration[7]. The most common remedy granted to a successful claimant is a quashing order. If a decision is quashed, the matter will normally be returned to the decision-maker to make a fresh decision in light of the judgment.

68. Judicial review is primarily a challenge to the way in which a decision has been made. The Courts will not normally quash a decision because they disagree with the conclusion that has been reached as long as all relevant factors (and no irrelevant factors) have been taken into account and the decision has been taken in a procedurally correct and reasonable manner, consistent with the law.

69. Judicial review can be a fast, effective and powerful way to convince a public body to reconsider a decision or take action it should be taking. However, judicial review only provides judgments in specific cases that are brought before the courts.

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[7] An order quashing a decision means that the decision is cancelled such that the matter in question must be reconsidered following the correct procedures. An injunction compels an authority to do or refrain from specific acts. A declaration clarifies the respective rights and obligations of the parties to the proceedings, without actually specifying any other legal remedy.

Other enforcement mechanisms

70. Government bodies are also subject to environmental law as regulated parties rather than as responsible authorities. For example, the Environment Agency and Natural England regulate and enforce legal regimes that cover other parts of government – including central government departments, local authorities and in some cases each other.

71. Environmental regimes for regulated parties have traditionally relied upon, as their ultimate sanction, criminal penalties. The last decade has also seen the introduction of alternatives to criminal prosecution in the form of civil sanctions, which apply equally to government bodies and other regulated parties. These can include monetary penalties as well as regulatory interventions such as compliance notices, stop notices and restoration notices[8]. Regulators can also accept enforcement undertakings under some environmental regimes. These focus on restorative action, allowing the offender to make good any environmental damage they have caused where this is possible, or to compensate for it by contributing to a good cause such as a local charity or environmental initiative. However, this process is distinct from ensuring the government itself is complying with the law.

Summary

72. The main environmental oversight, scrutiny and enforcement mechanisms that exist under current domestic and EU arrangements are summarised in Table 1 below. The table also notes the extent to which the EU mechanisms will be covered in England by existing domestic arrangements. It will be important to ensure that proposed functionality for the new environmental body dovetails with any existing domestic functions, ensuring effective environmental governance. The following sections of the consultation document (paragraphs 77-143) discuss the proposed functions of the new body in order to provide effective environmental governance after we have left the EU, upholding environmental standards and supporting our ambition to be the first generation to leave the environment in a better state than that in which we inherited it. The future arrangements will also depend on the outcome of the EU exit negotiations.

[8] Compliance notices require the party receiving the notice to take the steps specified in the notice in order to comply with the law. Stop notices require them to stop doing something that is in contravention of the law. Restoration notices require them to take specified steps to restore damage that has resulted from their non-compliance with the law.

Table 1 – Current environmental governance mechanisms

Environmental oversight, scrutiny and enforcement mechanisms	Key outcomes achieved	Extent of coverage by domestic arrangements
Legal requirements for systematic government reporting on the application of environmental laws.	Government is required to demonstrate implementation of environmental legislation and report on resulting outcomes. This supports transparency of government delivery of the legislation and its effectiveness.	Defra publishes significant data on the implementation of environmental laws (e.g. waste, water quality, air quality), for scrutiny by parliamentary committees as well as the EU. However, without further action there would not be the same legal requirements, post EU exit, for systematic reporting on implementation of environmental laws. Government therefore intends to replace requirements in EU environmental law to report on their implementation with requirements for the Secretary of State to publish implementation reports and data.
Preparation of official, assessments looking at government compliance with environmental law and progress towards environmental objectives. Assessments are undertaken by the European Commission, an independent body charged with overseeing application of (and enforcing where necessary) government compliance against environmental requirements and effectiveness of the measures.	This is intended to provide authoritative, objective scrutiny of the delivery of environmental policy and legislation and its effectiveness, and informs the development of new or amended policy and legislation.	Bodies like the Parliamentary EFRA and EAC committees, the NAO and the NCC conduct environmental assessments and inquiries in particular areas. NGOs and individuals additionally use publicly available data and their own analyses to assess government's policies and make recommendations. However, these arrangements are not equivalent to those of the EU, where the Commission has an official role of examining environmental compliance and progress, systematically assessing the application of environmental laws with a wide breadth and depth of coverage. Specialist support is provided by the EEA which, among other functions, provides assessments in relation to implementation of the EU's overarching environmental action programmes as well as specific environmental issues.
Mechanisms for individuals or organisations to complain, free of charge, to an official body with relevant expertise and powers.	Helps hold government to account for the delivery of environmental requirements by empowering citizens and giving them straightforward means of referring concerns to a relevant body.	There are domestic mechanisms for individuals and organisations to complain about the delivery activities of environmental authorities to those authorities, or to the PHSO or LGSCO. Complaints can also be made via parliamentary processes (letters to MPs and parliamentary committees) or by writing to the government (Defra). However, the Ombudsmen are not specifically focused on environmental issues

		and do not have the technical knowledge for complex environmental issues. Compared to EU arrangements, there are also constraints around the circumstances where people can bring, and the Ombudsmen can consider, complaints (e.g. time limits or the need to have been personally affected).
Formal and informal mechanisms by which an independent, official body can investigate concerns about governments' implementation of environmental law	Allows a specialist, independent body to access government information, undertake investigation and form a view on whether environmental law has been properly applied, through interaction with the responsible government body.	Parliamentary committees and the NAO have investigatory powers, and can investigate concerns directly. Alongside this, bodies such as the Parliamentary Committees and Ombudsman offices referred to above have powers of investigation and to obtain information. However, as noted above, the Ombudsmen can only exercise these powers where certain conditions around the complaints are met and are largely focused around issues of maladministration. These constraints do not apply in the EU mechanisms.
Powers to refer a government to court for alleged failure to implement environmental law. The court can then provide a judgment (and potentially impose interim measures if needed) on whether or not the law is being properly applied.	Provides clarity on the requirements of the law and ensures that government's implementation of environmental law is sufficient, so that the planned effect is realised.	The main current domestic mechanism is judicial review initiated by a third party, which first has to establish legal standing. This allows government's actions or decisions to be challenged and for a judge to determine if the processes government has taken are compatible with the law. NGOs frequently bring such cases against government. There is no public authority with a standing responsibility for bringing proceedings against government on the environment, and the process does not have the same scope or remedies as EU action.
Where the court finds that a government has failed to implement environmental law, compliance with the judgment is monitored and the case can be referred back to court in the event of ongoing non-compliance, potentially leading to the imposition of a fine.	Requires government to take steps specified to apply environmental law, ensuring the intended effect of the law is realised.	Government is held to account by Parliament and the system of judicial review. Although there are no domestic arrangements for fines, a government subject to a court judgment will be required to comply. Parliament provides scrutiny of government's compliance with court rulings and NGOs can apply pressure in Parliament and initiate further legal action if needed.

73. Table 1 shows that there are already domestic arrangements in place that cover, at least in part, some of the important EU environmental protection mechanisms. However, these come with a number of constraints and limitations and do not fully

meet government's ambitions for effective environmental governance after we have left the EU.

74. Firstly, existing domestic mechanisms lie mostly in the areas of general scrutiny and advice. In addition, they are divided among several different bodies with a mix of Parliamentary, statutory and non-statutory statuses. In some cases their environmental focus is only a small part of a much larger remit. As a result, the current arrangements do not by themselves meet our ambitions. As we stated in the 25 Year Environment Plan, launched earlier this year, we want to establish a new world-leading, independent, statutory body to give the environment a voice, championing and upholding environmental standards as we leave the EU. We therefore want to use this consultation to seek views on the precise functions, remit and powers of this new body, including any significant role in scrutinising and advising on the 25 Year Environment Plan. This will contribute to our goal of being the first generation to leave the environment in a better state than that in which we inherited it.

75. Secondly, while domestic complaint mechanisms do exist, these come with a number of constraints and limitations. We therefore propose to provide a clearer mechanism for dealing with complaints about government's implementation of environmental law, which would be considered by a specialist, independent body empowered to take action in this area.

76. Thirdly, there are more limited options in our domestic framework to ensure that the government remains fully held to account for the implementation of environmental law. The protections provided by the EU also exist in different areas of law. However, as others have noted[9], there is a special case to act on the environment. Most EU infringement proceedings against all Member States have related to environmental law, indicating a greater need for oversight in this area. In addition, while there are individuals or bodies with direct interests to protect in other areas of EU law, the environment is in a different position. It may be unowned and is unable to represent itself. Non-governmental environmental organisations promote the general interest of the environment, but vary in strength, coverage, specialist knowledge and standing. This means that we should not rely on non-governmental organisations to provide an official and systematic supervisory role, like that delivered by the European Commission for the EU.

Question 4: Do you think there will be any environmental governance mechanisms missing as a result of leaving the EU?

[9] See in particular the UK Environmental Law Association (UKELA) report "Brexit and Environmental Law – Enforcement and Political Accountability Issues" (July 2017), https://www.ukela.org/content/doclib/317.pdf.

A new, independent and statutory body holding government to account for the environment

77. The new environmental body will be created through an Environmental Principles and Governance Bill. We will publish a draft Environmental Principles and Governance Bill in the autumn of 2018, then introduce a Bill early in the second session of this Parliament. This legislation, creating a new, world-leading, independent environmental watchdog to hold government to account on our environmental ambitions and obligations, alongside a new statutory policy statement setting out the environmental principles that will guide successful and sustainable policy-making, will mark the beginning of a new era for our environment.

Goal and objectives in creating a new environmental body

78. The government's overarching goal in establishing a new body is to bolster our domestic environmental governance framework as we leave the EU. This should support our long term ambition to be the first generation to leave the environment in a better state than that in which we inherited it, while providing an even more effective and bespoke national approach compared to the oversight and enforcement mechanisms that currently apply.

79. Objectives for the establishment of the body are that it should:

- Act as a strong, objective, impartial and well-evidenced voice for environmental protection and enhancement.
- Be independent of government and capable of holding it to account.
- Be established on a durable, statutory basis.
- Have a clear remit, avoiding overlap with other bodies.
- Have the powers, functions and resources required to deliver that remit.
- Operate in a clear, proportionate and transparent way in the public interest, recognising that it is necessary to balance environmental protection against other priorities.

Question 5: Do you agree with the proposed objectives for the establishment of the new environmental body?

Functions of the new body

80. In order to meet the goal and objectives outlined above, and address the governance issues identified in the preceding section, we are consulting on three main, inter-related functions which would be assigned to the new body. These are described below and relate to the new body's roles in providing general scrutiny and advice (paragraphs 81-88), responding to complaints (paragraphs 89-94) and enforcing government delivery of environmental law (paragraphs 95-108).

General scrutiny and advice

81. The first proposed function for the new body on which we are consulting is whether to provide independent scrutiny and advice of implementation of environmental legislation and government policy. This would involve the new body undertaking functions in relation to the environment which would be advisory to government, similar to those performed by the Committee on Climate Change (CCC) in relation to climate change (see paragraph 61).

82. The new body would need to scrutinise the implementation of existing environmental legislation for the purpose of exercising its proposed functions of dealing with complaints about and, where necessary, enforcing government delivery of environmental law (see paragraphs 89-94 and 95-108 respectively). This would mean that the new body would be well placed to offer feedback and recommendations on the effectiveness of the legislation and its possible improvement. It could additionally be asked to express an independent opinion if government is planning to significantly change existing environmental law (domestic or retained EU law), with the specific aim of saying whether it thought the environmental outcome would be enhanced, maintained or diminished.

Question 6: Should the new body have functions to scrutinise and advise the government in relation to extant environmental law?

83. It is clear that the body's potential role in relation to advising on and scrutinising policy is different to that of scrutinising the government's adherence to extant environmental law. It is right that the government has the ability to determine which policies to adopt under environmental law, balancing environmental priorities with delivering economic growth and other policy priorities such as housing. Parliament will also continue to play its role in scrutinising policy.

84. There is, however, a question about the role of the body in advising government on whether and how it is enacting the environmental policies it has set out, for example in the 25 Year Environment Plan. Government could commission the body to provide advice on those policies set out in HMG strategies and other published documents and how they are being implemented, and also respond to government consultations on potential future policy.

85. However, this would be on an advisory basis only, rather than employing any enforcement mechanism, as there would be no associated environmental law to hold the government to account against. If the body was to be given an advisory role, it would be important that this would not create a conflict of interest with its role as a body to objectively hold government to account, similar to how the CCC operates.

86. If the body were to be given a role scrutinising delivery of policy, it would also be important to ensure it complemented the work of NGOs in Parliament who already do substantial work in this area. One way it could support these groups' work this could be by laying reports before Parliament with a requirement on the government to respond within a reasonable timeframe.

87. The NCC has called for the establishment of an independent, statutory body to scrutinise and advise on delivery of the 25 Year Environment Plan and the new environmental body could fulfil such a role as part of this function. In particular, the new body could be tasked with conducting and publishing an independent, annual assessment of national progress against the delivery of the ambition, goals and actions of the 25 Year Environment Plan, following a government report on its implementation (see paragraph 145). This would be similar to the function of the EEA in assessing and reporting on progress in implementation of the EU's environmental action programmes.[10] In this context, the new body could also provide advice and recommendations to government on the development of policy and legislation, in so far as they relate to the ambition, goals and actions referred to in the 25 Year Environment Plan, whilst recognising wider priorities such as those relating to new housing.

88. The new body's assessment of progress on the ambition, goals and actions of the 25 Year Environment Plan and any recommendations to government could be required

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[10] See for example the EEA's annual reports on implementation of the EU's 7th environmental action programme, which covers the period 2013-2020 and sets a vision to 2050. The EEA's 2017 report gives an overview of the EU's progress towards 29 environmental policy objectives relevant to the achievement of the action programme's three key priority objectives: natural capital; resource-efficient, low-carbon economy; and people's health and well-being.

[11] For more detail see https://data.gov.uk/dataset/statutory-duties-placed-on-local-government.

to be laid in Parliament for the government to respond to within a reasonable timeframe.

Question 7: Should the new body be able to scrutinise, advise and report on the delivery of key environmental policies, such as the 25 Year Environment Plan?

Responding to complaints

89. Broadly speaking the intention is to afford at least the same opportunities to submit environmental complaints and concerns as currently exist with the EU institutions (paragraphs 47 and 49). A first question to consider here is whether the new body needs to have a specific function of receiving and considering such complaints on the environment, given the established roles of existing bodies. In particular, as described in paragraphs 63-65 above, and in more detail in Annex C, the LGSCO and the PHSO already manage complaints in a wide range of areas, albeit with some constraints and limitations.

90. If the new body is also given a function of handling complaints, in contrast with the LGSCO and the PHSO it would have a specific and confined focus on the environment. It would also concentrate on issues concerning alleged failure by government authorities to implement the law rather than other matters dealt with by the Ombudsmen such as poor service or miscommunication. Government would need to ensure clarity of roles and avoid duplication between the functions of the LGSCO, the PHSO and the new body.

91. In order to be able to address complaints, the new body would need to have powers to conduct investigations and require the provision of information. Like the current ombudsmen, it would need to be able to give recommendations which would be expected to be strongly persuasive, and therefore would be likely to be implemented in most cases, even if the new body chose not to exercise its potential legal powers (discussed in paragraphs 95-108) to require compliance.

92. As is the case with the PHSO, LGSCO and the European Commission, the new body would need to consider all valid complaints received while having discretion to exercise its powers to act in appropriate cases, rather than a duty to act in response to all complaints. Otherwise its ability to focus on the most important issues – for example raising matters of national significance or addressing key points of principle – could be diluted if it were obliged to pursue every complaint received. It would therefore need some sort of assessment or filtering mechanism to be able to prioritise complaints and manage its workload.

93. The new body could make its recommendations to the government, publish them and report on findings and recommendations to Parliament. In the UK, as well as the

current ombudsmen, we already have similar functions carried out by organisations in other areas of policy such as the EHRC and the Children's Commissioner (Annex D).

94. Under this approach, the new environmental body would effectively be able to make a prominent declaration in cases where it found that an authority had failed to implement environmental law properly. Even though this declaration would not be legally binding, it would nevertheless be a powerful driver for the government to change its approach or reconsider its decision. The government could disagree with the environmental body's conclusions, but would need to be able to explain this and could be asked to do so before Parliament. The view of the new body could also be relied upon in the context of any legal proceedings brought by a third party regarding the authority's decision.

Question 8: Should the new body have a remit and powers to respond to and investigate complaints from members of the public about the alleged failure of government to implement environmental law?

Enforcing government delivery of environmental law

95. The Prime Minister, in her speech at the London Wetlands Centre on 11 January 2018, was clear that leaving the EU will not mean a lowering of environmental standards. In support of this commitment, the new, world-leading, independent statutory body would hold government to account and give the environment a voice. The Prime Minister set out how we will use the opportunity Brexit provides to strengthen and enhance our environmental protections – not to weaken them. As we leave the EU, it is right to consider how best the body can hold the government to account, and changes to the current regime that would be needed to ensure it works in a purely national system.

96. Currently, the European Commission oversees Member States' implementation of EU environmental legislation with the aim of ensuring consistent application of the law across the Union, shared stewardship of the environment and a level playing field in the single market. It does this using information in submissions and reports from Member States, its own assessments and those of other EU bodies including the EEA. The Commission can take action if it considers that EU law is not being properly implemented in a Member State. If necessary it can refer the case to the CJEU and also ask the CJEU to order interim measures before judgment is given.

97. The EU's activities sit within the unique circumstances of creating and enforcing a union and a single market among the Member States. This consultation seeks to establish which functions and activities can be closely replicated in a domestic setting and where a different approach may be required. Government is currently held to

account by Parliament and the other systems of governance outlined above, including judicial review.

98. In order to be able to take action in the most serious cases, the new body would need to be given the function and powers to supervise government delivery of environmental law within its areas of responsibility (see paragraphs 119-124) and take steps to seek to bring about compliance where necessary. It should be noted in this context that the new body's potential powers in this area could only be used where a legal obligation exists. For example, this could include acting to require proper delivery of a specific environmental law, or to give due regard to the statutory policy statement on environmental principles discussed in Part 1 of this consultation document. It is also important to note that this role would only be concerned with the implementation of environmental law by government authorities. It would not be concerned with enforcing environmental law against third parties such as private businesses, which will remain the responsibility of delivery bodies such as the Environment Agency and Natural England.

99. The enforcement function would be linked to the scrutiny and complaint functions of the new body, and indeed we would expect the majority of issues to be resolved as a result of the advice issued and remedial action taken as a result of those processes. In addition, ahead of considering a formal compliance action, the new body would be required to engage in discussions with the government body concerned, which might resolve the matter at hand. This would be similar to the interaction that happens between the European Commission and a Member State, and which resolves the majority of cases before the start of any formal infraction process.

100. The new body's legal powers around enforcement of environmental laws, therefore, would only be expected to be used rarely. Nevertheless, in the event of continued and serious failures to effectively implement environmental law despite previous scrutiny and advice, recourse to enforcement measures may be needed as a last resort. Paragraphs 102-108 below consider possible mechanisms that could be put in place for this purpose.

101. Such action by the new body would also be expected to focus on cases of particular importance – for example those raising issues of national significance or addressing key points of principle. We would seek to design the arrangements for action by the new body so that they could be more responsive and lead to swifter resolution than the EU model, where resolution of matters can be prolonged due to the nature of the EU institutions and processes, during which time there is legal uncertainty.

Powers to issue advisory notices requesting compliance

102. The new body would be given powers to issue advisory notices in relation to the government bodies and subjects in its remit. Currently, where the European Commission believes there may be a failure to comply with EU law, it can send an

initial letter of formal notice to a Member State inviting observations. If it is still unsatisfied, the Commission may issue a reasoned opinion, allowing the Member State a specified period to comply (usually two months). If the Member State fails to conform, the Commission can take the case to the CJEU for a binding judgment.

103. The new body could issue advisory notices to inform government of its opinion that government is failing to deliver its responsibility to implement environmental law, and to identify the corrective action which the new body considers is needed. This would be similar to current powers given to the EHRC and the ICO to issue notices in their areas of responsibility. Government would be obliged to provide a response back to such advisory notices from the new body

104. Beyond such advisory notices, there may be a case to introduce other enforcement mechanisms. Some possibilities in this regard are noted below (see paragraphs 105-108). Nevertheless, government believes that advisory notices should be the main form of enforcement, and should always be applied in the first instance before any further steps are considered. The intention would be that the majority of enforcement cases would be resolved through this route.

Binding notices

105. As an alternative or additional mechanisms to advisory notices, the new body could be given the power to issue binding notices. These could require government to implement the corrective action specified in the notice, subject to a right of appeal to resolve any disputed matters.

Intervention in legal proceedings

106. The new body could also be provided with the right to intervene in legal proceedings brought by others in relation to the government bodies and subjects within its remit. This would be similar to the powers that have been provided to environmental ombudsmen in some other countries such as Austria and Hungary (see Annex E). Looking at another area of policy in the UK, it would be similar to the EHRC, which can intervene in legal proceedings, including judicial review, in its areas of responsibility.

Environmental undertakings

107. A further alternative or additional mechanism could be for the new body to agree environmental undertakings in the event that a government authority accepts that it has failed to meet its environmental responsibilities. This would be similar to the approach that exists under some of our domestic civil sanctions provisions (see paragraphs 70-71 above and Annex C), which can include compliance notices, restoration notices and stop notices.

108. The example enforcement mechanisms outlined above are designed to be indicative of possible mechanisms a domestic governance framework could cover. We welcome stakeholder views on these mechanisms and whether there are any others that may be appropriate.

Question 9: Do you think any other mechanisms should be included in the framework for the new body to enforce government delivery of environmental law beyond advisory notices?

Scope and range of application

109. Beyond considering the functions of the new body in a general sense, it is also important to look at a number of related questions which will affect how widely those functions are applied and the nature of the new body.

Which bodies should it oversee?

110. The European Commission and CJEU oversees whether a Member State is complying with environmental legislation at a national level, and when action is taken by the European Commission or CJEU, it is against the Member State as a whole rather than any subsidiary government bodies. On this basis it would be sensible for the new environmental body to be given a remit to exercise its functions in relation to **national government** – i.e. central government departments. This would involve examining the relevant activities of government departments in England.

111. On the other hand, the failings underpinning EU action against a Member State may be due to the action or inaction of a body other than national government itself. Therefore there could be benefits for the body to oversee and act directly towards other public bodies. The main types of public authorities that could be directly in scope of the new body are discussed below.

112. The new body could also be able to exercise its functions directly in relation to the relevant activities of **Non-Ministerial Departments and Non-Departmental Public Bodies** (commonly referred to as ALBs) charged in law with implementing environmental legislation. Examples of Non-Ministerial Departments include the Forestry Commission and Ofwat, the Environment Agency Natural England and the Marine Management Organisation. ALBs have important national responsibilities for implementing environmental law, acting with a distinct status and independently from government in certain areas. However, such bodies may also be subject to examination by the PHSO, so there would be a need to manage the risk of overlap and duplication. Making ALBs directly answerable to the new body could also undermine the rights and responsibilities of departmental ministers.

113. The new body could also directly cover the relevant activities of **local authorities**. Local authorities have responsibilities for implementing a wide range of environmental laws.[11] On the other hand, local authorities' activities are by definition more locally focused, so including local authorities under the scope of the new body would have implications for its costs, number of staff and workload, and crucially, its strategic focus. Local authorities are also subject to oversight by the LGSCO so there would be a need to manage the risk of overlap and duplication.

114. Some environmental legislation assigns functions to **other authorities** beyond central government departments and the ALBs and local authorities referred to above. For example, the Wildlife and Countryside Act 1981[12] gives a wide range of authorities responsibilities with respect to Sites of Special Scientific Interest (SSSIs), including statutory undertakers and utility companies such as water and power companies, the Crown Estate, as well as NDPBs such as the Coal Authority and Homes England.

115. Such other authorities have a significant collective environmental impact and an important contribution to make in realising environmental goals. More generally, upholding high environmental requirements universally across authorities sends a strong message and example of shared commitment and common standards.

116. On the other hand, extending the remit of the new body to directly cover such a wider group of authorities would require additional resources and knowledge with potentially limited benefits. It could also risk diluting its focus on the most significant national or strategic issues.

117. In this context, therefore, a key issue is whether the levers available to the new body to hold government to account will only apply directly to central government departments, or also to other bodies:

    a. Firstly, the new body's possible functions of investigating and taking steps to require compliance could be directed only at national government, while covering the actions of other bodies indirectly (by requiring action by central government departments when needed). This is equivalent to current arrangements within the EU which are intended to ensure that the right outcome is achieved through the actions of central government. For instance, if the watchdog believes that an ALB or a local authority is failing to implement its

[11] For more detail see https://data.gov.uk/dataset/statutory-duties-placed-on-local-government.

[12] See s28G Wildlife and Countryside Act 1981. This includes some organisations that might otherwise be viewed as being outside the public sector.

functions, it could ask the national government to take the necessary steps to address the failing[13].

b. Alternatively, the new body could be established with a remit and powers that would apply directly to some or all of the other public bodies noted above (paragraphs 112-116).

118. As noted at paragraph 117a above, where authorities are not directly covered by the new body, it could still take action against central government departments in relation to their delivery of environmental law where relevant. The government's view is that the option described in paragraph 117a would strike a reasonable balance between ensuring that the focus of the new environmental watchdog remains sufficiently strategic (by addressing its powers to central government only), while still being able to require central government to address failures by other bodies (such as ALBs and local authorities). This is therefore government's proposed option.

Question 10: The new body will hold national government directly to account. Should any other authorities be directly or indirectly in the scope of the new body?

What subject matter should the new environmental body cover?

119. The new body is envisaged as having an environmental remit. However, it is important to consider more specifically what the new body will cover in terms of environmental governance. This will have a corresponding impact on the extent to which its oversight applies to or excludes other organisations. Our starting point in this consultation is that the subject matter should cover England and environmental matters that are not devolved. It would also exclude certain areas, such as national security and fiscal policy.

120. **Definition of the environment:** In terms of general scrutiny and advisory functions, the new body could be given a relatively broad remit by establishing a general definition of its environmental scope. For example, this could draw upon an established definition, such as that contained in the Environmental Information Regulations 2004[14], although it may be appropriate to consider other definitions depending on the set of functions that is determined subject to this consultation.

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[13] For example, in certain cases government has existing powers to direct the body in question to carry out whatever action is needed. See for instance section 40 Environment Act 1995 - Ministerial Power to issue general or specific directions to the Environment Agency, or similarly section 16 Natural Environment & Rural Communities Act 2006 in respect of Natural England.

[14] See for example Regulation 2 in which "environmental information" is defined. http://www.legislation.gov.uk/uksi/2004/3391/regulation/2/made

121. In relation to the new body's possible investigative and enforcement functions, it might be necessary to be more precise about the specific authorities and functions covered.

122. **EU environmental law retained under the EU (Withdrawal) Bill:** As a minimum, the new body should oversee the application of EU environmental law that will form part of retained EU law and continue to apply under the EU (Withdrawal) Bill at the point we leave the EU. This will include domestic legislation implementing EU environmental Directives (although not the Directives themselves), and EU Regulations, Decisions and tertiary legislation which are converted into domestic law.

123. **Domestic environmental law (not based on EU legislation):** There are important areas of environmental law which are provided for at a domestic level, for example dealing with water resources and contaminated land. The new body could also cover these. As we leave the EU, the immediate imperative is to convert the EU acquis to maintain a functioning statute book and avoid gaps in UK law. This will be achieved through the EU (Withdrawal) Bill. In the longer term, we will look to set out a new direction for our environment, building and improving on these protections to become the first generation that leaves the environment in a better condition than that in which we inherited it. The new body is likely to be most effective when it considers this body of law together. Government therefore proposes that the new body should also have a remit in relation to current and new domestic environmental legislation.

124. **International environmental law:** The UK is party to various multilateral environmental agreements, as illustrated in Annex E. Where we have put in place domestic legislation to implement our international environmental obligations, the functions of the new body should apply in relation to that domestic law. However, as set out in Annex E, international environmental agreements also have their own separate compliance mechanisms which will remain in place after our exit from the EU. Government therefore does not propose that the new body should have any enforcement role in relation to international environmental law. The Commission and CJEU similarly have no such role in relation to multilateral environmental agreements, but rather oversee the application of EU legislation that gives effect to them.

Question 11: Do you agree that the new body should include oversight of domestic environmental law, including that derived from the EU, but not of international environmental agreements to which the UK is party?

125. **Climate change:** Climate change is clearly a significant issue affecting the environment as noted in the 25 Year Environment Plan. Responsibility for most climate change policy and legislation falls under the responsibility of the Department for Business, Energy and Industrial Strategy (BEIS).

126. Climate change issues are already addressed through the Climate Change Act 2008 which goes beyond EU requirements. The Act provides a comprehensive framework to address climate change mitigation and adaptation including the independent oversight and advisory roles provided by the CCC and the ASC (see paragraph 61 and Annex C). Climate change is also subject to international governance beyond the EU via the UN Framework Convention on Climate Change (UNFCCC).

127. Given the robust mechanisms of the Climate Change Act and the international governance structure under the UNFCCC, it is proposed that the new body's remit does not cover matters related to climate change.

128. **Agriculture:** Agricultural activities can have both positive and negative effects on the environment and natural capital. Widespread adoption of sustainable land management practices is needed in order to improve the environment. This is specifically noted as an important objective in the 25 Year Environment Plan which states, among other elements, government's intention to design and deliver a new environmental land management system. Government has recently published a Command Paper[15] on "Health and Harmony: the Future for Food, Farming and the Environment in a Green Brexit".

129. Specific pieces of EU-derived environmental legislation that apply to agricultural activities, such as regulations implementing the Groundwater Directive (2006/118/EC), will be preserved under the EU (Withdrawal) Bill and would be subject to the new body's potential investigative and legal supervision functions. And if it were given wider policy scrutiny functions, for example to cover the 25 Year Environment Plan, the new body could independently assess progress on agricultural environment elements and make recommendations to government.

130. **Fisheries and the Marine Environment**: Overfishing is neither environmentally nor economically sustainable because it depletes fish stocks below a healthy level. Unsustainable fishing can have a major impact not only on fish stocks but also on the marine environment and biodiversity. This includes direct impacts on vulnerable species and seabed habitats, as well as incidental bycatch of marine species such as cetaceans and seabirds.

131. The 25 Year Environment Plan outlines our approach to sustainable fisheries management and conservation of the marine environment as we leave the EU and the Common Fisheries Policy (CFP). This includes commitments to achieve good environmental status in our seas while allowing marine industries to thrive, and to ensure that all fish stocks are recovered to and maintained at levels that can produce their Maximum Sustainable Yield.

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[15] https://www.gov.uk/government/consultations/the-future-for-food-farming-and-the-environment

132. Specific pieces of EU-derived environmental legislation related to fisheries and the marine environment include the Marine Strategy Framework Directive (2008/56/EC), the Birds Directive (2009/147/EC) and the Habitats Directive (92/43/EEC). The domestic implementing legislation for these measures will be preserved under the EU (Withdrawal) Bill and would be covered by the new body's potential investigative and legal supervision functions. This is without prejudice to ongoing framework discussions with the Devolved Administrations. As with agriculture, if the new body is given a remit including wider policy scrutiny it could provide independent assessments, advice and recommendations to government and Parliament in relation to the 25 Year Environment Plan's fisheries and marine-related elements, building on the assessments that we are already required to undertake.

Question 12: Do you agree with our assessment of the nature of the body's role in the areas outlined above?

Interaction with the planning system

133. Planning aims to ensure that the right development happens in the right place at the right time, benefiting communities and the economy. It plays a critical role in identifying what development is needed and where, what areas need to be protected or enhanced and in assessing whether proposed development is suitable.

134. The new body's functions in relation to environmental aspects of the planning framework would need to work alongside, while ensuring clear boundaries between, the established systems in place for scrutiny of and appeal against planning decisions and development plans. The intention would be that individual decisions made under relevant planning legislation would continue to be handled under the existing processes.

135. As with other areas of environmental law, we need to consider how the body would interact with the existing planning system in relation to environmental laws that apply to planning activities, notably those concerning implementation of habitats regulations assessments, environmental impact assessments and strategic environmental assessments. This should not be a case-by-case review of decisions regarding development plans and proposals, which would be duplicative and would amount to another tier in the planning process. The body would have no role in individual planning policy decisions. The focus of the new body would therefore be on ensuring the correct application of relevant environmental law within the planning system.

136. In relation to wider planning policy, the body could have two roles. Firstly, it could be a key consultee, when certain planning policy is being considered, for example when the National Planning Policy Framework is updated. Furthermore, if the body has a wider policy role, it could provide advice on the implementation of the environmental

aspects of existing planning policy and suggest future potential changes. The government would not be bound to agree to such suggestions, but should consider them alongside wider policy aims.

Question 13: Should the body be able to advise on planning policy?

Nature of the new environmental body

Status, form and source of funding

137. The new body will need:

- To be, and be seen to be, independent of government – in that Ministers should not be able to set its programme of activity or improperly influence its decision-making.
- To be funded in such a way that it is protected from accusations of being influenced by the funding organisation.
- To be funded in a way that meets the standards set out in 'Managing Public Money' for adequate financial transparency, accountability and, where appropriate, oversight.

138. Subject to the outcome of this consultation, we believe the most appropriate approach may be to create an independent body that will be accountable to Parliament. There are a number of models that could be used to establish the new body, for example by vesting powers and duties with an individual (e.g. a Commissioner), a group (a Committee, Commission or Board) or other arrangements that are independent of government. The exact classification and status of the body will be determined by its features, including its funding arrangements. The government is committed to the creation of a new, independent statutory environment body. Should the final proposal be for a new central government ALB, then the usual, separate government approval process would apply for such an entity.

139. Settling on a particular classification or model now would pre-empt the current, more important discussion of the body's desired role and functions. Given this, we believe that it makes sense to finalise the body's administrative classification and legal status at a later stage and depending on the response to this consultation. Selection of post-holders for this body should in any case follow strict rules on public appointments.

Public participation

140. The new body will need to operate in a clear, transparent way in the public interest, publishing reports and responding to information requests, where appropriate.

141. The extent to which the new body engages with the public in a specific way will also depend in part on its remit and functions. If it takes on an environmental ombudsman-type role, it will need to put in place mechanisms to receive and consider complaints from individuals and organisations. Even if it were not specifically tasked with considering individual complaints, individuals or groups could still bring matters to its attention for possible consideration within its legal supervision or wider scrutiny functions.

Resources and skills

142. The type and level of resources and skills that the new body will require will depend on the remit and functions of the organisation. In general terms, it is expected to require a mix of legal, technical, scientific and economic capabilities alongside resources for its leadership and governance. The new body will also need to have resources to maintain its distinct identity and independence.

Geographic application of the new environmental body

143. Our starting point is that the new body should cover England and environmental areas that are the responsibility of the UK government. We are, nevertheless, discussing the scope of the new body with the devolved administrations. One of the key questions, which we are exploring with them, is whether they wish to take a different or similar approach. If the devolved administrations would like to address the issues in this consultation jointly, we would welcome the opportunity to co-design the proposals for the new environmental body with them to ensure they work more widely across the UK, taking account of the different government and legal systems in the home nations. We will, of course, continue to respect each of the devolution settlements, in line with our manifesto commitment that no decision-making that has been devolved will be taken back to Westminster. This consultation does not pre-judge the outcome of any of these discussions.

Part 3: Overall environmental governance

144. A number of public bodies carry out functions within the overall environmental governance framework. The establishment of the new body will therefore need to take account of and complement other activities carried out by government and other existing bodies within this broader framework. These include:

- **Development of environmental law and policy.** Environmental law and policy will be developed by government and Parliament.

- **Delivery of environmental law and policy.** Actual delivery of policy measures and laws, while partly undertaken by government itself, is more commonly performed by responsible authorities such as the Environment Agency, the Forestry Commission, the Marine Management Organisation, Natural England, local authorities and others.

145. Government and its delivery bodies also undertake a range of monitoring and reporting activities that involve compiling and publishing data and information:

- **Statutory publication of implementation reports for specific environmental regimes.** Various EU environmental laws, such as those dealing with waste, water quality and air quality, require submission of periodic implementation reports to the Commission. Government submits the UK's implementation reports for EU environmental measures to the Commission. Government intends to replace this EU environmental reporting with requirements for the Secretary of State to publish implementation reports and data. The Secretary of State may delegate this reporting to delivery bodies responsible for implementing the laws. This would allow the delivery bodies to demonstrate their application of the law and the environmental outcomes achieved.

- **Publication of wider progress reports on the environment and implementation of the 25 Year Environment Plan.** In particular, the government, led by Defra, will produce an annual report against the 25 Year Environment Plan. Reports will cover progress against performance measures and an analysis of recent outcome indicator monitoring.

146. The new environmental body discussed in Part 2 of this document is not intended to replace current regulations or replicate the functions and responsibilities of government or its delivery bodies. Rather, subject to the outcome of this consultation, it is planned to complement and sit alongside them, giving the environment a voice, championing and upholding environmental standards, and holding the government to account.

147. The establishment of the new body and environmental principles are not the only actions that will be taken to address the wider environmental governance issues. For instance:

- EU environmental policy has developed in the framework of a series of environmental action programmes developed by the European Commission and endorsed by the Council of Ministers and the European Parliament. Following our exit from the EU and subject to the future relationship negotiations, government will set the strategic direction for environmental policy which will be maintained within the framework of the 25 Year Environment Plan. The new body would not itself be responsible for the 25 Year Environment Plan but, subject to the outcome of this consultation, it may have a role in conducting independent assessments and giving advice in relation to it (see paragraphs 83-88).

- A specific aspect of the Commission's role is to consider details of "derogations" from the normal standards of EU environmental law that are submitted by Member States. Measures like the Industrial Emissions Directive (2010/75/EU) and the Habitats Directive (92/43/EEC) allow such derogations in certain cases. Where they are applied, the Member State in question has to inform the Commission afterwards. Post EU exit it is anticipated that, subject to the outcome of the negotiations, in the first instance such derogations will still be determined by the regulatory bodies responsible for the regimes in question or by the Secretary of State. The new body would not itself determine such derogations but could consider them as part of its functions.

148. Table 2 gives an overall summary of the environmental governance framework, without prejudice to the final outcome of the negotiations with the EU. In contrast with Table 1 in Part 2 of this document, which is concerned with specific environmental scrutiny, oversight and enforcement issues, Table 2 considers the wider environmental governance framework including the development and delivery of environmental law and policy. The table identifies the main activities in the environmental policy cycle, which bodies will undertake them and when, as well as how they relate to the new environmental body.

Question 14: Do you have any other comments or wish to provide any further information relating to the issues addressed in this consultation document?

Table 2 - Governance on the environment for England

What	Description of function	Who is responsible	How often	Relevance to possible roles for the new environmental body
1. Set environmental policy, aims, objectives, and means for delivering them including development of environmental legislation	This will include maintaining the 25 Year Environment Plan which will encompass: - Aims; - Objectives; - Indicators and metrics; - Means for the plan's achievement. More broadly it will cover the wider development and revision of environmental policy and law.	Government, led by Defra, will develop environmental policy and law including maintaining the 25 Year Environment Plan. Government, principally Defra, will where necessary propose legislation to give effect to environmental policy. Parliament will debate and adopt legislation proposed to give effect to environmental policies and principles where appropriate.	Development of environmental law and policy will be ongoing. The 25 Year Environment Plan will be updated at least every 5 years based on annual reporting and assessments (rows 4 and 5). Revisions could occur at other times. The overall aim is expected to remain un-changed while other aspects may develop over time.	The new environmental body will not be responsible for setting environmental policy, aims, objectives or means for delivering them, but could provide independent advice and recommendations to government.
2. Delivery of environmental policy measures (including enforcement against regulated parties) and environmental monitoring	This involves practical delivery of environmental measures, e.g.: - Preparation and application of environmental plans - Environmental registration and permitting regimes - Inspections and enforcement. Monitoring involves activities to characterise and provide information on the environment, e.g. air, water and soil quality, and the state of habitats and species.	Delivery of environmental measures is mostly carried out by responsible authorities like the Environment Agency, the Forestry Commission, the Marine Management Organisation and Natural England. Defra and other departments have some delivery responsibilities. Enforcement functions will involve courts and appeal bodies where appropriate. Defra and its delivery bodies also undertake environmental monitoring.	On an ongoing basis.	The new body will not undertake delivery of environmental policy measures. Rather, it could scrutinise and potentially enforce delivery by responsible authorities (rows 6 and 7). The new body will not itself undertake environmental monitoring. However, it could use environmental monitoring information from others in its activities (rows 5 and 7).
3. Reporting on implementation of specific environmental measures	This involves reporting on practical steps taken and results achieved in implementing specific environmental measures (row 2). Various such implementation reports are submitted by the UK on EU measures.	Government submits the UK's implementation reports for EU environmental measures to the Commission. Government intends to replace this EU environmental reporting with requirements for the SoS to publish implementation reports and data. The SoS may delegate this reporting to delivery bodies for the regimes in question.	On an ongoing basis. Many EU measures require regular reporting. In the first instance government intends to carry forward the reporting requirements and cycles as they exist now. In the longer term we could explore how to align and improve them to best meet national needs.	The new body will not itself undertake implementation reporting for specific environmental measures. However, it could use implementation reports from others in its activities (rows 5-7).

4. a) 25 Year Environment Plan annual progress reporting **b) In depth state of the environment assessment**	a) Annual review and summary of actions undertaken in delivering the 25 Year Environment Plan. Along with independent scrutiny (row 5) this is the primary mechanism for assessing progress of the 25 Year Environment Plan. b) This would provide a detailed, evidence-led stocktake of the nation's natural capital, trends and pressures. It would be akin to the 2011 National Ecosystem Assessment.	a) Government, led by Defra, will produce a report against the plan and its implementation with a factual summary of information reflecting routinely collected data and statistics (rows 2 and 3) including achievement of targets and standards set in law. b) The in-depth assessment would use the latest reports and monitoring data, drawing together contributions and information from Defra and other bodies e.g. the Environment Agency, Cefas and ONS, as well as the views of academics and other specialists.	a) Annual b) Every 10 years	The new body will not itself undertake this component of 25 Year Environment Plan reporting. Rather, it could conduct independent scrutiny of the progress reported (row 5).
5. Independent scrutiny of 25 Year Environment Plan and environmental law delivery	Independent scrutiny of government's progress on 25 Year Environment Plan and implementation of environmental law and high level assessment of their sufficiency in meeting goals. This could include recommendations for government consideration on future revisions on policy and law.	The new environmental body could conduct and publish an independent report making an assessment of progress against the 25YEP and achievement of environmental law based on the government's progress reports (row 4), implementation reports (row 3) and other information.	Annual	This could be a function of the new environmental body
6. Investigation in response to complaints or concerns over environmental law delivery	Independent investigation of delivery of environmental requirements and standards in environmental law, leading to non-binding advice and recommendations to government.	This could be a function of the new body. The new body could investigate issues in response to complaints or concerns, or on its own initiative.	On an ongoing basis.	This could be a function of the new environmental body, potentially supporting its other functions (rows 5 and 7).
7. Action to require government delivery of environmental law	The new body could take actions against government to require the implementation of environmental law	This could be the function of the new body. This is distinct from enforcement of environmental law by delivery authorities against third parties, e.g. businesses (row 2).	On an ongoing basis.	The new body could undertake this function.

Annex A – Environmental principles – some examples

149. There is no single agreed definition of environmental principles. This consultation is seeking initial views on which principles to include. This will inform the drafting of the new Environmental Principles and Governance Bill and the new comprehensive policy statement. Some environmental principles which are widely referred to in international agreements, the EU Treaties or both are set out below together with brief descriptions based upon them.

150. ***Sustainable Development.*** Development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs.

151. ***Precautionary Principle.*** Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

152. ***Prevention Principle.*** Preventive action should be taken to avert environmental damage.

153. ***Polluter Pays Principle.*** The costs of pollution control and remediation should be borne by those who cause pollution rather than the community at large.

154. ***Rectification at Source Principle.*** Environmental damage should as a priority be rectified by targeting its original cause and taking preventive action at source.

155. ***Integration Principle.*** Environmental protection requirements must be integrated into the definition and implementation of policies and activities.

Annex B – EU environmental oversight and enforcement functions

European Commission

156. The European Commission has a responsibility[16] to ensure that both the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU), as well as measures adopted under them, are correctly applied. In this context the Commission oversees Member States' compliance with EU environmental law. This includes scrutinising the completeness of domestic transposing legislation and administrative arrangements to implement EU law. It also involves checking that EU law is applied in practice.

157. The Commission undertakes these activities using information from a variety of sources. These include submissions and reports from Member States and third parties, plus the Commission's own assessments and those of other EU bodies such as the European Environment Agency. The Commission has also established an online form on its website to allow individuals and organisations to lodge a complaint, free of charge, of an alleged breach of EU law by a Member State[17].

158. The Commission can pursue a number of activities if it considers that EU law is not being properly implemented in a Member State. Formally, it can take progressive steps[18] to ask a Member State for more information, notify a Member State of any perceived failure, consider their response and any remedial action, and if necessary refer the case to the CJEU (see paragraphs 167-171) below. Less formally, the Commission can engage with Member States outside the infraction process, for example by writing to a Member State or meeting with officials. Some of these steps are sometimes accompanied by press releases or other public statements which also play a part in supporting accountability and compliance.

159. The Commission does not have to take action in every case where it considers EU law has not been fully implemented. For example, the Commission may choose not to take enforcement action if the Member State in question has already addressed the problem.

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[16] This responsibility is specified in Article 17(1) of the Treaty on European Union.

[17] See https://ec.europa.eu/assets/sg/report-a-breach/complaints_en/index.html.

[18] These are laid down under Article 258 of the TFEU.

160. While the Commission can investigate any form of alleged non-compliance with EU law, it can only take action against a Member State. This means that, even if the perceived failing lies in the actions or inactions of a particular organisation within the Member State (or a particular territory, say a constituent region, province or local authority area), the Commission cannot take action against that particular organisation or territory. Rather, the Commission will address the issue only with the Member State government. In the UK's case, therefore, a failing by a Whitehall government department, a devolved government, or any UK delivery body could lead to an infraction process against the UK as a whole.

European Environment Agency

161. The European Environment Agency (EEA) is a statutory EU agency[19] tasked with providing sound, independent information on the environment. It operates as a major information source for those involved in developing, adopting, implementing and evaluating environmental policy, and also the general public.

162. The EEA's mandate is to help the EU and its member countries make informed decisions about improving the environment, integrating environmental considerations into economic policies and moving towards sustainability. It also develops and coordinates the European environment information and observation network (Eionet) which aims to provide timely and quality-assured data, information and expertise for assessing both the state of the environment in Europe and the pressures and driving forces acting upon it.

163. EEA staff are primarily located at the organisation's headquarters in Copenhagen and include experts on environment and sustainable development, information management and communication.

164. The EEA organises its activities in yearly work programmes, each part of a 5-year work programme. The current one covers 2014–18 and is structured around 4 main themes, one of which is informing policy implementation – with feedback and input to EU policy frameworks, objectives and targets, through continuous reporting on progress on key environmental issues. It conducts assessments and publishes findings on a wide range of topics including progress on the EU's overall environmental policy framework and objectives as well as reports relating to more specific environmental issues and legislation.[20]

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[19] The EEA was originally established by Council Regulation (EEC) No 1210/90 and now has the legal base of Regulation (EC) No 401/2009.

[20] See https://www.eea.europa.eu/publications#c7=en&c11=5&c14=&c12=&b_start=0.

European Parliament

165. The European Parliament also has a role in the application of EU environmental law. In particular, EU citizens and organisations can petition[21] the European Parliament over concerns about the application of EU law which affect them directly. Petitions can be submitted free of charge via the European Parliament website[22].

166. Such petitions allow the European Parliament to call attention to any perceived infringement by a Member State, local authority or other institution. Unlike the European Commission, the European Parliament cannot refer a dispute with an EU Member State to the CJEU. However, the Petitions Committee of the European Parliament can ask the Commission to investigate petitions on its behalf, which could lead to enforcement action by the Commission as outlined above.

Court of Justice of the European Union

167. The CJEU interprets EU law to make sure it is applied consistently in all EU countries, and settles legal disputes between national governments and EU institutions. Although such cases may originate from complaints by individuals or organisations, they cannot take part in the court proceedings.

168. Where the Commission, or in rare cases another Member State, refers a matter to it, the CJEU makes judgments about whether a Member State has failed to comply with EU law. If the Member State is found to be at fault, it must put things right in accordance with the decision of the CJEU, or risk a second case being brought, which may result in a fine.[23] There are two types of fines: lump sums and periodic penalty payments. This process can take a number of years to complete.

169. There have been a large number of judgments by the CJEU against Member States for failing to implement EU environmental law properly[24]. Like other Member States, the UK has been subject to a number of such judgments.

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[21] This is provided for under Article 227 of the TFEU.

[22] http://www.europarl.europa.eu/atyourservice/en/20150201PVL00037/Petitions.

[23] In cases where the Member State has failed to transpose an EU Directive the CJEU can impose fines without a second case being brought.

[24] Statistics are available at http://ec.europa.eu/environment/legal/law/statistics.htm.

170. Fines against Member States have been less common, and have been imposed in around 20 cases. The potential fines can run into tens or potentially even hundreds of millions of Euros[25]. To date, the UK has not been fined for failing to comply with EU environmental law (or indeed any other area of EU law).

171. When it refers cases to the CJEU, the Commission can also request that the CJEU orders interim measures before judgment is given. This is to prevent irreversible damage while the case is being determined[26].

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[25] For example, the CJEU imposed fines against Greece (Case C-378/13) and Italy (Case C-196/13) for non-compliance with EU waste law. In relation to Greece, a one-off fine of €10 million was imposed, plus a further €14.5 million for every six months of non-compliance. The judgment against Italy imposed a lump sum fine of €40 million, plus a further €42.8 million for every six months of non-compliance. The Commission sets minimum lump sums and formulae for calculating the size of the requested fines annually for each Member State based on their size and Gross Domestic Product. Although the Commission requests fines from the CJEU in accordance with its published formulae, the CJEU is not bound to follow the requested amount.

[26] For example, in cases C-503/06, *Commission v. Italy* and C-76/08, *Commission v. Malta*, the Court ordered the Member States to stop illegal hunting activities.

Annex C – Existing national environmental accountability mechanisms

172. Current national bodies and arrangements relevant to environmental governance in England are described below. The information seeks to summarise main elements of the existing governance framework but is not exhaustive in terms of all the bodies and their functions involved in this area.

Committees in Parliament

173. **Environment, Food and Rural Affairs (EFRA) Committee**: The EFRA Committee is a House of Commons' Select Committee which examines the expenditure, administration and policy of the Department for Environment, Food and Rural Affairs (Defra) and its associated public bodies. The Committee chooses its own subjects of inquiry on environmental and agricultural subjects within Defra's remit. Major inquiries can sometime last for several months and give rise to a report to the House of Commons containing a number of recommendations. The Committee normally invites interested parties to submit evidence, often including Ministers and officials from government departments and agencies whose implementation of law and policy is being examined. The Committee has powers to insist upon the attendance of witnesses and the production of papers and other material. These formal powers rarely need to be used.

174. **Environmental Audit Committee (EAC):** This is another Select Committee of the House of Commons. Its role is to consider the extent to which the policies and programmes of government departments and NDPBs contribute to environmental protection and sustainable development, and to audit their performance against sustainable development and environmental protection targets. It operates in a similar way to the EFRA Committee. However, unlike other Select Committees the EAC's remit cuts across government rather than focusing on the area of a particular department.

175. **House of Lords' EU Energy and Environment Sub-Committee:** This is a Sub-Committee of the European Union Committee of the House of Lords, which scrutinises the UK government's policies and actions in respect of the EU and seeks to influence policy and legislative development proposed by the EU institutions.

176. The Energy and Environment Sub-Committee focuses on a range of policy areas related to agriculture, fisheries, environment and energy. Attention is given to agricultural issues, particularly legislation relating to CAP and animal health and welfare issues. The CFP and wider environmental issues are also examined, as are policies relating to energy and climate change. The Sub-Committee's recent inquiries have included understanding the impact of EU exit on the environment, and more specifically on the trade in waste.

177. **House of Lords Select Committee on the Natural Environment and Rural Communities Act 2006:** This is a newly established Committee appointed in June 2017, specifically to consider and report on the Natural Environment and Rural Communities Act 2006. It is considering the breadth of the Act's remit, covering environmental and biodiversity protections and the interests of rural communities. As part of this inquiry, it has heard evidence from witnesses about existing environmental governance arrangements and how these might be affected by EU exit.

National Audit Office (NAO)

178. The NAO is overseen by the House of Commons' Public Accounts Committee and audits the financial statements of all central government departments, agencies and other public bodies, reporting results to Parliament. Its other work includes value for money studies, local audit, investigations and support to Parliament including the EAC. The NAO has conducted several significant environmental investigations including some that have looked at functions of environmental authorities such as Defra and its ALBs[27].

Advisory Committees

179. **Natural Capital Committee (NCC):** The NCC, established in 2012, provides independent advice to government on the state of England's natural capital. It is a non-statutory committee maintained and supported as a matter of government policy.

180. The NCC advises government and delivery bodies on the sustainable use of natural capital - that is, our natural assets including forests, rivers, land, minerals and oceans. It focuses primarily on helping the government develop its 25 Year Environment Plan. Under its terms of reference[28], the NCC is asked to:

    "Advise government and its delivery bodies on the development and implementation of an integrated 25 year environment plan to protect and improve our natural capital; making use of appropriate knowledge and tools to identify priority assets for protection and improvement."

    The terms of reference also provide for the NCC to produce and publish reports to the House of Lords' Economic Affairs Committee, and give advice to Ministers.

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[27] See https://www.nao.org.uk/search/type/report/sector/environment-energy-and-sustainability.

[28] See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/517123/ncc-terms-of-reference.pdf.

181. As a non-statutory body the NCC has no legal duties or powers. Its terms of reference expressly preclude the NCC from performing a watchdog or advocacy role with respect to government policy.

182. **Joint Nature Conservation Committee (JNCC):** JNCC is the public body that advises the UK government and devolved administrations on UK-wide and international nature conservation. Originally established under the Environmental Protection Act 1990, JNCC was reconstituted by the Natural Environment and Rural Communities (NERC) Act 2006. It also has statutory responsibilities under several other pieces of domestic and EU legislation.

183. JNCC is led by the Joint Committee, which brings together members from the nature conservation bodies for England, Scotland, Wales and Northern Ireland and independent members appointed by the Secretary of State for the Environment, Food and Rural Affairs under an independent Chair. Support is provided to the Committee by a company set up and controlled by the Committee solely for that purpose. The company employs around 170 people. They bring together scientific and technical specialisms, extensive knowledge of policy at global, European and national levels and skills in working with other organisations.

184. JNCC's role is to provide evidence, information and advice so that decisions are made that protect natural resources and systems. JNCC's functions are principally to:

- Advise government on the development and implementation of policies for, or affecting, nature conservation in the UK and internationally;
- Provide advice and disseminate knowledge on nature conservation issues affecting the UK and internationally;
- Create common standards throughout the UK for nature conservation, including monitoring, research, and the analysis of results;
- Commission or support research that is deemed relevant to these functions.

185. JNCC has a significant function within the UK as a supplier of evidence, mainly through marine and terrestrial surveillance and monitoring programmes. It also acts as a co-ordinator helping country and UK bodies to fit their evidence investments into a bigger picture and as an interpreter of evidence to support advice[29].

186. **Committee on Climate Change and Adaptation Sub-Committee**: The CCC is an independent, statutory body established under the Climate Change Act 2008 to advise the UK government and devolved administrations on emissions targets and report to Parliament on progress made in reducing greenhouse gas emissions and preparing for climate change. The paragraphs below present a summary of some of

[29] See http://jncc.defra.gov.uk/default.aspx?page=5284.

the CCC's main responsibilities under the Climate Change Act. As with other bodies in this annex these are not described exhaustively. The ASC, which is part of the CCC, was also established under the Climate Change Act 2008 to support the CCC in advising and reporting on progress in adaptation.

187. Both the CCC and ASC are jointly sponsored and funded by the relevant UK government departments (BEIS in relation to the CCC and Defra for the ASC), the Northern Ireland Executive, the Scottish Government and the Welsh Government.

188. Among their specific statutory duties the CCC and ASC are tasked with providing advice on:

- the level of the carbon budgets consistent with the 2020 and 2050 targets set under the Act;
- the extent to which carbon budgets should be met by domestic emissions reductions versus emissions credits purchased overseas;
- the sectors of the economy where there are particular opportunities for reducing emissions;
- the preparation of the UK government's Climate Change Risk Assessment;
- the implementation of the government's Statutory Adaptation Programme for England and reserved matters.

189. The Secretary of State is also required to obtain, and take into account, the advice of the CCC in a number of specific circumstances. These include, for example, where the Secretary of State intends to amend the 2050 target, alter carbon budgets or amend the list of targeted greenhouse gases. The CCC also advises the Secretary of State on the preparation of reports on the risks to the UK of the current and predicted impact of climate change, and provides advice, analysis, information or other assistance to the national authorities on their functions under the Act when requested

190. The CCC has specific responsibilities for reporting defined in the Act and must lay before Parliament each year a report setting out its views on progress towards meeting the carbon budgets and the 2050 target. It is required to report on the way in which the budget was or was not met and the action taken to reduce net UK carbon emissions. It must also include the ASC's views on the government's implementation of the Adaptation Programme in its report every two years.

191. The CCC and the ASC have produced a number of reports in fulfilment of their functions and these are published on the CCC's website.[30] These take the form of independent advice to government, with statutory reports being presented to Parliament. Government formally responds to the CCC's reports and recommendations as required under the Act[31].

192. In addition to their statutory duties, the CCC and ASC conduct additional work to promote understanding, inform evidence-based debate and support robust decision-making. These include independent analysis into climate change science, economics and policy and engaging with a wide range of organisations and individuals.

193. The CCC and ASC do not have a remit or powers to investigate or enforce delivery of legislation by other authorities.

Regulatory and operational bodies

194. Environmental law is delivered in practice by a number of regulatory and operational bodies. Two such organisations are outlined below.

195. **Environment Agency:** The Environment Agency is an NDPB, established in 1995 and sponsored by DEFRA, with responsibilities relating to the protection and enhancement of the environment in England. Its main purpose[32] is to protect or enhance the environment, taken as a whole so as to promote the objective of achieving sustainable development. To this end it has a wide range of regulatory, operational and advisory functions relating to waste management, climate change, industrial emissions, land quality, water quality and water resources, fisheries, navigation and flood and coastal erosion risk management.

196. The Environment Agency has statutory functions relating to the provision of environmental information and reports. These include compiling information which enables the Environment Agency to form an opinion of the general state of pollution of the environment, and carrying out assessments and providing advice to government on pollution prevention when requested. Statutory guidance issued to the Environment Agency under section 4 of the Environment Act includes a specific objective to report on the state of the environment as one of the government's chief sources of advice on this topic.

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[30] See https://www.theccc.org.uk/publications/.

[31] See for example: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/659283/CCS207_CCS0917051660-1_Un_Act_Govt_Response_to_CCC_Report_2017_Accessibl.._.pdf.

[32] As stated in Section 4 of the Environment Act 1995.

197. **Natural England:** Natural England is also an NDPB sponsored by Defra. It is responsible for ensuring that England's natural environment, including its land, flora and fauna, freshwater and marine environments, geology and soils are protected and improved. It also has a responsibility to help people enjoy, understand and access the natural environment.

198. Natural England is responsible for protecting biodiversity and geodiversity, conserving and enhancing landscape, enabling the study, understanding and enjoyment of the natural environment, promoting access to the countryside, open spaces and open air recreation and contributing to social and economic well-being through management of the natural environment. It designates SSSIs, advises government on establishing a Blue Belt of marine protected sites, administers the Countryside Stewardship scheme, leads the establishment of the England Coastal Path, leads the network of National Nature Reserves, works to conserve protected species and promotes green infrastructure. Its advice and work are based on a wide range of evidence and analysis. Natural England also publishes reports and other information in its areas of responsibility.[33]

199. **Third party complaints to regulators:** Third parties who are dissatisfied with the application of environmental law can complain to the responsible authorities charged with implementing it. The Regulators' Code[34] provides a clear, flexible and principles-based framework for how regulators should operate in this respect. This states that regulators should provide an impartial and clearly explained route to appeal against a regulatory decision or a failure to act. It also states that individual officers who took the decision or action should not be involved in considering the appeal. Regulators such as the Environment Agency and Natural England give effect to this in their complaint procedures with recourse to the PHSO or rights of appeal.

The planning system

200. There are established, robust systems in place for scrutiny of and appeal against planning decisions and for persons to seek to bring legal challenges through the courts against such decisions and development plans.

201. Applicants can appeal against the refusal or non-determination of a planning application. Appeals are dealt with by the Planning Inspectorate (PINS) on behalf of the Secretary of State although the Secretary of State makes the decision in certain cases.

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[33] See http://publications.naturalengland.org.uk/.

[34] See https://www.gov.uk/government/publications/regulators-code. This has statutory effect under the Legislative and Regulatory Reform Act 2006.

202. Local planning authorities are required to notify the Secretary of State where they are minded to grant certain types of planning applications for the Secretary of State to consider calling in, e.g. Green Belt, flood risk and World Heritage Sites.

203. Third parties can request the call in of planning applications for determination by the Secretary of State[35]. The policy of the Secretary of State is that he will, in general, only consider use of his call in powers if planning issues of more than local importance are involved. Third parties (and applicants or local planning authorities as relevant) can also seek to legally challenge planning decisions and development plans through the courts, such as the planning court.

204. Large scale energy, transport, waste, water, and waste water projects can use the Nationally Significant Infrastructure Projects planning regime set out in the Planning Act 2008. These applications are dealt with by PINS for decision by the relevant Secretary of State. Applications can be made to the courts for judicial review.

205. Local Plans and Spatial Development Strategies go through an examination process with independent inspectors responsible for examining whether plans have been prepared in accordance with legal and procedural requirements, and whether plans are sound. This will include fundamental requirements for sustainability appraisal (including requiring SEA) and Habitats Regulations Assessments (HRA).

206. Neighbourhood plans and Orders are examined against certain basic conditions and other legal tests before undergoing a local referendum. The Examiner and the relevant local planning authority are required to consider whether the neighbourhood plan or Order would breach, or otherwise be incompatible with, any EU or human rights obligations.

207. Environmental bodies including the Environment Agency, Natural England and the Marine Management Organisation are designated as statutory consultees in relation to certain planning activities.

Ombudsmen

208. **Parliamentary and Health Service Ombudsman:** The Parliamentary and Health Service Ombudsman (PHSO), while entailing two distinct offices established by two Acts of Parliament[36], is a role fulfilled by single person. The PHSO is appointed by

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[35] s77 of the Town and Country Planning Act 1990.

[36] The office of the Parliamentary Ombudsman was created by the Parliamentary Commissioner Act 1967. The office of the Health Service Ombudsman was created by the NHS Reorganisation Act 1973, with most powers now contained in the Health Service Commissioners Act 1993. By convention the two offices are held by the same person who is referred to as the Parliamentary and Health Service Ombudsman (PHSO).

the Crown on the recommendation of the Prime Minister. As such, the PHSO is not affiliated to a government department but rather is an Officer of Parliament.

209. The Parliamentary Ombudsman deals with complaints of maladministration made against UK government departments (including Defra and its ALBs) and certain other national public bodies. The Health Service Ombudsman investigates complaints about the National Health Service (NHS) in England. There are separate, statutory Ombudsmen for the devolved administrations in Scotland, Wales and Northern Ireland.

210. The PHSO is independent from government and its cases, findings and recommendations cannot be over-ruled by Ministers. The PHSO is accountable to Parliament via the Public Administration and Constitutional Affairs Committee (PACAC) through presentation of annual reports and accounts.

211. **Local Government and Social Care Ombudsman (LGSCO):** The Commission for Local Administration in England is an independent statutory body, created by the Local Government Act 1974 to operate the Local Government Ombudsman Scheme. It looks at individual complaints about local public services and all registerable adult social care providers throughout England.

212. The Ombudsman is appointed by the Queen on the recommendation of the Secretary of State for Housing, Communities and Local Government. The post-holder is accountable to the Secretary of State for Housing, Communities and Local Government in his or her role as Chair of the Commission for Local Administration in England, and to Parliament as the Ombudsman.

213. The LGSCO investigates complaints made against local authorities and certain other public bodies[37]. The LGSCO may investigate a complaint made by a member of the public that they have suffered injustice in consequence of maladministration in connection with action taken by or on behalf of an authority in the exercise of its administrative functions.

214. The LGSCO investigates most services provided by local authorities so does address cases with a local environmental element. A review of recent environmental cases shows that the Ombudsman has investigated cases around subjects including council handling of tree preservation orders, planning applications, trees in conservation areas, and harm to wildlife from site clearance.

[37] This includes the Environment Agency in relation to its flood defence functions. The Environment Agency is therefore covered by the PHSO and the LGSCO across the range of its functions, and the two Ombudsmen may undertake joint investigations.

215. The PHSO and the LGSCO share a number of common or similar features, including those outlined below.

216. Both Ombudsmen deal with complaints concerning “maladministration”. The term “maladministration” is not defined in law for the work of the PHSO or the LGSCO. In theory, it could include cases where someone claims that environmental regulations have not been implemented properly. The LGSCO website sets out some things it considers to be maladministration. These include: delay; poor record keeping; failure to take action; failure to follow procedures or the law; poor communication; failure to investigate; misleading information; or the organisation not doing what it said it would. In practice, however, most of the Ombudsmen’s cases deal with complaints about the processes used and services provided, rather than the more fundamental interpretation and application of the law.

217. The Ombudsmen must receive a complaint in order to launch an investigation – they have no power to investigate on their own initiative. In general, they usually cannot investigate complaints that are instigated more than 12 months after the problem in question. Complainants should also first have sought to resolve their grievance with the organisation concerned via that organisation’s complaints processes (see for example paragraph 199), in order to allow officials to respond, before taking the matter to the relevant Ombudsman.

- Complaints to the Parliamentary Ombudsman must also be directed through a Member of Parliament (the so-called “MP filter”) while complaints to the Health Service Ombudsman can be submitted directly.

- Complaints to the LGSCO must be made by or on behalf of the person who has been personally affected by the alleged maladministration. In general the LGSCO cannot investigate complaints where the issue affects most people in the authority’s area.

- The PHSO usually cannot investigate cases where the complainant could appeal or seek a remedy in a court of law. The LGSCO may investigate even if the complainant could go to court provided they have not involved the courts before complaining.

218. When complaints are received which they can investigate, the law gives the Ombudsmen a discretion rather than a duty to do so. It also gives the Ombudsmen wide powers of investigation and to obtain information, equivalent to those of the High Court, from such people as required.

219. If the Ombudsmen conclude that there has been injustice caused by maladministration or a failure in service, they can propose a remedy which can include recommending an apology, compensation or other action to put things right. They cannot compel an organisation to follow their recommendations. In practice,

however, public authorities will usually comply with the Ombudsmen's recommendations.

- The PHSO has an additional power to make a special report to Parliament where he or she believes an injustice has occurred which is unlikely to be remedied.

- If a council does not agree to carry out the recommendations, the LGSCO will publish a report that must be considered at full council. If it still does not take satisfactory action, the council must publish a statement explaining why it has refused to follow the Ombudsman's recommendations. The only way a council can challenge the Ombudsman's decision is through the courts using the judicial review process (see paragraphs 221-226).

220. In December 2016, government published a draft Public Service Ombudsman Bill[38] which would modernise the complaints service by creating a new, single Public Service Ombudsman. The draft Bill would merge the LGSCO with the PHSO (with the option of merging the Housing Ombudsman at a later date). The new Public Service Ombudsman would also see an end to the "MP filter" in respect of the Parliamentary Ombudsman. It would not introduce powers for the Ombudsman to make investigations on its own initiative or make its conclusions binding or enforceable.

Judicial review

221. Judicial review is a type of proceeding where a court reviews the lawfulness of a decision or action, or failure to act, by a body in relation to the exercise of a public function. The grounds of judicial review include illegality, procedural unfairness, unreasonableness or irrationality, and claims that a decision is incompatible with EU law. Remedies include an order quashing the decision, a mandatory injunction or a declaration. The most common remedy granted to a successful claimant is a quashing order. If a decision is quashed, the matter will normally be returned to the decision-maker to make a fresh decision in light of the judgment.

222. Judicial review is primarily a challenge to the way in which a decision has been made. The Courts will not normally quash a decision because they disagree with the conclusion that has been reached as long as all relevant factors (and no irrelevant factors) have been taken into account.

223. The individual or organisation that brings the claim must have "sufficient interest" - a direct, personal interest in the decision or action. The courts apply this rule liberally and are likely to recognise challenges by public-spirited citizens where there are

[38] See https://www.gov.uk/government/publications/draft-public-service-ombudsman-bill.

serious issue of public importance that are otherwise unlikely to be heard. However, “busybodies” are likely to be denied permission to bring judicial review proceedings.

224. A judicial review challenge is one of last resort, generally only available when all other avenues, such as appeal rights, have been exhausted. There is a short time limit for bringing a claim; it must be brought promptly and in any event within 3 months (shorter time limits apply to specific issues, such as planning cases). A “pre-action protocol” must generally be followed before a claim can be made. The purpose of the protocol is to encourage parties to seek to settle their differences outside of court, and avoid the expense of court. If that fails, the claimant must apply to the court for permission to apply for judicial review. This “permission stage” is designed to filter out frivolous and hopeless claims and also claims by those who don’t have standing or are out of time. A substantive hearing follows if permission is granted. Hearings may sometimes be expedited if the matter is urgent.

225. Remedies include an order quashing the decision, an injunction or a declaration. But the court also has discretion not to make any order, even if it finds that the decision was unlawful. Damages are not a traditional judicial review remedy. However, damages for breach of EU law may be awarded if the claimant can show they had a clear right under EU law, the breach was serious and it directly caused them damage. In addition, the court may refer the case to the CJEU for a “preliminary ruling” where the answer to a point is not clear in the CJEU jurisprudence. Once the CJEU has ruled, the case will revert to the UK courts.

226. In relation to environmental judicial review proceedings, the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters requires that proceedings to which it applies should, among other things, be “fair, equitable, timely and not prohibitively expensive”. Although the Convention is not directly applicable in domestic law it does bind the UK as a Party to it, and the same requirements have been incorporated into EU legislation, including Directives relating to environmental impact assessment and industrial emissions control and are a feature of CJEU case law.

Other enforcement mechanisms

227. Beyond judicial review, government bodies are subject to other types of enforcement mechanisms that relate to environmental law.

228. Government and public bodies that are covered by the Ombudsman Services described above are subject to the powers of those services. The Ombudsmen cannot compel authorities to adhere to their findings, but they do have powers to obtain information, conduct investigations and make recommendations.

229. Many government bodies are also subject to environmental law as regulated parties rather than as responsible authorities. For example, the Environment Agency and

Natural England all apply legal regimes that cover other parts of government – including central government departments, local authorities and, in some cases, each other. These government bodies need to comply with the law just like everyone else affected by it, and are subject to some but not all of the same provisions for enforcement and sanctions.

230. Much of our environmental legislation is based upon criminal sanctions. This provides for the courts to impose fines[39] or in severe cases prison sentences on a body or person that breaks the law. However, the well-established legal doctrine of Crown or Sovereign immunity provides that legislation does not bind the Crown unless specifically provided for by statute. Much environmental legislation does apply to the Crown, but also provides that the Crown cannot be prosecuted or be subject to a High Court order. It does, however, allow the responsible authorities to seek a declaration in the High Court to the effect that the Crown is in contravention of the law. The Crown for these purposes includes the ruling Monarch, the sovereign government, plus bodies and persons acting as servants or agents on behalf of the Crown. Central government departments like Defra are covered by the definition of the Crown, while ALBs like the Environment Agency and Natural England are not.

231. The Regulatory Enforcement and Sanctions (RES) Act 2008 introduced an alternative to criminal prosecution in the form of a civil sanctions regime. In this case the sanctions are determined by the regulator, rather than by a court, and do not give rise to a criminal record. These powers are available, for example, to the Environment Agency and Natural England[40]. The party upon whom a civil sanction is imposed can appeal against it to the First-tier Tribunal which will scrutinise the substance of the case. Civil sanctions can include fixed or variable monetary penalties. Regulators can also issue civil penalties in the form of compliance notices, stop notices and restoration notices.

232. An interesting feature of the RES Act is that it allows regulators to accept enforcement undertakings under some environmental regimes[41]. The majority of civil sanctions applied by the Environment Agency to date are enforcement undertakings under producer responsibility legislation.

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[39] Note that in a domestic context, in law the term “fines” generally relates to criminal sanctions while “penalties” relates to civil sanctions. This is the intended usage in this document. However, external commentaries sometimes use the terms interchangeably. Moreover, at an EU level, the fines that can be imposed by the CJEU on a Member State are not criminal.

[40] See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/673440/Public-register-civil-sanctions-prosecutions.xlsx for details of civil sanctions imposed by Natural England.

[41] See for example https://www.gov.uk/government/publications/enforcement-undertakings-accepted-by-the-environment-agency for details of enforcement undertakings accepted by the Environment Agency. See previous footnote for link to information on enforcement undertakings accepted by Natural England.

233. Like criminal sanctions, civil sanctions are intended to incentivise compliance by the regulated parties, bring them back into compliance and prevent recurrence where non-compliance has occurred. A key additional purpose of enforcement undertakings is to allow the offender to restore and remediate any environmental damage they have caused. They can do this by taking corrective action where possible, or making a contribution to a good cause such as a local charity or environmental initiative, rather than paying a fine and facing a criminal sanction.

234. Enforcement undertakings are focused on achieving environmental outcomes rather than establishing culpability and imposing penalties and do not involve the time and cost of court proceedings to establish guilt before restoration can be considered. Offenders can proactively offer detailed restoration for harm caused. In the event that the undertaking is not complied with, the regulator may still go down the prosecution route.

235. The provisions to impose civil sanctions under the RES Act apply equally to government bodies and other regulated parties. Civil sanctions also operate in separate legislation aimed at mitigating climate change[42]. In these cases there are only financial civil penalty provisions, with no scope for enforcement undertakings and no backstop of reverting to criminal prosecution. Again these apply to government bodies that fall under the regimes in question.

[42] See for example https://www.gov.uk/government/publications/climate-change-regimes-civil-penalties-imposed. The regimes in question relate to implementation of the EU Greenhouse Gas Emissions Trading Directive, the Energy Savings Opportunity Scheme (which implements part of the EU Energy Efficiency Directive), the Carbon Reduction Commitment (CRC) Energy Efficiency Scheme and Climate Change Agreements.

Annex D – Oversight and accountability bodies in other areas of policy

236. Annex C of this consultation document describes a number of bodies with a remit and functions which cover or include environmental matters. Separately, there are some bodies operating in other policy areas which exercise scrutiny and oversight functions in their areas of responsibility. These can be considered as possible models for the new environmental body. Several such bodies are described below.

Information Commissioner's Office (ICO)

237. The ICO is the UK's independent body for upholding information rights in the public interest, and promoting openness by public bodies and data privacy for individuals. It is sponsored by the Department for Digital, Culture, Media and Sport (DCMS). The ICO was set up in 1984 under the Data Protection Act, operating as the Data Protection Registrar. Its work is founded in a number of Acts and Regulations, and it is led by the Information Commissioner, who provides a focal point for the organisation's work. More than 400 staff are employed by the ICO and it has offices in each part of the UK[43].

238. The ICO can take actions around data protection, privacy and electronic communications, and freedom of information and environmental information. It has a number of tools available for taking action to change the behaviour of organisations and individuals in breach of the legislation it regulates. These include serving information and enforcement notices, issuing undertakings committing an organisation to a particular course of action, criminal prosecution, non-criminal enforcement and audit. The ICO also has the power to serve a monetary penalty notice imposing a penalty of up to £500,000, and fixed penalty notices of £1,000.

239. Specifically, where authorities or public sector bodies repeatedly or seriously fail to meet the requirements of the legislation, or conform to the associated codes of practice, the ICO can take the following action:

- conduct assessments to check organisations are complying with the Act;
- serve information notices requiring organisations to provide the ICO with specified information within a certain time period;
- issue undertakings committing an authority to a particular course of action to improve its compliance;
- serve enforcement notices where there has been a breach of the Freedom of Information Act or Re-use of Public Sector Information Regulations, requiring

[43] See https://ico.org.uk/about-the-ico/who-we-are/decision-making-structure/ for further details of the structure of the ICO.

organisations to take (or refrain from taking) specified steps in order to ensure they comply with the law;
- issue recommendations specifying steps the organisation should take to comply;
- issue decision notices detailing the outcome of the ICO's investigation to publically highlight particular issues with an organisation's handling of a specific request;
- prosecute those who commit criminal offences under the Act; and
- report to Parliament on freedom of information issues of concern.

240. Appeals against ICO notices are heard by the First Tier Tribunal (Information Rights), part of the General Regulatory Chamber (GRC). The First Tier Tribunal (Information Rights) specifically hears appeals against enforcement notices, decision notices and information notices issued by the Information Commissioner.

241. In general, if a member of the public wishes to raise a concern or make a complaint, the ICO advises them to raise this initially with the organisation concerned. If they are not satisfied with the response they can then refer the matter to the ICO. Members of the public can raise a concern to the ICO via their website, live chat or helpline.

242. Each year the ICO handles more than 16,000 data protection complaints, 5,000 freedom of information complaints and 200,000 calls to its helpline. It administers over 400,000 entries on a Register of Data Controllers, which includes details of organisations that process personal data. The Data Protection Act 1998 requires every organisation that processes personal information to register with the ICO.

Children's Commissioner for England

243. The post of Children's Commissioner[44] was established under the Children Act 2004 which gave the Commissioner responsibility for promoting awareness of the views and interests of children. The Commissioner's statutory remit includes understanding what children and young people think about things that affect them and encouraging decision makers to always take their best interests into account.

244. The Commissioner does not have an enforcement role but is empowered under the Children Act to:

- advise persons exercising functions or engaged in activities affecting children on how to act compatibly with the rights of children;

- encourage such persons to take account of the views and interests of children;

- advise the Secretary of State on the rights, views and interests of children;

[44] See http://www.legislation.gov.uk/ukpga/2004/31/contents and also, for the Commissioner's constitutional arrangements, http://www.legislation.gov.uk/ukpga/2004/31/schedule/1.

- consider the potential effect on the rights of children of government policy proposals and government proposals for legislation;
- bring any matter to the attention of either House of Parliament;
- investigate the availability and effectiveness of complaints procedures so far as relating to children;
- investigate the availability and effectiveness of advocacy services for children;
- investigate any other matter relating to the rights or interests of children;
- monitor the implementation in England of the United Nations Convention on the Rights of the Child
- publish a report on any matter considered or investigated.

245. In order to fulfil these functions, the Commissioner has data gathering powers and powers of entry to talk with children and gain evidence. These enable her to help bring about long-term change and improvements for children, particularly the most vulnerable. The Children and Families Act 2014 further strengthened the remit, powers and independence of the Commissioner.

Equality and Human Rights Commission (EHRC)

246. The EHRC is Great Britain's national equality body. It is an independent, statutory non-departmental public body established by the Equality Act 2006. Its role is to safeguard and enforce the laws that protect people's rights to fairness, dignity and respect.

247. The EHRC has a range of powers to challenge discrimination, promote equality of opportunity and protect human rights. These powers enable the EHRC to require that employers, service providers, educational institutions, public bodies and housing providers cease any discriminatory practices, and make changes that are necessary to prevent future discrimination or non-compliance. Its specific powers allow the EHRC to:

- Conduct inquiries and investigations;
- Serve unlawful act notices, where the EHRC has carried out an investigation and considers that a person has committed an unlawful act;
- Issue compliance notices in relation to the public sector equality duty;
- Provide legal assistance to victims of discrimination;
- Intervene in or institute legal proceedings, including judicial review; and

- Make applications to court for injunctions or, in Scotland, interdicts.

248. These powers can be exercised across a range of issues, including employment, access to goods, facilities and services, housing, transport and education.

Care Quality Commission (CQC)

249. The CQC is a non-departmental public body of the Department of Health. It was established in 2009 to regulate and inspect health and adult social care services in England. It ensures health and social care services provide people with safe, effective, compassionate, high-quality care and encourages care services to improve.

250. The role of CQC is to:

- Register care providers;
- Monitor, inspect and rate services; and
- Take action to protect people who use services.

251. The CQC is accountable to Parliament through the Secretary of State for Health. It provides an independent voice, publishing its views on major quality issues in health and social care. It monitors, inspects and regulates services to make sure they meet fundamental standards of quality and safety and publishes its findings, including performance ratings to help people choose care.

252. The CQC sets out what good and outstanding care looks like and ensures services meet fundamental standards below which care must never fall. Where it finds poor care, it uses its powers to take action.The CQC has a wide range of enforcement powers to protect people who use regulated services from harm and the risk of harm and to hold providers and individuals to account for failures in how the service is provided. These include:

- Requirement Notices - notifying a provider that they are considered in breach of legal requirements and should take steps to improve care standards;
- Warning Notices - notifying a registered person that CQC consider they are not meeting a relevant condition of registration or other legal requirement;
- Imposing, varying or removing conditions of registration;
- Suspending registration; and
- Cancelling registration.

253. CQC is able to prosecute cases under criminal law where people using a registered service are harmed or placed at risk of harm

254. CQC publishes an annual report on the state of health care and adult social care in England, individual inspection reports including ratings, and guidance to service providers.

Office for Budget Responsibility (OBR)

255. The OBR was established in 2010 and provides independent, authoritative fiscal analysis of the UK's public finances. Its key functions are to provide independent economic and fiscal forecasts, to evaluate the government's performance against fiscal and welfare spending targets, to assess the long term sustainability of the public finances, to evaluate fiscal risks and to scrutinise government costings of tax and welfare measures.

256. The OBR was set up through primary legislation and the three members of the Budget Responsibility Committee are appointed by the Chancellor, with the consent of the Treasury Select Committee in Parliament. It is constituted as an independent body, but as it needs to work closely with government data and departments, it has formally set out its interactions with government in a memorandum of understanding clarifying roles, resources and expectations[45].

[45] http://budgetresponsibility.org.uk/docs/dlm_uploads/obr_memorandum040411.pdf.

Annex E – Examples of environmental governance arrangements in international law and other countries

Governance mechanisms under international environmental law

257. A number of the international treaties to which the UK is party have compliance mechanisms. For example:

- the Meeting of the Parties to the Montreal Protocol on Ozone Depleting Substances can impose sanctions for non-compliance, such as cautions or the suspension of privileges under the Protocol.
- the Basel Convention on the Movement of Hazardous Wastes has a non-binding process to resolve disputes between Parties on compliance and implementation of the Convention.
- the Secretariat to the Convention on International Trade in Endangered Species of Wild Flora and Fauna analyses cases of violations of the Convention and reports on them to the Conference of the Parties.
- the Bern Convention on the Conservation of European Wildlife and Natural Habitats is governed by a Standing Committee which meets annually and takes decisions on non-compliance complaints, as well as adopting recommendations and resolutions.

258. In addition, through obligations under the Aarhus Convention, a United Nations Economic Commission for Europe (UNECE) Treaty which provides for access to information, public participation in decision-making and access to justice in environmental matters, the UK is required to complete a national implementation report every three years[46].

259. Beyond these mechanisms, virtually all international environmental agreements allow Parties to invoke a dispute settlement procedure involving recourse to an arbitral tribunal or the International Court of Justice, in order to resolve disputes on the interpretation or application of the obligations under those agreements.

260. These international obligations and mechanisms will remain in place after our exit from the EU.

[46] Reports are available online at http://apps.unece.org/ehlm/pp/nir/index.asp.

Environmental governance in other countries

261. ***Sustainable development in Germany.*** Germany has an advanced institutional framework for its National Sustainable Development Strategy, which is dealt with at the highest political level as a key national priority. The strategy falls under the competence of the Federal Chancellery, and all ministries are involved in shaping and implementing it. A State Secretaries' Committee for Sustainable Development, chaired by the Head of the Federal Chancellery is in charge of developing and monitoring the strategy. The Committee is also the contact for a Parliamentary Advisory Council for Sustainable Development, federal states (Länder) and associations of local authorities. External knowledge is provided by the German Council for Sustainable Development. This comprises fifteen individuals from businesses, trade unions, churches, the media, and consumer and environmental associations who advise the federal government on all matters relating to sustainable development.

262. ***Investigation of offences in Canada.*** Canada's legislation provides a mechanism for residents to apply to the Minister for investigation of alleged offences under the Environmental Protection Act. Where this happens, the Minister must investigate all matters that she or he considers necessary to determine the facts relating to the alleged offence. The Minister must also report to the applicant every 90 days on progress of the investigation and the action taken. An individual who has applied for an investigation may also bring an environmental protection action against the Minister for failure to conduct an investigation and report within a reasonable time, or if the response to the investigation was unreasonable.

263. ***Environmental Ombudsmen.*** Many countries have Ombudsmen (including the UK as noted in Part 2 and Appendix C of this consultation document). However, in some countries there are specific offices for environmental issues. For example, Austria has an Environmental Ombudsman as well as a general Ombudsman Board. The former can bring complaints before Austria's Supreme Courts, whereas the latter cannot. Hungary also has an Environmental Ombudsman (originally via the Parliamentary Commissioner for Future Generations, this is now provided through the Office of the Commissioner for Fundamental Rights). There are many other countries where Ombudsmen can participate in or initiate legal or disciplinary proceedings, and some cases where they can propose amendments or laws.

264. ***New Zealand - Parliamentary Commissioner for the Environment.*** New Zealand has had a Parliamentary Commissioner for the Environment (PCE) since 1986. The Commissioner is an independent person appointed by Parliament who investigates and reviews the effectiveness of the government's processes for environmental planning and management and investigates any negative impacts on the

environment. Since 2014 the Commissioner has also provided commentary to Parliament on environmental reports produced by the government.

The scope of the PCE's work is limited because of the small staff of 20 so not everything can be investigated, but the Commissioner has extensive powers to obtain information and receives direct correspondence from the public complaining or raising concerns about environmental issues. This provides a valuable independent and advisory role and helps resolve environmental disputes.

265. The specific functions of the PCE include:

- Reviewing the system of agencies and processes set up by the government to manage the country's resources;
- Investigating the effectiveness of environmental planning and management by public authorities, and advising them on remedial action;
- Investigating any matter where the environment may be or has been adversely affected, and advising on preventative measures or remedial action;
- Reporting on petitions, Bills, or other matters which may have a significant effect on the environment;
- Inquiring into matters that have had or may have a substantial and damaging effect on the environment;
- Undertaking and encouraging the collection and dissemination of information about the environment;
- Encouraging preventive measures and remedial actions to protect the environment.

266. The New Zealand PCE is accountable and reports to Parliament, often working at Parliament's direct request. At the same time the office of the PCE has its own work programme and can give advice to other authorities. The PCE can make recommendations, but cannot require their implementation.

267. ***Kenya.*** Kenya provides an example of a Public Complaints Committee where an Ombudsman services the whole country. The Ombudsman facilitates a forum for environmental policy-making and conflict resolution, although resource limitations mean investigation of all complaints is impossible.

Kenya also has a National Environmental Tribunal that deals with cases that have a potentially large environmental impact. It is formed from 5 members with legal and environmental capabilities. It functions in a similar way to a court. Its primary focus is the power to confirm, overturn or vary decisions made by the Kenyan Environment

Agency in an informal and “friendly” manner and to keep fees lower than passing through the courts.

268. ***USA.*** Environmental protection in the USA is achieved through statute law passed through Congress and regulations developed by federal agencies. This means environmental governance in the USA is divided between numerous federal and state agencies which have varying and occasionally conflicting priorities.

The Environmental Protection Agency (EPA), established in 1970, has evolved to become the most well-known governance body. Its mission is to protect human health and the environment and it aims to achieve this through scientific methodology. The EPA has the power to develop and enforce regulations, give grants, study environmental issues, sponsor partnerships, educate the public and publish information. It does not however interfere with federal, tribal, state or local agency responsibilities, but may direct public concerns to the appropriate body. The EPA has an Environmental Appeals board, established in 1992, consisting of 3 independent judges in recognition of the need for appeals to be heard independently.

269. ***Japan***. In 1970 Japan became the first nation in the world to impose criminal sanctions for acts of pollution that endanger human health and set the precedent for other nations. More recently, the Basic Environment Law of 1993 provided for the Basic Environment Plan in 1994. This set out measures to be taken by national and local governments and actions to be taken by citizens, businesses and private organisations to protect the environment in light of Japan’s socio-economic development. It is based on a co-operative common focus by all parties to improve and protect the environment for future generations The Central Environment Council is the body responsible for monitoring the plan annually to ensure implementation is on track.

The Japanese Environment Agency is responsible for setting out environmental policies, standards and objectives, with 47 local governments assigned jurisdiction to enforce compliance. Japanese citizens are encouraged to file pollution complaints through the Japanese police who then have the power to investigate. Environmental protection in industry tends to be co-operative because regulators use a policy of administrative guidance to encourage compliance through economic and regulatory incentives and denial of licences and permits to violators.

SOURCES

The UK Environmental Law Association (UKELA) report “Brexit and Environmental Law – Enforcement and Political Accountability Issues” (July 2017)[47] was used to source much of this information. The report cites the following sources of specific content:

[47] https://www.ukela.org/content/doclib/317.pdf.

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3. Forever Sabah, Environmental Courts and Tribunals: An introduction to national experiences, lessons learned and good practice examples (2016).

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