



Brexit and Environmental Law

UKELA's response to the Environmental Principles and Governance consultation

UKELA's response to the consultation paper published by Defra: Environmental Principles and Governance after the United Kingdom leaves the European Union: Consultation on environmental principles and accountability for the environment

July 2018

The UK Environmental Law Association (UKELA) is the foremost body of environmental lawyers in the UK. UKELA aims to promote better law for the environment and to improve understanding and awareness of environmental law. UKELA is composed of 1,400 academics, barristers, solicitors, consultants, and judges involved in the practice, study and formulation of environmental law across England, Scotland, Wales and Northern Ireland.

UKELA remained neutral on the Brexit Referendum. In order to ensure regulatory stability and continued environmental protection, UKELA considers it imperative that the UK's current environmental legislation is preserved pending proper review, and that there is full and open consultation on options for change. UKELA's position on Brexit can be found at: www.ukela.org/ukelaposition.

UKELA's Brexit Task Force was established in September 2016 to advise on all matters relating to and arising from the UK's decision to leave the European Union insofar as this impacts environmental law, practice and enforcement in the UK. The Task Force has been examining the legal and technical implications of separating our domestic environmental laws from the European Union and the means by which a smooth transition can be achieved.

With the assistance of UKELA's specialist Working Parties, the Task Force aims to inform the debate on the effect of withdrawal from the EU, and to draw attention to potential problems which may arise.

The UKELA Brexit Briefing Papers have been produced under the guidance and approval of UKELA's Brexit Task Force and with input from relevant UKELA Working Parties and individuals. They do not necessarily and are not intended to represent the views and opinions of all UKELA members. For a list of reports available, see *Annex A*.

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1. INTRODUCTION

1. The UK Environmental Law Association (UKELA) welcomes the consultation paper published by Defra in May 2018 entitled: *Environmental Principles and Governance after the United Kingdom leaves the European Union: Consultation on environmental principles and accountability for the environment* (EPG Consultation). UKELA regards the matters discussed as being critical to UK environmental law, including EU derived law, post-Brexit. It is crucial to be clear at the earliest possible stage how environmental law and governance fits and supports the Government's long term aspirations for environmental protection.
2. UKELA has been exploring what Brexit might mean for the UK's environmental policies and laws for some time through events, papers, and responses to inquiries and consultations.
3. UKELA has prepared this response following extensive internal discussions with, and submissions from, its members including its specialist working party groups. The response has been approved by UKELA's Brexit Task Force but does not necessarily, and is not intended to, represent the views and opinions of all UKELA Members.

2. EUROPEAN UNION (WITHDRAWAL) ACT 2018

4. Since publication of the EPG Consultation in May 2018, the European Union (Withdrawal) Bill 2018 has received Royal Assent. Section 16 of the European Union (Withdrawal) Act 2018 ("EU (Withdrawal) Act 2018"), entitled *Maintenance of environmental principles, etc*, entered into force on 26 June 2018. Section 16 is set out in Annex B to this response. This will undoubtedly

inform the Government's own actions on the consultation proposals and may have answered some of the consultation questions.

5. UKELA generally welcomes the section 16 provisions, while identifying in its responses some matters relating to section 16 that require further consideration.
6. In addition, on 12 July 2018, the Department for Exiting the European Union published a White Paper on the future UK-EU relationship, setting out more detail on the UK government's vision of the future economic partnership and security partnership with the EU, and on cross-cutting areas¹. This confirms the government's commitment to maintaining high standards, in part by a non-regression clause, and to international commitments in areas including the environment and climate change after Brexit. It also includes the desire to establish cooperation arrangements between UK regulators and EU regulators, and to participate in key EU agencies such as the European Chemicals Agency. UKELA generally welcomes this approach to maintaining high environmental standards supported by non-regression of standards and cooperation with EU regulators and agencies.

3. RESPONSES TO CONSULTATION QUESTIONS

7. UKELA's responses to the EPG Consultation questions below are in the order as published while recognising that there may be some overlap in the answers.

PART 1: ENVIRONMENTAL PRINCIPLES (Q1-Q3)

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

8. UKELA considers that the environmental principles set out in Annex A to the EPG Consultation are a good starting point and notes the outline definitions

¹ HM Government: *The future relationship between the United Kingdom and the European Union* (Cm 9593) (Crown Copyright, July 2018).

provided for each. It does not disagree or object to the definitions. Instead, it recognises that these are outline definitions and that it will be for the environmental policy statement required by section 16(1)(b) of the EU (Withdrawal) Act 2018 to provide more detailed definitions of the principles. UKELA considers that in order to finalise an appropriate final list of principles, it is essential that, when the Draft Bill (referred to in section 16) is published for consultation, there is scope to consider which further principles might be added. Further, a Draft of the Statement of Policy should be provided at the same time to properly understand how the principles will be defined and applied.

9. UKELA notes that section 16(2) of the EU (Withdrawal) Act 2018 incorporates the same principles as Annex A to the EPG Consultation into the legislation, and that the section adds three further principles of: (g) public access to environmental information, (h) public participation in environmental decision making and (i) access to justice in relation to environmental matters. These added “principles” derive from the Aarhus Convention 1998 (to which both the UK and EU are parties).
10. UKELA notes that some of its members suggest that the Aarhus Convention information, participation and access to justice principles may more properly be described as rights. UKELA’s view is that they are, without doubt, rights conferred upon all citizens in the UK (and those within all the states that have ratified the Aarhus Convention). The Statement of Policy may wish to make this distinction.
11. The environmental principles in the EPG Consultation and the EU (Withdrawal) Act 2018 represent a continuation of the current position under EU and UK law and policy. In UKELA’s view, they underpin existing UK environmental law and will play a key role in achieving the outcomes of environmental protection and conservation under UK law post-Brexit.
12. When a draft Statement of Policy is available, it may be appropriate to consider the addition of further principles. We suggest a number for consideration, including:

- 1) Principle of maintaining and increasing natural capital

- 2) Principle of non-regression
- 3) Principle of improving public health and well-being
- 4) Principle of consistency

1) Principle of maintaining and increasing natural capital

- 13. UKELA recommends that the principle of maintaining and increasing natural capital should be considered by the Government for inclusion as a key environmental principle. This supports the Government's 25 Year Environment Plan and its key goal of being the first generation to leave the natural environment in a better condition than that in which we found it². This is also supported by the view of Government's independent advisory committee, the Natural Capital Committee, which advised that the 25 Year Environment Plan should be based upon the principle of a natural capital approach.
- 14. UKELA considers that the principle of a natural capital approach should encompass the notion of the conservation of biological diversity and ecological integrity and should be framed to complement the principle of sustainable development.

2) Principle of non-regression

- 15. UKELA recommends that the principle of non-regression should be considered by the Government for inclusion as a key environmental principle. This follows on from the principle of improving and enhancing natural capital and is consistent with a commitment to maintain and improve the environment for the next generation. The United Nations explains that:

“... the principle of non-regression prohibits any recession of environmental law or existing levels of environmental protection, and comprises its protective norms in the category of non-revocable and intangible legal rules, in the common interest of humanity.”³

² HM Government: *A Green Future: Our 25 Year Plan to Improve the Environment* (HM Government, Jan 2018). www.gov.uk/government/publications.

³ based on M. Prieur 'Le principe de non régression en droit de l'environnement, condition du développement durable', RADE, 2013).

16. Its inclusion is consistent with the Government's White Paper, which recognises that a non-regression clause should form part of any trading partnership with the EU. It is a common requirement of trade deals.
17. The form of the Statement of Policy will be important in ensuring practical application where a balancing and weighting exercise has to be undertaken between environmental principles where more than one environmental principle applies.

3) Principle of improving public health and well-being

18. UKELA suggests that public health and environmental protection are interdependent. In order to benefit from all the socio-economic gains that flow from having a healthy public, it is essential that a principle of improving public health and well-being is at the heart of environmental law, policy and governance. Therefore, it should be considered for inclusion as a key environmental principle.
19. A principle of public health and well-being may be defined as:

Placing environmental protection at the heart of all legislation, policy and governance to ensure that the primary, secondary and tertiary socio-economic consequences of environmental pollution and degradation of nature are avoided in order to optimise the acute and chronic health benefits of living in harmony with nature.

4) Principle of consistency

20. This principle is set out in Article 7 of the Treaty of the Function of the European Union (TFEU), which provides that:

“The Union shall ensure consistency between its policies and activities, taking all of its objectives into account in accordance with the principle of conferral of powers.”
21. Consistency and transparency are core principles in proper enforcement, for example, by the Environment Agency under its Enforcement and Sanctions Policy and should be considered as important in the creation of policy.

Further comment on environmental principles

22. As environmental impacts (both beneficial and harmful) are often transboundary by their nature, UKELA urges the Government to achieve agreement or close cooperation with the devolved administrations to ensure that common environmental principles are adopted and that the environmental principles are applied in a similar way across the UK. This will help ensure consistent commitment to the UK's international environmental obligations. It will also present a common position on environmental protection to trading partners and third countries generally and set standards for international co-operation and collaboration. UKELA welcomes the approach of partnership and cooperation between UK and EU regulators proposed in the White Paper.
23. The fact that the list of principles in the EU (Withdrawal) Act 2018 is different to that in the EU (Legal Continuity) (Scotland) Bill adds complexity. UKELA reiterates the need for a draft Statement of Policy before a final position can be taken on what principles are appropriate.
24. It should be noted that, in addition to the overarching environmental principles to be enshrined in the Draft Bill, there are a number of sector-specific environmental principles, such as the proximity principle and application of the waste hierarchy principle under waste legislation. UKELA recommends that this is acknowledged and addressed in the statutory policy statement.

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

25. The requirement for a statutory policy statement elaborating the policy roles of environmental principles is now enshrined in legislation under section 16(1)(b) of the EU (Withdrawal) Act 2018. This Statement will be the basis for the definition and application of the environmental principles. UKELA recommends that an early draft of the Statement is provided for public consultation with the Draft Bill. The Statement is fundamental to understanding how important the principles will be in the development of policy. When the draft Statement is available, UKELA will comment further on the effectiveness and ambit of the Statement.

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)?

26. UKELA considers that this question has largely been superseded by section 16 of the EU (Withdrawal) Act 2018. To help ensure legal certainty and consistency with that provision, the extra environmental principles discussed above should be listed within the new Draft Bill. This should include the principles in section 16(2) of the EU (Withdrawal) Act 2018 and, in addition, those principles recommended by UKELA for consideration as set out above.
27. UKELA does not consider the list of environmental principles in section 16 of the EU (Withdrawal) Act 2018 to be exhaustive and it is within the discretion of the Secretary of State to add other environmental principles.
28. An important defining point for the environmental principles is that they should provide for a high level of environmental protection, as is currently the position in Article 191(2) of the TFEU. Failing to achieve that high level of environmental protection would result in UK environmental law not attaining the same standard as current EU law. There are two ways of achieving this outcome. It is possible either to provide a further “principle” of a high level of environmental protection or, consistent with current EU policy, the preamble text introducing the principles can note that they “shall aim at a high level of protection”. This reflects the Government’s stated position, as most recently set out in the White Paper.
29. Any such legislative provisions, however, make it imperative to consider the mix and list of environmental principles carefully to ensure internal consistency and long-term durability of the policy vision.
30. UKELA feels that the most important role of environmental principles is to guide the development of detailed policy. Principles may also be useful in assisting the interpretation of environmental legislation where there are ambiguities.

PART 2: ACCOUNTABILITY FOR THE ENVIRONMENT

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

31. Yes. UKELA considers that there will be the loss of the governance functions of the European Commission (EC), the Court of Justice of the European Union (CJEU) and the European Environment Agency. However, the gap in environmental law and regulation through the absence of these bodies has been ameliorated to some extent by the enactment of section 16(1) of the EU (Withdrawal) Act 2018, which provides for a new environmental body with enforcement functions. Provided that the nature and scope of its role is wide enough, it should ensure that (as with the remit of the EC) it covers all emanations of the state (public bodies). UKELA considers that it can and should cover all public bodies through, for example, section 16(1)(d) and (e). It will be important for the Draft Bill to clarify the role and the duties of the new environmental body to create robust and wide-ranging environmental governance mechanisms in the UK post-Brexit.

New environmental body

32. Section 16(1)(d) of the EU (Withdrawal) Act 2018 affirms that the new environmental body will have the power to take enforcement action, including legal proceedings if necessary, where it considers there is non-compliance with environmental law. The section 16(1)(d) provision appears solely to limit the regulatory function to non-compliance by a Minister, whereas at present the function of the EC covers non-compliance by all public bodies. UKELA considers that it is critical that the new environmental body can review, if need be, all public body functions and that its scope is not limited to Government Ministers. If it was limited to Ministers, an important lacuna may arise.
33. There are two key ways that the environmental body could cover non-compliance of all public bodies by providing within the Draft Bill that:

- (1) the new body's enforcement function can be exercised directly against all public bodies in addition to Ministers of the Crown, using the powers under s 16(1)(e) to make additional provisions; or
 - (2) any enforcement action relating to a public body is directed to the relevant Minister with ultimate responsibility for the relevant public sector.
34. For Option (1), the structure and operation of the new body could take a similar approach to, say, the Information Commissioner in dealing with alleged non-compliance in that it could consider complaints received directly from the public as well as pursuing breaches on its own initiative directly against relevant public bodies.
35. The Option (2) approach would be novel in conventional public law terms although it has considerable attraction. In many ways, it is more akin to the current role of the EC in taking enforcement action against a Member State where the Member State's Government effectively has to take responsibility for whatever public body is in breach of EU law. This is the safeguarding position that the Government is aiming to replicate. Importantly, this approach ensures that Central Government cannot duck its responsibility to take steps to address the breach of environmental law by arguing that this is a matter for local government or some other public body. It would have to provide a convincing response to show that it is addressing the issue or default.
36. In response to enforcement action by the new body that relates to breaches of environmental law by public bodies outside Central Government, Government would have to take convincing steps to remedy the situation. The details of such steps would be dependent on the circumstances of the case in hand and the precise nature of Government powers in that area but could include the issuing of directions to bodies such as the Environment Agency, exercising default or reference powers, or providing more resources to local government.
37. The new body will gain information about potential breaches of environmental law by government and other public bodies both from complaints from the public and its own investigations. This will apply whether Option (1) or (2) is chosen, but having decided that further action is justified, under Option (2) the new body will then take up its concerns with Central Government rather than directly with the public body. As with current EC infringement procedures

concerning public bodies and local government, Central Government will no doubt bring these bodies into discussion during enforcement proceedings, but ultimately it has to take responsibility for its response to the new body.

38. UKELA considers that any enforcement action taken against Central Government for a breach of environmental law by any public body will be based on the enforcement remit of the new body being selective and strategic (as discussed further in the next section). The environmental body should not attempt, nor will it be able, to deal with all breaches of environmental law by public bodies. UKELA considers that it should focus its enforcement action on the most significant issues that are of more than local significance (in much the same way that the EC has clear priorities in the types of cases it investigates). This can be clarified and confirmed by the environmental body publishing an enforcement policy. In that context, it appears reasonable and practical that Central Government should assume primary responsibility for solving compliance problems that arise.
39. In order to ensure that any action taken is proportionate, the new body must have discretion as to whether to act and need only act on a proportionate basis. Providing it does so, it need not investigate every alleged complaint. This is in line with normal practice for enforcement bodies to have a high level of discretion as to what cases are pursued, subject to their stated policies and public law principles.
40. In any event, the new body should develop and publish a policy giving an indication of the types of cases it is likely to investigate and, if necessary, take enforcement action. This will assist in a greater public understanding of its role and focus. The Equality and Human Rights Commission, for example, makes clear that:

“We do not get involved in every issue or dispute, however. We only use our legal or enforcement powers when it is the best way to achieve change, such as:

- *to clarify the law, so people and organisations have a clearer understanding of their rights and duties*

- *to highlight priority issues and force these back to the top of the agenda*
- *to challenge policies or practices that cause significant disadvantage, sometimes across a whole industry or sector”*

41. The number of cases that the new body pursues will be dictated, in part, by its proposed size and the extent of its funding.

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

42. UKELA supports the proposed objectives for the establishment of the new environmental body set out in the consultation paper and as provided for by section 16(1) of the EU (Withdrawal) Act 2018. However, there are some key objectives missing in the EPG Consultation, including:

- That the new environmental body has compliance and enforcement functions beyond those proposed. This has largely been provided for by the section 16(1) provisions, although see the discussion in answer to Question 4 above in this regard.
- That the new body is independently and transparently funded either directly from Parliament or, at the very least, by ring-fenced funding through Defra. UKELA considers that a funding provision can be provided for in a Schedule to the Draft Bill. This is to help prevent the new body’s important work being compromised in any way by Defra cutting its funding and to underpin its long-term integrity as an independent watchdog in which the public has confidence.
- To review annually and report to Parliament on progress towards the goals and objectives set out in the Government’s 25 year Environment Plan. This should include a review of the adequacy of the tools available to Government to achieve the objectives of the Plan and the success or otherwise of their implementation.

- To review annually and report to Parliament on progress with the implementation and operation of existing environmental law. Certain existing EU legislation already requires Member States to report to the EC. Consequently, a more general review power for the new body would ensure its core function of supervising compliance with UK environmental law.

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

43. UKELA agrees that the new body should be able to scrutinise government and its performance in relation to all extant environmental law. For the avoidance of doubt, that should include those laws that are brought into force at a future date. However, the new body should not scrutinise new statutory proposals and policy on behalf of Government.
44. UKELA does not agree that the advice to Government should extend to being a general advisor on, for example, the application of law. This could give rise to a conflict of interest whereby the new body is regulating and potentially sanctioning Government for a failure to enforce an environmental law, when it may have previously advised Government upon that law. Moreover, Government departments will have specialist internal advisors in that regard and there could be a duplication or conflict of tasks.

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?

45. Yes. Subject to the comments above, UKELA does consider that the new environmental body should have a role in monitoring delivery of key environmental policies as part of its specific functions. In particular, it could reasonably advise on any aspects of non-compliance or potential non-compliance. With reference to Table 2 of the EPG Consultation, UKELA considers that the possible scrutiny roles in the final column are reasonable for the new body to undertake. However, its scrutiny, advising and reporting functions should not be limited to these.

46. The key role of the new body should be one of compliance and enforcement with environmental law. While that may, incidentally, involve scrutiny of the actions or omissions of public bodies under the 25 Year Environment Plan, it should not be involved in formally advising Government on the substance of policies. The new body should be entitled to report on their effectiveness in delivering policy aims and be prepared to indicate whether reporting and monitoring of progress by other parties is adequate or not. If policy levers for achieving goals appear to be inadequate in the opinion of the new body, it should be permitted to report on that basis.

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?

47. Subject to the points made in answer to Question 4 above on giving the new body a strategic discretion whether to take forward a complaint, UKELA considers that the new body should welcome information from the public to alert it to potential breaches of environmental law by Government and other public bodies which could trigger investigations in accordance with its strategic enforcement policy. But the new body should not be under a duty to deal with every breach of environmental law by the public sector. In that regard, it would replicate the governance role of the EC that accepts references from individuals highlighting alleged breaches of EU environmental law.
48. However, the response and investigation should not be limited to the alleged failure of government (in its widest sense, for example, including local authorities) to implement environmental law. It should be wide enough to cover all sectors of civil society, including, for example, the operations and activities of organisations when carrying out public functions, while not necessarily being a government body. However, it will be important that the new body does not overlap its functions with, or duplicate the roles of, other regulators.

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?

49. Consistent with section 16(1) of the EU (Withdrawal) Act 2018, UKELA considers that the new body should have a toolkit of compliance and enforcement mechanisms at its disposal. These may include the ability to issue an advisory notice, but it should not be limited to this. It should also have the power to issue warning notices, compliance notices and enforcement notices. There should also be the power to refer a public body to an independent court or tribunal that can determine whether the public body has failed to comply with any notice and the steps it must take to bring it into compliance. Similarly, that public body should have the right to appeal to the same court or tribunal against the terms of any notice. The new body should also have the power to intervene in any legal proceedings, including judicial review, where it considers an important issue relating to breach of environmental law has arisen.
50. The new body should be able to apply to the court for certain sanctions to be imposed on the Minister (or other public body direct), as provided in section 16(1)(d) of the EU ((Withdrawal)) Act 2018. These could be analogous to the existing powers available to the Administrative Court in judicial review proceedings under section 31(1) of the Senior Courts Act 1981 (SCA 1981) of: (a) a mandatory, prohibiting or quashing order; or (b) a declaration or injunction.
51. The ability for the new body to apply to the court should not exclude the opportunity for prior informal discussion and/or negotiation between the new body and public body or Minister. This is similar to the EC's practice with Member States and can be carried out without prejudice to taking any further more formal action under its powers. There will need to be a statutory framework and timetable for the service of notices and related appeals and court proceedings.

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?

52. As set out in reply to Question 8 above, UKELA favours widening the scope of the powers of the new environmental body to consider non-compliance by, and enforcement against, all public bodies where a breach of environmental law is involved. On balance, UKELA considers this is best achieved by making Government primarily accountable for breaches of environmental law by all public bodies.

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?

53. UKELA considers that the new environmental body should have the power to consider non-compliance of all environmental law, whether that derives from national, EU or international law. There will be significant overlaps in those responsibilities and obligations. It will assist good governance for the new body to be able to have within its remit international environmental agreements to which the UK is a party. The new body will be open to liaise with any relevant Government department to discuss matters associated with any alleged non-compliance. It would be useful for the new Body to review those international obligations that have never been properly implemented under UK law and to make recommendations for implementation.
54. The new arrangements should cover all of the UK, whether through a single body or close collaboration between equivalent bodies in each nation. This would be consistent with the new body proposed under section 16(1) of the EU (Withdrawal) Act 2018. This may create political complexities but, at the very least, a standard remit should be agreed for such a body with each of the devolved administrations, if at all possible. Funding arrangements would need to be agreed for the devolved administrations.
55. With respect to the meaning of “breaches of environmental law”, it could be argued that the legislation setting up the new body will need to list all the

environmental legislation over which it has jurisdiction to provide clarity and certainty. This might be the case where one is proposing criminal or civil sanctioning powers against individuals or the private sector, but here the new body is dealing with failures by Government and the public sector in respect of their environmental responsibilities. UKELA does not feel a listing approach is appropriate in this instance. Apart from the added complexity, the need to update as new environmental laws are passed, and the possibility of omissions, a listing approach could give the impression that the new body is responsible for ensuring compliance with the detail of every law specified, when, in reality, it will be more strategic in its approach.

56. A simpler and more flexible approach would be to adopt the wording of the Aarhus Convention in article 9.3 and that the new body would consider acts and omissions "... which contravene provisions of its national law relating to the environment". Article 9.3 is referenced in those terms in the Civil Procedure Rules concerning fixed costs without trying to specify in more detail (Part 45 VII), and the broad definition has not appeared to have given rise to any difficulties in practice. In the vast majority of cases where the new body decides to intervene, it will be obvious that laws relating to the environment are involved. If there were doubts in any particular case, this would finally be a matter of interpretation by court or tribunal designated for appeals (see below).
57. Another approach would be to adopt a definition of the environment having a wide scope consistent with domestic legislation. Regulation 2 of the Environmental Information Regulations 2004 (EIR 2004) has a wide definition of "environmental information" and this could be a basis for a definition of the environment⁴. In any case, the new body should not feel constrained by any definition and if it considers that an environmental breach needs investigating, the regulatory system should not prohibit this. For ease of reference, the definition in the EIR 2004 is set out in Annex C of this response.

⁴ The definition of environmental information in Reg. 2 of the EIR 2004 has the same meaning as article 2(1) of Council Directive 2003/4/EC on public access to environmental information. Article 2(1) is, in turn, based upon the provisions in the Aarhus Convention 1998.

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

58. UKELA does not agree with the assessment at paragraphs 125-132 of the consultation paper as to the nature of the body's role. For some of the reasons given above, UKELA considers that the EPG Consultation's assessment of the new body's role is too limited.
59. In relation to the areas of climate change, agriculture and fisheries and the marine environment, the new body should be able to cover any environmental law breaches in these areas. The new body's role is unlikely to conflict with the advisory role of the Climate Change Committee and it is important that the scope and purpose of the new body's role covers all areas within a broad definition of the environment, which involve breaches of environmental law. Any potential overlaps can easily be dealt with by agreeing appropriate Memoranda of Understanding as already happens between other bodies (for example, the Environment Agency and the Health and Safety Executive).

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

60. UKELA considers that the new body should be able to advise on breaches of environmental law by public bodies where that law is part of the planning framework, such as habitats, environmental impact assessment and contaminated land. It would also be appropriate for the new body to consider failures by public bodies to apply planning policy correctly in such areas of environmental law. The new body should not be involved in the creation of planning policy unless it amounts to a breach of environmental law or clearly fails to reflect environmental policy.

Nature of the new environmental body

61. Paragraphs 137-143 of the EPG Consultation discuss other possible features of the new environmental body, including its form and structure, status and funding sources.

Enforcement scope and funding of the new environmental body

62. As noted above, UKELA considers it will be necessary to set the scope for the environmental law in relation to which breaches are investigated by the new body. Listing by reference to specific legislation seems unduly cumbersome, inflexible and open to error or omission. The Information Commissioner works within a subject-based remit and UKELA considers that a similar outcome could be achieved for the new body having the ability to investigate breaches arising from environmental law as defined by subject matter. This should also be defined by further reference to the public bodies subject to the remit of the new body, directly or indirectly. UKELA fully supports the suggestions for a fully independent body reporting to Parliament and compliance with the standards set out in 'Managing Public Money' to ensure financial transparency, accountability and, appropriate oversight.

Public participation

63. UKELA agrees with the EPG Consultation that the new body will need to operate in a clear, transparent way in the public interest. It should be able to receive complaints with the power to investigate these as appropriate. However, the new body should not be obliged to consider all complaints it receives and, further, it should not duplicate existing functions such as the Local Government Ombudsman and the Parliamentary Services Ombudsman who can investigate complaints by individuals.

Resources and skills

64. UKELA agrees that the new body is likely to require a mix of legal, technical, scientific and economic skills and ability and that it will need to have the resources to maintain its distinct identity and independence. The level of resources must be adequately geared to its wide remit.
65. In achieving the Government's ambitions for high environmental standards and outcomes, it is also important not to lose sight of the crucial work of other environmental regulatory bodies, such as the Environment Agency, and the need for them also to be properly resourced. Otherwise, pressures will arise elsewhere in the system for maintaining an environmentally compliant society and could place unreasonable pressures on other public bodies.

PART 3: OVERALL ENVIRONMENTAL GOVERNANCE

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

An independent judicial function that is affordable and effective

66. UKELA notes the provisions of section 16(1)(d) of the EU (Withdrawal) Act 2018 and that the new body will have the power to take legal proceedings if necessary. The new body must have the support of an independent court or tribunal to ensure that it can pursue the ambition of holding Government and other public bodies to account for breaches of environmental law.
67. UKELA acknowledges the current position and the important role played by a range of courts and tribunals dealing with environmental matters. These include the Queen's Bench Division of the High Court, including the Planning Court, the Environment Tribunal, the County Court, the Magistrates' Court and the Crown Court, the Planning Inspectorate and the Information Tribunal.
68. UKELA has already indicated its reservations on relying on judicial review as the only remedy post-Brexit for holding public bodies to account for breaches of environmental law⁵. Therefore, UKELA considers that additional access to the courts will be required to support the new body's enforcement powers and related appeals and proceedings.
69. UKELA considers that there a number of options for England. One or more of the following taken together could provide a suitable system for bringing UK environmental law enforcement proceedings.

1. Expanding the role of the Planning Court

70. One option is to expand the role of the Planning Court to encompass further environmental matters including those covered by matters relating to the functions of the new environmental body. This option would need to be taken in conjunction with option 2 below, of expanding the role of the Environment

⁵ *Brexit and Environmental Law: Enforcement and Political Accountability Issues* (July 2018).

Tribunal to ensure that access to environmental justice is readily available. This includes ensuring that public bodies under scrutiny have the ability to effectively and properly represent themselves before the court.

71. At its simplest, the name of the Planning Court could be revised to the 'Planning and Environment Court'. Indeed, in practice, the Planning Court is already operating as a 'Planning and Environment Court' because a range of environmental matters fall within scope of the Planning Court. In particular, Civil Procedure Rule (CPR) 54.21(2)(a) provides that a "Planning Court claim" means a judicial review or statutory challenge which involves, among other things:

'... vii) EU environmental legislation and domestic transpositions, including assessments for development consents, habitats, waste and pollution control; and

... (ix) any other matter the [Planning Liaison Judge] considers appropriate. ...'

72. A simple amendment to the CPR Rules could be made where CPR 54.21(2)(a) includes a further subsection such that a 'Planning and Environment Court claim' includes any matter that is referred to it by the new environmental body.
73. There are limits to this approach in isolation. In particular, there would be a need to address the current concerns that the grounds of review give rise to limited review by the court. The nature of some of the allegations that will need referral may well be based upon a merits review claim and this is something that should be permissible for the 'Planning and Environment Court' to consider.
74. There is also a concern about the cost of bringing or defending claims in the High Court with the general 'loser pays' costs principle under CPR 44.2(2) applying. At present, the Aarhus Convention applies to judicial review in UK law, but its application is incomplete and complex. A simple approach to resolve this would be to provide an "each party pays their own costs principle" by default.

2. Expanding the role of the Environment Tribunal

75. At present, the First-tier (Environment Tribunal) England and Wales covers a number of environmental appeal functions. These are listed in Appendix 2 of the UKELA Brexit Briefing Paper: *Enforcement and Political Accountability Issues* and include, among other things, appeals relating to Emissions Performance Standard Regulations 2015, the Nitrate Pollution Prevention Regulations 2015 and the Waste (England and Wales) Regulations 2011. The Tribunal sits within the General Regulatory Chamber and has both legal members and members with relevant scientific or technical expertise, and has flexibility in how it handles appeals. The general approach to costs is that each party pays their own costs, making this an affordable tribunal procedure. It is arguably a better forum for dealing with merits and facts based appeals as it draws on established panels of experts that are available to deal with technical issues.

3. A new environment court/tribunal

76. Environmental lawyers have been debating for a long time whether a specialist environmental court or tribunal is required to oversee the safeguards and protection for the environment. The introduction of the new statutory body and environmental principles may be the opportunity to review whether such an environmental court or tribunal should be established. Not only could it take over the role of overseeing enforcement for the new body and appeals against its enforcement measures, but could also take over the work of the Planning Court and have a comprehensive jurisdiction for the administrative, civil and criminal enforcement of all environmental law.

77. There are economic efficiencies of one court or tribunal being responsible for all environmental law cases: a single combined jurisdiction is administratively less expensive than multiple separate tribunals with lower costs for users and public resources, less delays and could provide greater certainty in development projects.

78. Globally, there is exponential growth in environmental courts and tribunals. The establishment of such a court or tribunal for all environmental law cases could support the Government in meeting its aim to become a world leader on the environment, while providing increased, cost effective access to justice and an

opportunity for highlighting real opportunities arising out of Brexit.

79. Environmental enforcement often requires urgent action to prevent irreversible harm to the environment or human health. It is therefore important that whichever tribunal is chosen by the Government to oversee enforcement action by the new body is adequately funded and resourced to ensure it provides timely and effective remedies.

Access to the courts by the public

80. There is an issue as to the nature and extent of public access to the court system for matters within the scope and purpose of the new environmental body.
81. In terms of any legal action instigated by the new body, it would be appropriate for any person that prompted the investigation to be regarded as an interested party in any subsequent proceedings. From this point, that person could choose to be active or inactive in the proceedings. The Tribunal procedure is likely to be a less expensive and more accessible option for such persons. The public would, in any event, continue to have the conventional mechanism of judicial review available to it.

Remedies and sanctions

82. As noted above, the orders available to the court could reasonably follow the sanctions currently available to the courts for judicial review under section 31(1) of SCA 1981, namely the option for a mandatory, prohibiting or quashing order, a declaration or an injunction.
83. Failure to comply with a court order following action by the new body would be contempt of court (as would a failure to comply with an order or undertaking in a judicial review) and the court would have inherent powers to fine, sequester or imprison if need be. Similar to current EU infringement proceedings the new body would apply to the court where it feels the court's previous order had not been complied with, and ask the court to impose an appropriate sanction. Alternatively, and more closely replicating the EU procedures, the legislation establishing the new body and its enforcement procedures could explicitly give the court or tribunal the power to impose fines where its orders have not been

complied with. Giving the court or tribunal such explicit sanctioning powers would send powerful signals, even if rarely having to be exercised in practice, of the high priority of environmental protection, its distinctive vulnerability, and the absolute importance of Government and other public bodies complying with their environmental responsibilities.

84. UKELA considers that an award of damages may not be appropriate against a public body (except, perhaps, in exceptional circumstances where a person affected by the concern raised has suffered loss as a result of the non-compliance). As with section 31(4) of the SCA 1981, these occasions are likely to be rare.
85. However, there should be the option for the court to be able to fine any non-compliant body should the new environmental body apply for such an order. This would be analogous to the current position whereby the EC can apply to the CJEU to impose a fine for non-compliance of EU law.
86. The deterrent effect of fines was referred to at paragraph 23 of UKELA's report, *Enforcement and Political Accountability Issues*. However, having a system that simply resulted in the fine being sent to central funds would have no real deterrent effect, particularly if it was a Central Government department being fined. UKELA suggests that if there is to be a mechanism for fines, then there needs to be hypothecation of the funds generated and the funds would need to be directed towards environmental benefit or use by projects as is currently the case for funds received for enforcement undertakings under the civil sanctions regime for environmental law breaches. The Big Lottery Fund would be another option. The alternative view is that if a mandatory court order is made it is unlikely Government would wish to be in contempt by failing to comply.

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UKELA Brexit Task Force Reports

The UKELA Brexit Task Force reports already available include:

- Brexit and Environmental Law: Exit from the Euratom Treaty and its Environmental Implications (July 2017)
- Brexit and Environmental Law: Enforcement and Political Accountability Issues (July 2017)
- Brexit and Environmental Law: Brexit, Henry VIII Clauses and Environmental Law (July 2017)
- Brexit and Environmental Law: the UK and International Environmental Law after Brexit (September 2017)
- Wales, Brexit and Environmental Law (October 2017)
- Brexit and Environmental Law: The UK and European Co-Operation Bodies (January 2018)
- Brexit and Environmental Law: Environmental Standard Setting outside the EU (February 2018)

These are available at: <https://www.ukela.org/brexitactivity>

Section 16 of the EU (Withdrawal) Act 2018

16 Maintenance of environmental principles etc.

(1) The Secretary of State must, within the period of six months beginning with the day on which this Act is passed, publish a draft Bill consisting of -

- (a) a set of environmental principles,
- (b) a duty on the Secretary of State to publish a statement of policy in relation to the application and interpretation of those principles in connection with the making and development of policies by Ministers of the Crown,
- (c) a duty which ensures that Ministers of the Crown must have regard, in circumstances provided for by or under the Bill, to the statement mentioned in paragraph (b),
- (d) provisions for the establishment of a public authority with functions for taking, in circumstances provided for by or under the Bill, proportionate enforcement action (including legal proceedings if necessary) where the authority considers that a Minister of the Crown is not complying with environmental law (as it is defined in the Bill), and
- (e) such other provisions as the Secretary of State considers appropriate.

(2) The set of environmental principles mentioned in subsection (1)(a) must (however worded) consist of -

- (a) the precautionary principle so far as relating to the environment,
- (b) the principle of preventative action to avert environmental damage,
- (c) the principle that environmental damage should as a priority be rectified at source,
- (d) the polluter pays principle,
- (e) the principle of sustainable development,
- (f) the principle that environmental protection requirements must be integrated into the definition and implementation of policies and activities,
- (g) public access to environmental information,
- (h) public participation in environmental decision-making, and
- (i) access to justice in relation to environmental matters.

<http://www.legislation.gov.uk/ukpga/2018/16/contents/enacted> (26 June 2018)

**Definition of environmental information in the
Environmental Information Regulations 2004**

Regulation 2 of the Environmental Information Regulations 2004

2. Interpretation

(1) In these Regulations—

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);