October 2021

Reforming the Framework for Better Regulation – Government Consultation

ClientEarth submission

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ClientEarth

Contents

Introduction

1. ClientEarth is an environmental law charity with offices in London, Brussels, Warsaw, Berlin, Madrid, Beijing, Luxembourg and Los Angeles. We use the law to fight climate change, tackle pollution, defend wildlife and protect people and the planet.

2. ClientEarth has extensive experience in domestic, international and EU environmental law and climate related financial regulation. ClientEarth has recently been involved in a number of activities that seek to defend the rule of law, promote sound environmental and climate related financial governance and ensure the public's right to participate in government decision-making and to access the courts.

    - We are advocating, in coalition with our partners, for the forthcoming Environment Act to create an independent and effective Office of Environmental Protection;
    - We have responded to the Independent Administrative Law Review Call for evidence[1] and the government's Judicial Review consultation;[2]
    - We have responded to the draft National Action Plan for the Sustainable Use of Pesticides consultation.[3]
    - ClientEarth is one of three communicants[4] of communication ACCC/C/2008/33 to the Aarhus Convention[5] and has participated in meetings before the Aarhus Convention Compliance Committee and the Meetings of the Parties on the UK's compliance with the three pillars[6] of Convention since March 2008 to date.
    - We have seconded an employee to the Department for Work and Pensions in the past two years to work on policy proposals including in connection with the climate change provisions within the Pension Schemes Act 2021 and the regulations being put in place to implement those provisions which require pension schemes to consider, manage and disclose risks and opportunities associated with climate change.

3. ClientEarth has engaged in significant environmental litigation in the English courts. Perhaps most notably, we have commenced and won three cases against the UK government regarding its compliance with air quality laws.[7] In addition, we joined RSPB and Friends of the Earth in proceedings regarding reforms to costs rules under the Aarhus Convention.[8]

[1] Ministry of Justice (IRAL Secretariat), "Does judicial review strike the right balance between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government? Call for Evidence" (September 2020).
[2] Ministry of Justice, "Judicial Review Reform Consultation – The Government Response to the Independent Review of Administrative Law" (March 2021).
[3] Defra, "Sustainable Use of Pesticides: Draft National Action Plan" (December 2020).
[4] The other joint communicants are The Marine Conservation Society and Robert Lattimer.
[5] UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters
[6] The Aarhus Convention grants the public rights against public authorities to access information, public participation and access to justice in public authority decision-making on matters concerning the environment.
[7] *R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28; *R (ClientEarth (No.2)) v Secretary of State for the Environment, Food and Rural Affairs* [2016] EWHC 2740 and *R (ClientEarth (No.3)) v Secretary of State for the Environment, Food and Rural Affairs and others* [2018] EWHC 315 (Admin).
[8] *RSPB and others v Secretary of State for Justice* [2017] EWHC 2309 (Admin).

Opening Statement

4. Before considering the specific proposals put forward by government in its consultation document,[9] we make some general comments in relation to both the consultation document and the Taskforce on Innovation, Growth and Regulatory Reform independent report (the "TIGGR report"),[10] on which the consultation proposals are informed.

The Environmental Imperative

5. According to the most recent report of the Intergovernmental Panel on Climate Change, the world is rapidly approaching a global warming level of 1.5º C as the result of human caused greenhouse gas emissions, and has the potential to warm to much higher levels unless immediate action is taken by governments and others to limit these changes.[11] Without such action, global warming on such a scale will increase the probability of heat extremes that could catastrophically impact upon agriculture and human health worldwide, as well as leading to more severe weather events and increased coastal and inland flooding, including within the United Kingdom.[12]

6. In response, the UN Secretary General has called the IPCC's report "a code red for humanity".[13] Indeed, Alok Sharma, the Government appointed President for the upcoming COP 26 UN Climate Change Conference warns that "[w]e can't afford to wait two years, five years [or] 10 years" but rather that "this is the moment" for governments to take serious action.[14] To this end, it is notable that the current legal approach for achieving a reduction in carbon emissions – government's target of reaching net zero by 2050 and its carbon budgeting duties under the Climate Change Act 2008 – is itself a "prescriptive", government-led regulatory approach to protecting the environment.

7. At the same time, the diversity and abundance of life on earth is in free fall decline due to ever-expanding and intensifying human activity, with the grave potential to cause a mass extinction of animal and plant species not seen since extinction of the dinosaurs 65 million years ago.[15] The recently published Dasgupta Review[16], commissioned by the Chancellor of the Exchequer - which considers the immense economic, social and moral value of nature set against the present scale of its destruction - makes for very uncomfortable reading in this regard.

8. The Review concludes that unless and until society properly takes the value of biodiversity and other environmental assets – also referred to as "natural capital" – into account in making economic

[9] Department for Business, Energy & Industrial Strategy, "Reforming the Framework for Better Regulation" (July 2021) ("the consultation document").
[10] Rt Hon Sir Iain Duncan Smith MP *et al*., "Taskforce on Innovation, Growth and Regulatory Reform" (May 2021) ("the TIGRR report").
[11] Intergovernmental Panel on Climate Change, "Climate Change 2021: The Physical Science Basis – Summary for Policymakers" (August 2021), pages 17-18.
[12] *Id*. at page 32.
[13] United Nations, "IPCC report: 'Code red' for human driven global heating, warns UN chief".
[14] The Guardian, "We're on the brink of catastrophe, warns Tory climate chief" (August 2021)
[15] Natural History Museum, "What is a mass extinction and are we facing a sixth one?" (Begum, T., May 2021)
[16] HM Treasury, "The Economics of Biodiversity: The Dasgupta Review – Abridged Version" (Dasgupta, P., February 2021)

decisions, sustainable development will not be achieved and natural capital will continue to be lost.[17] As with the response to the climate crisis, governments must play a key part in leading clear, positive and effective change to halt this disturbing and unacceptable trend.[18]

The Importance of Environmental Regulation

9. The ever-increasing scale and complexity of human-induced environmental impacts in today's world demands bold and effective government leadership. As reflected upon in the Dasgupta Review, economic markets inevitably fail to take account of costs to the environment that the public at large must then instead externally bear.[19] Regulation of these market activities by governments to avoid or minimise such costs is a fundamental mechanism to correct such failures and prevent externalities from arising.[20] Indeed, it is difficult to comprehend how complex environmental threats arising from a multitude of industrial sources, such as air or water quality, can even begin to be responded to in the absence of a clear, comprehensive and prescriptive, government-led regulatory approach. To the contrary, the UK as a nation has been a world-leader on the development of environmental legislation to address these threats and their attendant public costs.[21]

10. Government has recently committed to ambitious action to protecting and enhancing the UK's natural capital – including by implementing and enforcing a strong regulatory approach – in its 25 Year Environment Plan.[22] The 25 Year Plan describes how the UK's departure from the EU is not an opportunity to roll environmental protection backwards, but rather represents a "Green Brexit" in which it will "set gold standards in protecting and growing natural capital – leading the world and using this approach as a tool in decision-making."[23] An effective regulatory approach, including taking necessary enforcement action, is clearly identified throughout the 25 Year Plan as a primary pillar of achieving these gold standards.[24] The government also acknowledges "the many benefits provided by EU regulation" as a starting point to achieve such standards.[25] Accordingly, the 25 Year Environment Plan explicitly confirms government's position that a strong and effective environmental regulatory framework is the way forward in addressing the environmental imperative before us.

ClientEarth's Concerns with the Consultation Document

11. When set against the government's commitments made in its 25 Year Environment Plan, ClientEarth is concerned that the proposals set out in the consultation document, as primarily informed by the TIGRR report, may foreshadow an attempt to move away from an effective regulatory approach to protect the public interest, including in relation to environmental matters.[26] At least some of these proposals appear to represent an affirmative step towards putting the interest of potentially harmful

[17] *Id.* at, *e.g.*, page 69.
[18] *Id*. at page 80.
[19] *Id.*, at, e.g., pages 41 and 69.
[20] The Oxford Handbook of Regulation, (Veljanovski, C., 2010) at page 21.
[21] See, e.g. the Alkali Act of 1863, from which modern UK air pollution regulation has evolved.
[22] HM Government, "A Green Future: Our 25 Year Plan to Improve the Environment".
[23] *Id*. at page 9.
[24] *Id*. at *e.g.*, pages 22, 32, 33, 38, 41, 83, 91, 92, 101, 109, 122 and 150.
[25] *Id*. at page 129.
[26] The consultation document appears to acknowledge the importance of the retention of "fundamental protections" for the environment (paragraph 3.2.9), but the overall purpose document looks to be for exploring case for deregulatory approach that could ultimately threaten or undermine environmental protection in the future.

and short-term market activity over the public interest in achieving a sustainable environmental future. Indeed, the TIGRR report advises that retained EU regulations - which the Government's 25 Year Environment Plan, conversely, tell us have "many [environmental] benefits" - are instead "shed" as necessary to achieve a new UK regulatory framework with the three aims of "boosting productivity, encouraging competition and stimulating innovation" at its core.[27]

12. Our current environmental imperative, however also demands that the critical need for strong environmental protection in an age of unprecedented environmental challenges must remain at the core of the UK regulatory framework as we move forward from Brexit. As recognised by the Aldersgate Group, "while the [TIGGR] report examines areas to modernise regulation and highlights important areas of innovation, such as transport, energy and finance, it fails to adequately incorporate Government's environmental objectives and net zero ambitions, which will be essential to ensure that the UK builds back greener and creates a green industrial revolution."[28]

13. ClientEarth is concerned that the proposals now consulted on by the Government could represent the thin end of a deregulatory wedge that will (perhaps inadvertently) begin to undermine the existing legal protections that are already in place to protect the environment at this critical time, and also impede the opportunity to expand the scope of those protections as necessary. By contrast, we need a clear, comprehensive and prescriptive Government-led approach to regulating environmental impacts to achieve the "gold standards" aspired to in the 25 Year Environmental Plan, rather than starting down a road that leads to the unravelling of environmental protections.

A "common law approach" to regulation

Responsive to:

Question 1: What areas of law (particularly retained EU law) would benefit from reform to adopt a less codified, more common law-focused approach?
Question 2: Please provide an explanation for any answers given.
Question 3: Are there any areas of law where the Government should be cautious about adopting this approach?
Question 4: Please provide an explanation for any answers given.

14. It is difficult to understand what the Government is proposing in relation to the introduction of a new "common law" approach to regulation.[29] The proposal in the consultation is vague and ambiguous, and altogether lacks any clear examples or illustrations as to how this might work in practice in relation to particular sectors or areas of public interest.

15. This lack of clarity is contrary to the consultation document's opening statement that "[t]he UK has earned an international reputation as a great place to set up and scale a business, *due to its stable*

[27] TIGGR report at page 5.
[28] Aldersgate Group, "Regulatory reform needs to recognize economic benefits of ambitious climate and environmental regulations" (June 2021).
[29] Government consultation document at page 19.

and predictable regulatory environment" (emphasis added).[30] Independent evidence demonstrates that clear policies and regulations benefit UK industry by creating jobs and making those businesses increasingly competitive in the growing international markets.[31] It is self-evident, by contrast, that the implementation of a vague and ambiguous proposal to fundamentally change the existing regulatory framework with a "common law approach" - which would increasingly turn legislative control of important matters of public interest over to the discretion of individual regulators - is a recipe to make the regulatory environment *less* stable and predictable, not more so.

16. The complete lack of clarity associated with this proposal in the consultation document necessitates a search for a basic definition of "common law" in order to even begin to assess the proposal's merits (or lack thereof). The Oxford English Dictionary, for instance defines "common law" as "[t]he part of English law that is derived from custom and judicial precedent rather than statutes".[32] When this definition is considered against the consultation document's proposal, it would appear that the Government is considering a move away from the established legislative framework into a *de-regulated* space shaped by unwritten or non-binding rules, and an over-reliance on the courts.

17. We have seen this kind of approach fail the environment before. Prior to the introduction of modern environmental legislation in the latter part of the 20th century, those seeking a remedy for environmental damage were largely confined to rely upon the courts to adjudicate common law claims of trespass or nuisance.[33] This approach necessitated an evidentiary showing that damage to a particular private property interest was caused by an identifiable actor that could be brought to court.[34] However, "as environmental problems grew worse, common law adjudication of environmental disputes became less effective because proving that a particular [actor] had caused a significant harm became difficult when many different polluters contributed to an environmental problem".[35]

18. Accordingly, history makes it clear that the scale and complexity of modern environmental issues instead require the implementation of a government-led regulatory framework that safeguards the wider public interest in natural capital and protects against market externalities. The TIGGR report's fundamental assumption that this kind of prescriptive, top-level approach to regulation is somehow a unique legacy of the UK's EU membership is a red herring; independent, government-led environmental regulatory frameworks have been established outside of the EU context with regard to its domestic legal affairs in the past when the public interest required the prevention of environmental harm.

19. Examples of independent UK environmental regulation that *preceded* the arrival of EU legislation include:

[30] *Id*. at page 6.
[31] See, e.g., Aldersgate Group, "Help or Hindrance? Environmental Regulations and Competitiveness", (December 2017.
[32] https://www.lexico.com/definition/common_law
[33] The Oxford Handbook of Regulation (Driesen, D. 2010) at page 204.
[34] *Id*.
[35] *Id*.

- The Alkali Act of 1873, the first systemic attempt to control air pollution in the UK, from which modern UK air pollution policy has evolved;[36]
- The National Parks and Access to the Countryside Act 1949, which provided the framework for the creation of national parks and addressed public rights of way and public access to common land;
- The Water Resources Act 1963, which established regional river authorities, with various regulatory functions including pollution control and the new system of licensing water abstraction[37];
- The Control of Pollution Act 1974, which addressed a variety of environmental issues, including waste on land, water pollution, abandoned mines, noise pollution and the prevention of atmospheric pollution.[38]

20. In the absence of any regulatory framework, a number of negative environmental impacts have gone more or less completely unaddressed notwithstanding the continued existence of "common law" mechanisms within our legal system. For example, despite the significant natural capital associated with soils, "they are virtually ignored when compared to issues such as air quality, water quality and biodiversity" in terms of statutory protection.[39] As a result the health of our soils continue to degrade, with significant negative consequences for carbon release, water quality and food production.[40] It is safe to say that the "common law" has not done anything to address these issues in any meaningful, widespread or systemic way in terms of the public interest in the environment.

21. On a separate note, we believe that Government should think very carefully as to whether its proposal for a "common law" approach will in fact set the stage for increased reliance on the courts, including by way of judicial review of administrative decisions that are not assessed against clear and prescriptive legislative criteria. This could increase the cost burden of resolving environmental disputes for both the public and private sectors, contribute to greater inefficiency and administrative distraction within public authorities and lead to inconsistent results for our critically threatened environment. We submit, by contrast, that a clear, comprehensive and prescriptive environmental regulatory framework allows for more predictability for both businesses and government, supports a level playing field for economic competitors, and reduces the need for costly resort the courts.

22. In sum, given the current environmental imperative, ClientEarth submits that we cannot rely on a historically ineffective legal approach to complex and challenging environmental issues in which the whole of the UK public has a stake. Accordingly, the Government should not entertain, much less adopt, a "common law" approach in relation to the environment, but instead continue to maintain and evolve a strong, and appropriately prescriptive, regulatory framework, as committed to within its own 25 Year Environment Plan.

[36] Environment & Society Portal, England passes first Alkali Acts | Environment & Society Portal (environmentandsociety.org).
[37] Environmental Law, Ninth Edition (S. Bell et al, 2017) at page 619.
[38] *Id.* at page 178.
[39] Natural Capital Committee, "Advice on Soil Management" (May 2019) at page 5.
[40] *Id*. at pages 2-3.

Adopting a proportionality principle

Responsive to:

> *Question 5: Should a proportionality principle be mandated at the heart of all UK regulation?*
> *Question 6: Should a proportionality principle be designed to 1) ensure that regulations are proportionate to the level of risk being addressed and 2) focus on reaching the right outcome?*
> *Questions 7: If no, please explain alternative suggestions.*

The proportionality principle should not be expanded to undermine environmental protection

23. The consultation document proposes that a "new Proportionality Principle" should apply to "all" UK regulation and even completely replace the application of the precautionary principle in some areas.[41] Characterising the proportionality principle as "new" is somewhat confusing, as proportionality has a long history of application in both the EU[42] [43] and international law[44], including in a manner that gives weight to the health and importance of market activities[45] and complements the application of other regulatory principles, including the precautionary principle.

24. This being the case, we are concerned that the use of the word "new" indicates a fundamental change to the content of the proportionality principle, to either seriously erode or eliminate public interest protections, including the application of the precautionary principle, in favour of enabling harmful market activities. Although the Government appears (at this time) to be excluding the environment from this approach,[46] ClientEarth is concerned that, as with the Government's proposed "common law approach", this could represent an initial step towards an erosion of hard-fought progress on the legal protection of the environment achieved over many decades.

25. The TIGRR report's proposal for a "new" proportionality principle that makes "regulation proportionate to both *the scale of the risk being mitigated*, and *the capacity of the organisation being regulated*"[47] (emphasis added) – echoed at paragraph 3.1.14 of the consultation document -- is particularly disturbing in this regard. Lack of scrutiny over the cumulative effect of small scale environmental impacts invites a "death by a thousand cuts" outcome for the environment. One needs to look no further than the cumulative effects of small-scale activities that are poorly regulated, if at all, such as

[41] Consultation document at page 21.
[42] See, *e.g.*, Article 5 of Protocol No. 2 to the Treaty on the Functioning of the European Union.
[43] The European Court of Justice recently summarised the position in *Exxonmobil Petroleum & Chemical v ECHA* (Case T-177/19): "according to settled case law, the principle of proportionality, which is part of the general principles of EU law, requires that EU measures do not exceed the limits of what is appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question, it being understood that, when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued."
[44] See, *e.g.*, the *Gabčíkovo-Nagymaros Project* case (Hungary/Slovakia) (1997)
[45] See, *e.g.*, *Criminal proceedings against Fidenato and others* (Case C-111/16).
[46] See, *e.g.*, consultation document at 3.1.13.
[47] TIGGR Report at page 6.

the pollution of waterbodies from diffuse sources to see the negative cumulative impact that these activities have brought about in modern times, including within the UK.[48]

26. For this reason, ClientEarth is extremely concerned that the Government's proposals might set the stage for eventually dismantling those regulatory frameworks that currently require cumulative impacts to be considered in the course of assessing environmental impacts. Clearly, regulation addressing a cumulatively significant risk resulting from multiple sources cannot be considered disproportionate because of the individual sources' scale or capacity – the question is whether the proposed regulatory measures are proportionate to *the objective being pursued*, i.e., the prevention of collective and widespread environmental damage.

The precautionary principle should not be compromised on matters affecting the environment

27. The consultation document suggests that the "new Proportionality Principle" advocated by the TIGRR report might be used to reduce or eliminate the application of the precautionary principle in some regulatory areas, without providing actual evidence as to why this is necessary or justified.[49] To be clear, the precautionary principle, which also has longstanding application in international law [50] – and is by no means a unique attribute of EU law – is of fundamental importance for the protection of the environment. For example, the 1992 Rio Declaration on Environment and Development, in relation to which the UK is a direct signatory, defines the precautionary principle as such:

> In order to protect the environment … [w]here 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.[51]

28. In essence, this means that development should not proceed in a way that adversely affects the environment where there is scientific doubt about the nature of those potential negative impacts. The burden of demonstrating that development should proceed due to the absence or the avoidance of negative environmental impacts falls upon the proponent of the activity.[52] It is also the case that precautionary measures must be proportionate to the regulatory aim pursued, with the two principles applying in a complementary way.[53] As applied, the precautionary principle therefore does not prohibit innovation or economic growth; it instead promotes reflection in the face of uncertainty and guides decision-making in the direction of sustainable development and the protection of the public interest.

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[48] OECD, *Diffuse Pollution, Degraded Waters: Emerging Policy Solutions*, at pages 4-5 (March 2017).
[49] *Id*.
[50] See, *e.g.*, the 1992 *Convention on Biological Diversity*, the 1992 *United Nations Framework Convention on Climate Change*, the 1994 *Protocol to the 1979 Convention on Long-range Transboundary Air Pollution on Further Reduction of Sulphur Emissions* and the *1996 London Protocol to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, all of which the United Kingdom are independently committed, irrespective of prior EU membership, as a ratifying party.
[51] See Principle 15 of the Declaration.
[52] International Institute for Sustainable Development, *Earth Negotiations Bulletin*, "Still Only One Earth: Lessons from 50 years of UN Sustainable Development Policy" (Pinto-Bazurco, J., October 2020).
[53] See, e.g., the Treaty on the Functioning of the European Union, where both principles are established as core principles of EU law.

29. For the above reasons, ClientEarth is of the view that the erosion or abandonment of the precautionary principle in relation to the environment (and indeed in relation to public interest matters generally) is a retrogressive step that is not compatible with the critical and complex environmental challenges that we currently face. The proportionality principle, as it currently stands in law, already ensures that environmental protection measures do not have a disproportionate economic impact. We strongly oppose further expansion of the proportionality principle, now or in the future, to prioritise harmful economic interests over the safeguarding of the public interest in the environment, whether by way of the erosion of the precautionary principle or otherwise.

Delegating discretion to regulators to achieve regulatory objectives/Accountability of regulators

Responsive to:

> *Question 11: Should the Government delegate greater flexibility to regulators to put the principles of agile regulation into practice, allowing more to be done through decisions, guidance and rules rather than legislation?*
> *Question 14: If greater flexibility is delegated to regulators, do you agree that they should be more directly accountable to Government and Parliament?*
> *Question 15: If you agree, what is the best way to achieve this accountability? If you disagree, please explain why?*
> *Question 17: Should there be independent deep dives of individual regulators to understand where change could be introduced to improve processes for the regulated businesses?*

30. A striking feature of the changing landscape of environmental law and governance post-Brexit is the increasing reliance on particular types of administrative guidance, for example policy statements and decisions, that are not created through any law-making process. This has implications for both the enforcement of environmental rules and the scrutiny process through which they are established. Whilst policy statements, guidance and other instruments may be appropriate for some areas of policy, they are not subject to effective forms of Parliamentary scrutiny, transparency and stakeholder engagement in decision-making. There is therefore a large risk that delegating greater flexibility to regulators, allowing more to be done through decisions, guidance and rules instead of legislation, will result in less transparent and accountable decision-making and ultimately worse outcomes for the environment in the UK.

31. The Brexit bills, including the Environment Bill[54] and the Fisheries Act[55], are examples of the risks of overreliance on guidance and rules rather than legislation. Both the Environment Bill and the Fisheries Act are framework pieces of legislation, with much of the detail and substantive policy implemented via policy statements and other law and policy instruments. In relation to the Fisheries Act, vital environmental provisions that should have been in primary legislation given their importance (such as a commitment to fish at sustainable levels, which was previously a legally binding commitment under

[54] https://bills.parliament.uk/bills/2593
[55] Fisheries Act 2020, https://www.legislation.gov.uk/ukpga/2020/22/enacted

EU law)[56] were relegated to a policy statement instead, which can be disregarded in a wide range of circumstances. This means that it is much more difficult to hold authorities to account if they breach these important commitments, which undermines trust in regulators and the rule of law.

32. Similarly, the Environment Bill provides for an Environmental Principles Policy Statement that Ministers must have due regard to in the formation of policy.[57] This approach is far weaker than the application of the environmental principles under EU law, where they are used by the courts to interpret and apply EU environmental law.[58] Relegating these principles from legislation to a policy statement could undermine their value in shaping the interpretation of environmental law in important areas, including the requirement that polluters bear the financial cost of their actions and the prevention of environmental damage. Offering greater flexibility to regulators by allowing more to be done through similar tools, such as decisions, guidance and rules, therefore risks undermining the application of important environmental commitments in the UK.

33. It is important to note that much environmental law is technical and fast-changing, where policy statements, decisions and guidance may be the most appropriate and sensible mechanism by which to establish rules that can quickly react to a changing environment. However, by relegating certain matters to guidance and decisions and giving greater flexibility to regulators makes it difficult to enforce the relevant standards. In addition, there is potential for very little scrutiny without the formal scrutiny and consultation processes associated with primary legislation, with greater discretion being increasingly accorded to decision-makers in how policy statements, guidance and other instruments are to be interpreted.

34. One example of where the lack of legislative prescriptiveness has led to overly-wide discretion on the part of a regulator – to the potential detriment of the environment – is in the oil & gas extraction and production context. In revising its Maximum Economic Recovery UK Strategy in 2020[59], it is ClientEarth's considered view that the Oil and Gas Authority failed to incorporate adequate provisions to ensure that levels of oil and gas extraction in the UK are consistent with the UK's achieving the 1.5ºC temperature goal under the Paris Agreement, and in turn to ensure, among other things, that the UK meets its human rights law obligations in the context of climate change. It has also so far not ensured that its approach to regulating operational emissions – including through the issuing of venting and flaring consents – is adequate to secure emissions reductions consistent with the UK's net zero target. It is concerning to realise that, with respect to one of the primary environmental crises of our times, sufficient action is still not being taken by a lead regulator, a state of affairs that is attributable to a lack of legislative prescriptiveness and oversight.

35. In another example, the diffuse pollution of the UK's waterways remains a very serious problem[60] *despite* the existence of a relatively prescriptive regulatory regime, due to the failure of the Environment Agency (the "EA") to take meaningful monitoring and enforcement action. As of 2021, it

[56] Article 2 of Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, which can be found at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013R1380

[57] Clauses 18 to 20 of the Environment Bill, as amended at Lords Report Stage.

[58] See, i.e., Article 191(2) of the Treaty of the Functioning of the European Union, which provides for the precautionary, prevention, rectification at source and polluter pays principles and can be found at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT.

[59] The MER Strategy was consulted on by the OGA in May of 2020 and was responded to by ClientEarth. The final strategy as adopted is referred to as the *OGA Strategy* (2021).

[60] See paragraph 25, *infra*.

appears to be the case that the EA has taken very little enforcement action (including no prosecutions or fines issued) in relation to The Reduction and Prevention of Agricultural Diffuse Pollution Regulations 2018, which aim to limit harm to waterbodies from poor agricultural land management practices.[61] This is despite hundreds of EA documented breaches of these regulations and the likelihood that many, many more have actually occurred.[62] In addition, despite a statutory requirement for Defra to review and report on the achievement of environmental objectives (or lack thereof, as appears to be the case) by April of 2021[63], no such report has been completed.[64] This is not only a clear example of where too much regulatory discretion and too little accountability have dire environmental consequences, but also demonstrates a disproportionate regulatory approach *in favour* of harmful economic activities over environmental protection when considering the lack of monitoring and enforcement action against the vast number of detected and likely potential breaches.

36. 'Better regulation' for the environment should mean robust and ambitious rules that better protect the environment. Parliament should have a meaningful role in decision-making, public engagement and consultation should be effective and rules should be transparent and clear. In addition, there should be mechanisms to allow authorities and other actors to be held to account on the implementation of and compliance with environmental rules.

37. In order to achieve the Government's intention to leave the environment in a better state than that in which it was found[65], and to help deliver the UK's international legal commitments (for example the Sustainable Development Goals[66] and the Paris Agreement[67]), primary legislation should continue to be used for the most important environmental rules, with greater flexibility accorded to regulators only where the requirements highlighted above in relation to transparency, accountability and certainty are adequately met.

38. Finally, the UK's obligations under the Aarhus Convention are also relevant here. The Aarhus Convention provides an international framework for ensuring access to information, public participation and access to justice in environmental matters. There is a clear risk that giving greater discretion to regulators will undermine the rights granted to members of the public in the Convention, particularly under Article 6 where for example a regulator reconsiders or updates permit conditions through its discretion or if the decision may have significant effect on the environment.

[61] The Guardian, "Revealed: no penalties issued under 'useless English farm pollution laws" (February 2021).
[62] *Id*.
[63] Regulation 16 of the The Reduction and Prevention of Agricultural Diffuse Pollution Regulations 2018 (SI 2018/151).
[64] As confirmed by the Defra Information Rights Team in response to Freedom of Information request EIR2021/21714 from Guy Linley-Adams (27 September 2021).
[65] See for example commitments set out in the 25 Year Environment Plan, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/693158/25-year-environment-plan.pdf
[66] https://sdgs.un.org/goals
[67] https://unfccc.int/sites/default/files/english_paris_agreement.pdf]

Revising the process and requirements of better regulation/Scrutiny of regulatory proposals/Measuring the impact of regulation: reviewing the BIT/Regulatory offsetting: One-in, X-out

Responsive to:

> *Question 18: Do you think the early scrutiny of policy proposals will encourage alternatives to regulation to be considered?*
> *Question 20: Should the consideration of standards as an alternative or compliment to regulation be embedded into this early scrutiny process?*
> *Question 21: Do you think that a new streamlined process for assessing regulatory impacts would ensure that enough information on impacts is captured?*
> *Question 23: Are there any other changes you would suggest to improve impact assessments?*
> *Question 24: What impacts should be captured in the Better Regulation Framework?*
> *Question 25: How can these objectives be embedded into the Better Regulation Framework?*
> *Question 28: Which of these options would ensure a robust and effective framework for scrutinising regulatory proposals?*
> *Question 29: Which of the four options presented would be better to achieve the objective of striking a balance between economic growth and public protections?*
> *Question 30: Should a One-in-X-out approach be reintroduced in the UK?*

39. ClientEarth is concerned about the Government's proposals in relation to the expansion of self-regulation, including through voluntary standards, by way of implementing changes the regulatory impact assessment process. Indeed, the Government appears to suggest that expansion of this approach is an effective and reliable alternative way to protect the environment by referring to self-regulation as a mechanism "whereby market participants agree to adopt behaviour consistent with public policy objectives, such as … environmental sustainability."[68]

40. To the contrary, there are serious downsides to this kind of approach for the environment, including the lack of legal enforcement mechanisms, a lack of public transparency and accountability, and the development of an unequal playing field, in which some businesses choose to self-regulate and some do not.[69] These risks are comparable to those that could be brought on by the Government's proposals for expanding regulator discretion; in both cases, the lack of a sufficiently clear and prescriptive regulatory framework, overseen by both Parliament and Government, could have serious negative implications for the environment in an age where the Government should be doing all it can to ensure its protection and enhancement.

41. ClientEarth also finds the proposals for regulatory offsetting – i.e., the "one-in, X-out" approach to be a crude and arbitrary a mechanism for making environmental regulation more clear or efficient from a business perspective, whilst still keeping critical public interest protections in place. Rather, we advise that the scale and risks associated with the current environmental imperative – described in our Opening Statement,[70] should be placed on equal footing with those related to key public safety

[68] Consultation document at page 28.
[69] *Environmental Law*, (Bell, S*. et al*) at page 256.
[70] *Supra.*

regulations, which the Government proposes to *exclude entirely* from regulatory offsetting.[71] An arbitrary approach to the review of environmental regulations is just not fit for purpose in this day and age of critical environmental concern.

42. Despite having many concerns about the proposals set out in the Government's consultation, there may be real opportunity to elevate the importance of the environment within the scope of regulatory impact assessment and review processes in a way that promotes responsible, Government-led leadership to address the current environmental imperative. For example, a mandatory requirement to effectively consider the full value of natural capital in relation to measuring the impact of regulation, would go some way towards implementing the findings of the government-commissioned Dasgupta report to ensure that the public interest in the environment is given the proper weight that it is due in the regulatory assessment context, as opposed to business impacts being the sole or primary interest being measured. Accordingly, the Government should ensure that any reform in this area puts the protection and enhancement of the environment at the heart of the approach.

Conclusions

43. ClientEarth is concerned that the proposals contained within the Government's consultation document, as informed by the May 2021 Taskforce on Innovation, Growth and Regulatory Reform, could lead to a deregulatory initiative to reduce public interest protections, including in respect of the environment, in favour of promoting harmful market activities.

44. Several of the main proposals, including the introduction of a "common law" approach to regulation and the introduction of a "new" proportionality principle, are completely unhelpful in terms of ensuring that strong regulatory frameworks remain intact, or may be expanded as necessary, to ensure that the unparalleled 21st century environmental challenges that we face are capable of being addressed. ClientEarth opposes these particular proposals and strongly recommends that the Government does not take them forward in respect of the environment.

45. The Government should consider the proposal to delegate more discretion to regulators with extreme caution. Whilst greater flexibility may be sensible in some circumstances, over-delegating flexibility to regulators by allowing more to be done through decisions and guidance rather than legislation risks less transparent and accountable decision-making, as well as making it more difficult for industry to understand the decisions, manage the risks and comply with the obligations. Further the public are left without a voice in such decision-making and their rights under the Aarhus Convention are undermined. This seriously risks poor, unreliable and inconsistent outcomes for environmental protections in the UK.

46. We support increased regulator accountability *in addition* to retaining and improving upon a strong regulatory framework that is clear and prescriptive. It is clear that UK environmental regulators, such as the Environment Agency and others have underperformed in the past due to funding cuts and by already having too much discretion, for example when it comes to enforcing regulations. The consultation's proposal to conduct "deep dives" into regulator performance in this respect makes some sense, provided this is done in an open and transparent way and leads to effective public engagement

[71] Government consultation at page 37.

and reporting. It is of course also critical that the objective of better environmental protection leads such processes.

47. Finally, there is similar merit to ensuring that *mandatory* consideration of the environment is at the heart of any regulatory impact assessment and/or review reform that is progressed following on from this consultation to ensure that regulatory assessments and reviews are not one-sided in favour of business costs and benefits only. Government should show leadership in giving real consideration as to how this can be achieved in order to ensure that the full value of natural capital is given proper weight in relation to such exercises.

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