

# European Scrutiny Committee's Call to Evidence on Regulating after Brexit

ClientEarth Submission

---

## Contents

<b>Executive Summary .....</b>	<b>2</b>
<b>Introduction .....</b>	<b>3</b>
<b>Response to questions.....</b>	<b>5</b>
<b>Question 1. How was the UK's regulatory autonomy constrained when it was an EU Member State?.....</b>	<b>5</b>
<b>Question 2. After Brexit, how can the UK now regulate differently? .....</b>	<b>5</b>
<b>Question 3. How is the Government regulating differently since EU exit and how could the process of doing so be most effectively undertaken? .....</b>	<b>8</b>
<b>Question 4. What restrictions are there on the UK's regulatory autonomy as a result of commitments in the UK/EU Withdrawal Agreement and the UK/EU Trade and Cooperation Agreement?.....</b>	<b>9</b>
<b>Question 7. In which sectors is the UK well placed to maximise the opportunities afforded by its newfound regulatory autonomy and, conversely, in which areas might diverging from the EU prove more challenging? .....</b>	<b>10</b>
<b>Question 8. Of the priority sectors highlighted by the Committee (agriculture, data and financial services), where and how should the UK diverge from EU rules? .....</b>	<b>11</b>
<b>Question 9. Should the Government adopt a particular approach to regulating in areas previously governed by EU rules? .....</b>	<b>11</b>

## Executive Summary

- Regulation is needed to protect the environment because economic markets inevitably fail to take account of costs to the environment caused by pollution and other environmental harm.
- The government has made numerous commitments to strengthen environmental protection on leaving the EU in order to deliver a “Green Brexit”. The UK is also obliged to apply the internationally recognised environmental principles under the Environment Act 2021 and the UK/EU Trade and Co-operation Agreement.
- The regulatory framework relating to pollution from agriculture could be strengthened in several ways. These include filling in gaps in the existing regulatory framework (for example, concerning ammonia emissions and protecting soil health) and adopting a more integrated economy-wide approach to the control of nitrogen pollution. The control of pesticides could also be improved by ensuring that the regulatory framework is more transparent and makes better use of the environmental principles and the latest scientific knowledge.
- ClientEarth is concerned with the recent trend towards deregulation that the government appears to have adopted after Brexit with regards to the control of pollution from agriculture. A large proportion of retained EU law relates to the protection of the environment and there is a danger that this may be weakened or replaced with statutory guidance, self-regulation and voluntary schemes.
- While guidance, policy statements and private accreditation schemes can be useful in promoting environmental standards, they are not an adequate substitute for a regulatory framework to set and enforce environmental protection. Reliance on non-regulatory measures can also hinder accountability, transparency and public participation. Voluntary government schemes with outcome-based payments such as ELMS have the potential play a significant part in promoting environmental enhancement but will be most effective when implemented alongside an improved regulatory regime for environment protection.
- There has also been a lack of enforcement action in relation to regulations to control pollution from agriculture which has rendered existing regulations largely ineffective.
- Now that the UK has left the EU, the government should stand by its commitments to strengthen environmental protection by adopting a more comprehensive, transparent and joined-up approach to regulation. To ensure its effectiveness, this improved regulatory framework should reflect consultations with relevant stakeholders and be implemented alongside advice, guidance, incentives and a robust system of inspection and enforcement.

## 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. ClientEarth has recently been involved in a number of activities that seek to defend the rule of law, promote sound environmental governance and ensure the public's right to participate in government decision-making and to access the courts.
3. ClientEarth welcomes the opportunity to respond to the European Scrutiny Committee's call for evidence on "Regulating after Brexit". For the purpose of this response, we have focused our answers and the examples we have provided on the core theme of regulating pollution from agriculture in England. We believe that agriculture is an area of critical priority when evaluating the current regulatory landscape in England due to its significant environmental impacts on air quality, water quality, biodiversity and public health.

### *The environmental imperative*

4. This is a time of critical importance for the environment in the UK. As highlighted in the Office for Environmental Protection's (OEP) recent report "Taking stock: protecting, restoring and improving the environment in England", the UK is now one of the most biodiversity depleted countries in the world.<sup>1</sup> Poor air quality is now responsible for between 28,000 and 36,000 premature deaths a year in the UK due to long-term exposure to pollution<sup>2</sup> while a recent report by the NAO has found that the government has been too slow to act and is not doing enough to protect people's health.<sup>3</sup>
5. The state of England's rivers is in rapid decline due to an unsustainable build-up of nutrients from agricultural sources, sewage and plastic waste which is placing significant pressure on eco-systems and public health. According to a recent report by the Environmental Audit Committee<sup>4</sup>, the health of our rivers is "hampered by outdated, underfunded and inadequate monitoring regimes. Last year, the Dasgupta Review of the economics of biodiversity<sup>5</sup> concluded that unless and until society properly acknowledges the value of biodiversity and other environmental assets ("natural capital") when

---

<sup>1</sup> Based on a Biodiversity 'Intactness' Index. Natural Environment Research Council (NERC), State of nature 2016, (2016), <http://nora.nerc.ac.uk/id/eprint/516567/> referenced in, The Office for Environmental Protection, Taking stock: protecting, restoring and improving the environment in England, (2022),

<https://www.theoep.org.uk/report/taking-stock-protecting-restoring-and-improving-environment-england>  
<sup>2</sup> Public Health England, Review of interventions to improve outdoor air quality and public health, (2019), <https://www.gov.uk/government/publications/improving-outdoor-air-quality-and-health-review-of-interventions>

<sup>3</sup> <https://www.nao.org.uk/report/tackling-local-breaches-of-air-quality/>

<sup>4</sup> House of Commons Environmental Audit Committee, Water quality in rivers Fourth Report of Session 2021–22, (2022), <https://publications.parliament.uk/pa/cm5802/cmselect/cmenvaud/74/summary.html>

<sup>5</sup> HM Treasury, "The Economics of Biodiversity: The Dasgupta Review – Abridged Version" (Dasgupta, P, February 2021)

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/957292/Dasgupta\\_Review\\_-\\_Abridged\\_Version.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/957292/Dasgupta_Review_-_Abridged_Version.pdf)

making economic decisions, the environment will continue to decline, with the potential for this decline to result in a mass extinction of animal and plant species.<sup>6</sup>

*The importance of environmental regulation and government's existing commitments*

6. As set out in the Dasgupta Review, economic markets inevitably fail to take account of costs to the environment with the result that the public at large must then externally bear these costs. Regulation of these market activities by governments is needed to correct these failures in order to avoid or minimise the costs to the environment.
7. The government has recognised this need to regulate environmental protection in its 25 Year Environment Plan (25 YEP) which was published in 2018.<sup>7</sup> In this document, the government has committed to a range of ambitious plans to protect and enhance the environment, including a commitment to implement and enforce a strong regulatory regime. The government acknowledges the need for a “balance of incentives and regulations” to harness Brexit opportunities, adding that some of the goals set out in the plan “derive from our membership of the EU while others go further than EU rules require.”<sup>8</sup> The 25 YEP also describes how the UK’s departure from the EU represents an opportunity for a “Green Brexit” in which it will set “gold standards in protecting and growing natural capital”.<sup>9</sup> An effective regulatory approach, including taking enforcement action where necessary, is identified throughout the 25 YEP as a primary means to achieve these gold standards.
8. In the UK/EU Trade and Co-operation agreement, the UK government has committed to respecting the internationally recognised environmental principles which are also contained in the Environment Act 2021.<sup>10</sup> The draft Environmental Principles Policy Statement also notes the new opportunity afforded by leaving the EU to “strengthen environmental protection and enhancement” and review historic EU rules and processes “to ensure our regulations work for us.”<sup>11</sup>
9. The government reiterated these sentiments in relation to agriculture and land management in a policy paper from 2020, which highlighted the opportunity that leaving the EU brings to reform the regulatory system for farming and land management “to better meet the country’s needs.”<sup>12</sup> The policy paper responded to Dame Glenys Stacey’s independent review of farm inspection and regulation, acknowledging the need to “make regulation more joined up, transparent and consistent” and underpinned by a “robust system of inspection and enforcement.”<sup>13</sup>
10. The Clean Air Strategy 2019 also contains commitments to introduce a new regulatory framework to reduce ammonia pollution from agriculture (see response to Question 2 below).<sup>14</sup> Furthermore, the government has committed to ensuring that after Brexit “the regulation of pesticides continues to develop with scientific knowledge and is robust and fit for purpose, so as to protect people and the environment.”<sup>15</sup>

---

<sup>6</sup> *ibid* pp. 69

<sup>7</sup> HM Government, “A Green Future: Our 25 Year Plan to Improve the Environment” (2018)

<sup>8</sup> *ibid* pp. 22, 24

<sup>9</sup> *ibid* pp. 9

<sup>10</sup> Section 17

<sup>11</sup> Draft Environmental Principles Policy Statement (May 2022)

<sup>12</sup> [Farming for the future: Policy and progress update \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/105442/farming-for-the-future-policy-and-progress-update.pdf)

<sup>13</sup> *ibid*, pp. 29

<sup>14</sup> HM Government, “Clean Air Strategy” (2019) pp. 71

<sup>15</sup> HM Government, “A Green Future: Our 25 Year Plan to Improve the Environment” (2018) pp. 41

## Response to questions on regulating after Brexit

### **Question 1. How was the UK's regulatory autonomy constrained when it was an EU Member State?**

11. When the UK was an EU Member State, the requirement to align UK legislation with EU rules resulted in the introduction of an important set of standards of environmental protection across a range of areas including the improved regulation of water and air pollution to protect the health of people and the environment.
12. For example, the Water Framework Directive led to the introduction of new regulations to control water pollution in the UK. The Water Framework Directive, which was transposed into domestic law by the Water Environment (Water Framework Directive) Regulations 2017, aims to achieve 100% of all surface water bodies at good ecological status by 2027.<sup>16</sup> The Farming Rules for Water 2018<sup>17</sup> were introduced to restrict the spreading manure and other fertilisers in England in order to address the impact of diffuse pollution from agriculture on water quality.
13. The regulations noted above represented an important step in developing the control of water pollution in England. Unfortunately, these regulations have not yet been successful in achieving their goal and as of 2019, only 16% of water bodies in England meet good ecological status and 0% meet good chemical status.<sup>18</sup> The failure of the Farming Rules for Water to reduce water pollution in England appears to be largely due to a lack of monitoring and enforcement<sup>19</sup> (see response to Question 3 below) rather than due to constraints on the UK's regulatory autonomy. Now that the UK has left the EU, a stronger and more ambitious regulatory framework is urgently needed to protect the environment, including in relation to pollution from agriculture.

### **Question 2. After Brexit, how can the UK now regulate differently?**

14. As stated in the 25 YEP, leaving the EU has provided the UK with an opportunity to improve and strengthen environmental protection and deliver a "Green Brexit". The existing regulatory framework in England to reduce pollution from agriculture could be improved in several ways to make the regulations more effective in protecting the environment and people's health. We have set out some specific examples below of how the regulatory framework could be improved.

#### *An improved framework to reduce nitrogen pollution*

15. Nitrogen pollution is causing significant harm to water, air, the climate, biodiversity and soil health from a range of sectors including agriculture, transport and energy. There is now a pressing need to develop an improved approach to the regulation of nitrogen in the form of a more joined-up approach, filling in gaps in legislation and applying the polluter pays principle.

#### A joined-up approach to regulation

16. Nitrogen pollution has so far been addressed by targeting specific pollution pathways and sectors separately. For example, regulations have been introduced to control nitrogen pollution from manure

---

<sup>16</sup> Water Framework Directive (2000/60/EC)

<sup>17</sup> The Reduction and Prevention of Agricultural Diffuse Pollution (England) Regulations 2018

<sup>18</sup> [State of the water environment indicator B3: supporting evidence - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/state-of-the-environment-indicator-b3-supporting-evidence)

<sup>19</sup> [Revealed: no penalties issued under 'useless' English farm pollution laws | Farming | The Guardian](https://www.theguardian.com/environment/2019/dec/12/revealed-no-penalties-issued-under-useless-english-farm-pollution-laws)

and other fertilisers (the Farming Rules for Water 2018) and to require a reduction in total emissions of ammonia (The National Emissions Ceilings Regulations 2018). However, the current regulatory approach has thus far resulted in minimal progress in reducing nitrogen pollution. This is largely because of the siloed and piecemeal approach taken to addressing nitrogen pollution which has resulted in gaps in the regulatory framework. There has also been a lack of enforcement of regulations relating to diffuse pollution from agriculture (see response to Question 3 below).

17. The Environmental Audit Committee recognised this issue in its report on Nitrates in 2018 (the “Nitrates Report”) which noted that “The Government should seek to ensure that various EU Directives and regulations are aligned and do not result in a siloed approach to individual pollutants but address them in their totality.”<sup>20</sup> In response to this report, the government acknowledged the potential to develop a more joined-up approach to nitrogen regulations after the UK’s exit from the EU. It indicated that it would conduct a statutory review of the Nitrate Pollution and Prevention Regulations 2015, the Farming Rules for Water 2018 and the Clean Air Strategy 2019 to evaluate how these regulations can be improved.<sup>21</sup>
18. There is a growing need for a comprehensive, cross-government overarching framework for addressing nitrogen pollution across the economy, which integrates regulation to reduce the impacts of nitrogen waste on air, water, climate and biodiversity. A full-system approach will enable the co-benefits of different policy interventions across sectors to be realised and ensure that trade-offs are minimised. An integrated regulatory regime should also be combined with advice, incentives and effective enforcement of the regulations.

#### Filling in gaps in the regulatory framework

19. Leaving the EU also provides an opportunity to fill in some of the major gaps in the control of nitrogen pollution, such as the regulation of ammonia emissions which are associated with widespread air pollution in England. A comprehensive baseline for regulating ammonia emissions is needed to fill this gap, as highlighted in the 2018 25 YEP, the 2019 Clean Air Strategy, and the 2020 Agriculture Transition Plan.<sup>22</sup> In the 25 YEP, the government acknowledged the need to reduce harmful ammonia emissions from agricultural practices through the implementation of a “robust framework to limit inputs of nitrogen-rich fertilisers such as manures, slurries and chemicals to economically efficient levels and to make sure they are stored and applied safely.”<sup>23</sup> Similarly, in the Clean Air Strategy 2019, the government made a commitment to reduce emissions from urea-based fertilisers and to introduce legislation to achieve this “in the shortest possible timeframe.”<sup>24</sup> However, these regulations have not been introduced. Instead, the proposed regulatory approach has been abandoned in favour of voluntary industry-led measures and consequently, a significant gap remains in the regulatory framework to control ammonia emissions from agriculture (see response to Question 3 below).

#### The polluter pays principle

---

<sup>20</sup> Environmental Audit Committee. (2018). UK Progress on Reducing Nitrate Pollution: Government Response to the Committee’s Eleventh Report - Environmental Audit Committee - House of Commons (parliament.uk)

<sup>21</sup> UK Progress on Reducing Nitrate Pollution: Government Response to the Committee’s Eleventh Report - Environmental Audit Committee - House of Commons (parliament.uk)

<sup>22</sup> HM Government, ‘The Path to Sustainable Farming: An Agricultural Transition Plan 2021 to 2024’ (2020)

<sup>23</sup> See the 25 Year Plan at pp. 38 & 39.

<sup>24</sup> Defra (2019) Clean Air Strategy 2019 at pp. 71 & 72

20. The polluter pays principle<sup>25</sup> should be embedded into the regulatory framework to ensure that those responsible for environmental harms are held to account and to deter breaches of rules from occurring again in line with the draft Environment Principles Policy Statement and as reiterated in the 25 YEP.<sup>26</sup> There is concern that the government's current trend towards voluntary and non-regulatory approaches to environmental protection (see response to Question 3 below) will not ensure proper accountability for the root causes of environmental degradation.

### *Control of the use of pesticides*

21. Another area where a more comprehensive regulatory approach is urgently needed is in relation to the control of pesticides. Pesticides can cause an array of harmful impacts, reducing soil and water quality, driving species decline and putting human health at risk. The current system of pesticide control and authorisation is not transparent and does not go far enough to protect the environment. Independent research has shown that pesticides are having a harmful impact on pollinators and disrupting food webs, killing plants and insects and removing weed seeds from the environment, which may be essential food or habitat for other wildlife. Water companies also spend large amounts of money every year removing pesticides from drinking water.<sup>27</sup>
22. Following the UK's departure from the EU, we recommend that the government takes the opportunity to adopt an improved, comprehensive and world-leading approach to the control of pesticides, that is based on the following:
23. The precautionary principle. Where there is insufficient information available, decisions relating to the authorisation of pesticides should be made in accordance with the precautionary principle<sup>28</sup> to avoid undue risk to the environment and public health. It should be up to the pesticide manufacturers to demonstrate that the authorisation of a pesticide will not cause harm to the environment or public health.
24. The prevention principle. To minimise harm to the environment and public health, the prevention principle should be thoroughly embedded in a new regulatory framework for pesticides to ensure that harm to protected species, natural habitats, water, soil and human health, is avoided from the outset.
25. Transparency. The authorisation process for approving pesticides should be revised so that it is fully transparent. The public should have full access to information and evidence to allow them to understand and scrutinise the impacts of decision-making relating to the authorisation of pesticides, in line with the principles of the Aarhus Convention.<sup>29</sup> There is also a pressing need to improve public access to information on pesticide use so that the impacts of pesticides on human health and biodiversity can be assessed and changes in pesticide use can be monitored.
26. Best available scientific advice. As part of the authorisation process for pesticides, there should be a requirement to consult with scientific experts and expert advisory bodies, as well as a regular review of pesticide authorisations to ensure that the regulatory system keeps up to date with the latest scientific developments.

---

<sup>25</sup> See Sections 17-19 of the Environment Act and the draft Environmental Principles Policy Statement

<sup>26</sup> See 25 YEP pp. 37, 129

<sup>27</sup> [Pesticides and Wildlife Friendly Farming - The RSPB](#)

<sup>28</sup> See Sections 17-19 of the Environment Act 2021 and the draft Environmental Principles Policy Statement

<sup>29</sup> [Aarhus Convention - Environment - European Commission \(europa.eu\)](#)



### *Soil Health*

27. Leaving the EU also provides an ideal opportunity to introduce a new regulatory framework to protect soil health. Despite the significant natural capital associated with soils and the importance of soil health for food security, biodiversity and carbon sequestration, there is no regulatory framework to protect soil in the UK. Soils have been largely ignored in the existing environmental protection frameworks when compared with other aspects of the environment such as air quality or water quality. As a result, our soils are continuing to degrade with significant negative consequences for biodiversity, food production, water quality and climate regulation. A new regulatory framework to protect our soils is now urgently needed to prevent further degradation of our soils.

### ***Question 3. How is the Government regulating differently since EU exit and how could the process of doing so be most effectively undertaken?***

28. Since the UK's departure from the EU, the government appears to be taking a different approach to controlling harmful impacts on the environment. One striking feature of environmental law in the post-Brexit landscape has been a move away from regulation in favour of private voluntary schemes and administrative guidance such as policy statements. The government has also started to weaken the environmental protection previously afforded by EU law in some areas. This move away from regulation threatens the fulfilment of the government's previous commitments noted above to strengthen environmental protection and deliver a "Green Brexit". Some examples of this weakening of regulatory control in relation to the environmental impacts of agriculture are provided below.

#### The shift towards industry-led voluntary approaches

29. As noted above in response to Question 2, the government has opted for industry-led non-regulatory measures which focus on the use of a private certification scheme approach to control the use of urea-based fertilisers<sup>30</sup> instead of introducing new regulations to control ammonia emissions from agriculture as committed to in the Clean Air Strategy 2019. While accreditation schemes play their part in improving farming standards, it is our view that private certification schemes are not an effective substitute for a strong regulatory framework to secure action and investment to protect the environment. Such accreditation schemes are not mandatory, certification data is often not published and disqualification from a scheme does not always prevent the polluting activity from causing harm to the environment.

#### Greater reliance on policy statements and guidance

30. One example of greater reliance on policy statements in the government's approach since leaving the EU is the provision in the Environment Act which requires ministers to have regard to the policy statement on environmental principles when making policy.<sup>31</sup> This approach is weaker than the application of the environmental principles under EU law where the principles are used directly by the courts to interpret and apply EU law. The duty to have regard to a policy statement instead of the principles themselves results in a more limited interpretation of the principles which has the potential to restrict their scope and application.

31. Another recent example of the government's increased reliance on guidance and policy statements is the statutory guidance issued by Defra on 22 March 2022 on "Applying the farming rules for water". In

---

<sup>30</sup> See the Government's response to the Urea Consultation (Defra, 2022) at p. 14

<sup>31</sup> Section 19 (1) of the Environmental Act 2021

this guidance, Defra advises the Environmental Agency to prioritise advice and guidance over taking enforcement action against breaches of the Farming Rules for Water. The guidance also allows land managers to breach the rules provided they have taken "all appropriate reasonable precautions to help mitigate against the risk of diffuse agriculture pollution".<sup>32</sup> The guidance from Defra affirms the general reluctance on the part of the Environment Agency to enforce the Farming Rules for Water since they were introduced<sup>33,34</sup>

32. This flexible approach to enforcing the Farming Rules for Water severely undermines their effectiveness and means that they have been largely ineffective in reducing water pollution from agriculture. While statutory guidance and policy statements are useful tools in promoting environmental protection, they are not an adequate substitute for a comprehensive and prescriptive regulatory framework that is enforced by the regulator.

#### The weakening of environmental protection in the regulation of pesticides

33. An example of the weakening of environmental protection following the UK's departure from the EU is the recent set of amendments made to some regulations relating to the process for the authorisation and regulation of pesticides. A previously applicable EU Regulation<sup>35</sup> required the review of maximum residue levels of pesticides within 12 months of an active substance being authorised. However, the Pesticides (Maximum Residue levels) (Amendment Etc.) (EU Exit) Regulations 2019 extended this review period to 36 months. This could mean that the UK may not be applying the latest scientific advice in relation to pesticides authorisation because the product will remain on the market for far longer periods before having to be reviewed.
34. Furthermore, the scrutiny process for amendments to requirements relating to pesticides has been removed. Regulation 12 (6) of The Plant Protection Products (Miscellaneous Amendments) (EU Exit) Regulations 2019 gives the Secretary of State and devolved ministers the power to amend requirements relating to pesticides without any further consultation or input from expert advisers. Under the previous EU-derived rules, the amendment of requirements relating to pesticides involved a scrutiny procedure which required the input of an expert committee.
35. Rather than weakening existing protections in relation to pesticide authorisation and use, we recommend that the government takes the opportunity of regulatory autonomy to strengthen and improve the previous system in order to better protect people and the environment. In line with the commitments made in the 25 YEP, the government should develop a more comprehensive approach to the control of pesticides that is more robust and fit for purpose and based on the latest scientific knowledge.

#### ***Question 4. What restrictions are there on the UK's regulatory autonomy as a result of commitments in the UK/EU Withdrawal Agreement and the UK/EU Trade and Cooperation Agreement?***

36. There are a number of restrictions on the UK's regulatory autonomy in the UK/EU Trade and Cooperation Agreement (TCA) relating to environmental protection. The TCA affirms the parties' right to regulate on environmental matters but contains a 'non-regression' commitment not to weaken or

---

<sup>32</sup> [Applying the farming rules for water - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/applying-the-farming-rules-for-water) Updated 16 June 2022

<sup>33</sup> [Revealed: no penalties issued under 'useless' English farm pollution laws | Farming | The Guardian](https://www.theguardian.com/environment/2022/jun/16/revealed-no-penalties-issued-under-useless-english-farm-pollution-laws)

<sup>34</sup> [Breaches of English farm pollution laws rise as rules remain largely unenforced | Farming | The Guardian](https://www.theguardian.com/environment/2022/jun/16/breaches-of-english-farm-pollution-laws-rise-as-rules-remain-largely-unenforced)

<sup>35</sup> Regulation (EC) No. 396/2005

reduce, in a manner affecting trade or investment between the parties, its environmental levels of protection below the levels in place at the end of the transition period including by failing to effectively enforce its environmental law (Article 391). In accordance with this article, the government is obliged to maintain and enhance the existing regulatory baseline for environmental protection that is derived from EU law so far as it affects trade.

37. Article 393 also contains commitments by the parties to respect the internationally recognised environmental principles adopted at Rio de Janeiro on 14 June 1992 and now contained in the Environment Act 2021<sup>36</sup> (the integration principle, the precautionary principle, the polluter pays principle, the prevention principle and the rectification at source principle). In accordance with Article 393, the environmental principles should be used to inform and underpin the development of the regulatory framework for environmental protection as we have recommended in our response to Questions 2 and 3.

***Question 7. In which sectors is the UK well placed to maximise the opportunities afforded by its newfound regulatory autonomy and, conversely, in which areas might diverging from the EU prove more challenging?***

38. The UK is particularly well placed to maximise the opportunities afforded by its newfound regulatory autonomy in the agricultural sector as it makes the transition from the EU Common Agricultural Policy (CAP) to a new system of agricultural subsidies and land management. The Agricultural Transition Plan 2021-2024 sets out the government's objectives for the future of agriculture in England, including making improvements to the existing regulatory system and working towards "a better strategic and operational join up between regulatory organisations."<sup>37</sup> As noted above, leaving the EU provides the opportunity to adopt a more tailored and integrated approach to regulating agricultural practices that addresses critical environmental issues more effectively. This new regulatory approach should be implemented and enforced to ensure that environmental protections are maintained and strengthened.
39. In the new Environmental Land Management Schemes (ELMS) which are to be introduced in England, (the Sustainable Farming Incentive, Local Nature Recovery and Landscape Recovery), farmers will be rewarded for a wide range of positive environmental outcomes. We believe that there is an important place for the ELMS in the environmental protection framework– if and when satisfactorily designed and implemented - that will enable greater levels of environmental enhancement. However, ELMS should not be considered as a substitute for a strong regulatory baseline that prevents harm to the environment from agricultural pollution, implements the polluter pays principle and is a credible deterrent for would-be polluters.
40. Relying too heavily on voluntary schemes can bring risks when it comes to maintaining environmental standards as the government cannot guarantee the uptake of voluntary schemes. In the recent consultation on the government's environmental targets, the target for reducing nutrient pollution from agriculture in England was based on modelling which predicted an 85-100% uptake of measures including the Sustainable Farming Incentive.<sup>38</sup> As this ambitious percentage may not be achievable in practice, enforceable regulation is required to prevent further environmental harm.

---

<sup>36</sup> See Sections 17-19

<sup>37</sup> HM Government, 'The Path to Sustainable Farming: An Agricultural Transition Plan 2021 to 2024' (2020) pp. 65-66

<sup>38</sup> [Water targets Detailed Evidence report.pdf \(defra.gov.uk\)](#) pp. 19

Even if the overall participation in ELMS is good, land managers will still have a choice of which suite of “standards” to adopt (e.g. hedgerows, improved grassland soils or nutrient management), and the level at which they do so. This means that environmental standards across all impact areas of agriculture cannot be reliably secured by ELMS alone.

41. Furthermore, many uncertainties remain about what the requirements of the scheme will be. Cross-compliance has been an important feature of the EU CAP model (and the current Rural Development Schemes) as it requires farmers to comply with a comprehensive set of environmental land management standards in order to qualify for subsidies. Under ELMS, cross-compliance will no longer exist<sup>39</sup> and, in addition, the Rural Payments Agency will no longer have the important enforcement role it presently has in relation to these standards. If the full suite of cross-compliance protections that currently exist are not carefully integrated into a comprehensive regulatory baseline for agriculture, a key incentive to encourage all farmers to maintain environmental standards will be lost.
42. It is crucial, therefore, that the government implements a regulatory framework which either presents a credible deterrent to would be polluters or includes a set of core enforceable environmental standards which must be complied with as a condition of participating in ELMS.

***Question 8. Of the priority sectors highlighted by the Committee (agriculture, data and financial services), where and how should the UK diverge from EU rules?***

43. The EU standards of environmental protection that have been incorporated into the UK legal system have provided a foundation for environmental protection in England. However, as water quality, soil health and biodiversity continue to decline and levels of air quality persist at levels known to harm the health of people and the environment, it is clear that a more robust system of regulation is required to be implemented and enforced in order to achieve the environmental improvements envisaged in the 25 YEP. Divergence from EU Rules should be undertaken where this is necessary to increase environmental protection, for example in relation to the areas described in response to Question 2.

***Question 9. Should the Government adopt a particular approach to regulating in areas previously governed by EU rules? Should priority be given to forms of governance like legislation or should other methods like self-regulation be pursued?***

44. As highlighted throughout this response, ClientEarth believes that a combination of incentives, advice, guidance and robust regulation is needed to ensure that environmental standards are maintained and enforced. Over-reliance on non-regulatory measures such as policy statements, guidance notes and self-regulation has implications for accountability, transparency and public participation as these instruments are not subject to parliamentary scrutiny and are not always subject to stakeholder engagement. These tools are therefore not appropriate for many areas of environmental policy where disregarding the guidance or policy statement can have significant impacts on the environment and human health. It is crucial that regulatory models safeguard the

---

<sup>39</sup> Noting that some of these standards are underpinned by separate and independent statutory instruments, which have been, in our view, historically underenforced, e.g., by the Environment Agency. It is our view that a regulatory baseline that is comprehensive and properly enforced must be in place by the end of the agricultural transition period.

rights protected under the Aarhus Convention around access to information and public participation in decision making relating to the environment.

45. The government should be wary of delegating too much discretion to industry regulators as this is likely to result in a lack of transparency around decision-making and make it more difficult for industry to manage risks and comply with obligations. Regulatory frameworks offer a much more robust mechanism to hold authorities and private entities to account. This, in turn, affords greater certainty and predictability for businesses and reduces potential litigation costs of resolving environmental disputes.

## **Lucy Metcalfe**

UK Environment Lawyer

[lmcalfe@clientearth.org](mailto:lmcalfe@clientearth.org)

[www.clientearth.org](http://www.clientearth.org)

## **Kyle Lischak**

Head of UK

[klischak@clientearth.org](mailto:klischak@clientearth.org)

[www.clientearth.org](http://www.clientearth.org)

**Brussels   Beijing   Berlin   London   Warsaw   Madrid   Los Angeles   Luxembourg**

ClientEarth is an environmental law charity, a company limited by guarantee, registered in England and Wales, company number 02863827, registered charity number 1053988, registered office 10 Queen Street Place, London EC4R 1BE, a registered international non-profit organisation in Belgium, ClientEarth AISBL, enterprise number 0714.925.038, a registered company in Germany, ClientEarth gmbH, HRB 202487 B, a registered non-profit organisation in Luxembourg, ClientEarth ASBL, registered number F11366, a registered foundation in Poland, Fundacja ClientEarth Poland, KRS 0000364218, NIP 701025 4208, a registered 501(c)(3) organisation in the US, ClientEarth US, EIN 81-0722756, a registered subsidiary in China, ClientEarth Beijing Representative Office, Registration No. G1110000MA0095H836. ClientEarth is registered on the EU Transparency register number: 96645517357-19. Our goal is to use the power of the law to develop legal strategies and tools to address environmental issues.