UNITED KINGDOM ENVIRONMENTAL LAW ASSOCIATION (UKELA)

Submission to the Public Bill Committee in relation to the Environment Bill

1. The United Kingdom Environmental Law Association ("UKELA") comprises approximately 1,400 academics, barristers, solicitors and consultants, in both the public and private sectors, involved in the practice, study and formulation of environmental law. Its primary purpose is to make better law for the environment. It has been exploring what Brexit means for environmental law since 2016 and published a series of briefing papers and reports on the topic. Throughout 2018 and 2019, UKELA made detailed submissions to Defra, the Welsh Assembly, the Scottish Parliament and the House of Commons EFRA and EAC Committees on the Draft Environment Bill through its Brexit Task Force, Wales Working Party and Scottish Working Party. Details of the briefings, reports and submissions are provided in the Annex.

2. The following submissions comprise UKELA's comments on key areas of the Bill[1]. These submissions have been prepared by UKELA's Governance and Devolution Group ("GDG") that builds on the work of its Brexit Task Force. With the assistance of UKELA's specialist Working Parties, the GDG aims to inform the debate on how UK environmental law and policy should develop over the coming months and years. Further, these submissions have also been informed by a series of Briefing Papers produced under the guidance of its Brexit Task Force, Working Parties and individuals. They do not necessarily and are not intended to represent the views and opinions of all UKELA members.

Introduction

3. UKELA welcomes the Environment Bill ("the Bill") and considers the proposals and the general approach of the provisions to be a positive step in moving environmental law and policy forward in the coming years. Importantly, while UKELA notes some specific

[1] These submissions refer to the numbering and text of the Environment Bill as published on 30 January 2020.

points of clarification and suggested amendments, it considers the Bill provides the foundations and springboard for a progressive, innovative and meaningful approach to environmental improvement and enhancement in the short, medium and long term. As a general point of principle, UKELA believes that this improvement and enhancement of the environment will be vital for the future wellbeing of nature and civil society in the UK and for the planet as a whole.

Environmental targets (clauses 1-6)

4. UKELA welcomes the introduction of environmental targets and notes the priority areas. It supports the legally binding nature of the targets (see clause 4) and that they can be enforced by the Office for Environmental Protection ("OEP"). A sound environmental law structure and framework will be vital if the UK is to be a world leader in environmental law and policy and to achieve the Government's aim to deliver the most ambitious environmental programme of any country on earth[2]. To assist the Government in achieving its aim, UKELA notes that:

   a. The clause 1(2) requirement is only to set a target in "at least one matter within each priority area". This gives broad discretion to the Secretary of State in choosing the metric and it would be preferable for detailed parameters for targets to be included in the Bill for each priority area, (for example, in terms of habitat extent and condition, and species abundance and occupancy).

   b. It is important to ensure that the priority areas listed in clause 1(3) are not exhaustive and that a purposive approach to the provisions is adopted, so that matters such as land quality (including, for example, contamination) and noise can also be given priority. It will be vital that air quality in urban areas is included within the priority areas and not inadvertently excluded because it does not relate to the 'natural environment' as currently prescribed in clause 1(1).

5. UKELA supports amendments that bind the setting of targets to the objective of securing an overall improvement in the natural and wider environment.

6. The procedural provisions in clauses 3-6 as to regulations and target setting must be sufficiently robust, subject to scrutiny and operate to secure genuine and significant

[2] See §3, Defra Environment Bill 2020 Policy Statement (Defra, 30 January 2020).

improvement in environmental matters. The duty on the Secretary of State to seek advice under clause 3(1) is welcome but, as worded, gives overly broad discretion in the choice of persons who should be consulted; notwithstanding that the Secretary of State should regard them as independent. UKELA considers that the clause 3(1) advice process should also include public consultation provisions analogous to the consultation provided in strategic environmental assessment and contained for example in Regulations 12 and 13 of the Environmental Assessment of Plans and Programmes Regulations 2004 *(SI 2004/1633)*[3]. Providing a robust form of consultation, including mechanisms for consulting the public, will help ensure that the independent advice process is robust. Moreover, any advice received by the Secretary of State should be made publicly available.

7. As well as considering whether the targets would significantly improve the natural environment, the five-year target reviews should also include the requirement that the Secretary of State is satisfied that they are in fact achieving those improvements, based on evidence and consultation that are publicly accessible.

Environmental improvement plans and monitoring (clauses 7-15)

8. UKELA welcomes the introduction of environmental improvement plans ("EIPs") in the Bill. EIPs will be central to tackling environmental degradation and securing mid to long term measures for enhancing the environment. However, we suggest that clause 7 should include a provision that EIPs must also explain how they deliver progress towards meeting the targets defined under clause 1. Further, we suggest replacing the word 'may' in clause 7(5) to 'should', as improving people's enjoyment of the natural environment is inextricably linked to improving the natural environment in some areas, for example, natural capital and ecosystem services.

Environmental principles, rights and statements (clauses 16-20)

9. As with targets and EIPs, UKELA generally welcomes the environmental principles under clauses 16-18. However, UKELA notes that the duty on Ministers under clause

[3] The Environmental Assessments and Miscellaneous Planning (Amendment) (EU Exit) Regulations 2018 (SI 2018/1232) were made on 26 November 2018 and come into force at the end of the transition period, to ensure that existing EIA and strategic environmental assessment (SEA) regimes can continue to operate after the transition period. The transition period will end on 31 December 2020 unless extended. The Regulations amend the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/571) the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/572) and the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633). They also amend the Town and Country Planning Act 1990, the Planning and Compulsory Purchase Act 2004 and the Planning Act 2008.

18(1) is merely to have due regard to a policy statement (which has yet to be published), rather than to have due regard to the legal principles themselves (which would be capable of being enforced by the OEP). Further, the blanket exclusions for defence and taxation in clause 18(3) should not apply as currently drafted and the OEP should at least be entitled to review the impact of environmental taxation. In UKELA's view, the combination of the principles being unenforceable and subject to these exemptions significantly weakens their application and effect.

10. In relation to clause 18 (Policy statement on environmental principles: effect), UKELA welcomes the fact that the legal duty concerning the policy statement on environmental principles is applicable to all Ministers of the Crown.

11. The legal duty under clause 18(1) is to "have due regard to"' the policy statement. Although some have criticised this duty as lacking substance, we note that the case law on the "have regard to"' duty as it appears in other legislation would require a Minister genuinely to address the principles and make a reasoned justification for not applying the policy statement in any particular case. When interpreting such a duty, the courts will look carefully at the particular legislative context of the policy or guidance document in question. In this case, the fact that the policy statement is both subject to statutory requirements concerning consultation and must be laid before Parliament are likely to give it heightened legal significance[4].

Aarhus Convention 1998

12. The UK, along with EU Member States, the EU itself, and a number of other European countries, has ratified the UNECE Aarhus Convention 1998, which provides for access to environmental information, to participation in environmental decision making and access to environmental justice. EU legislation, including two Directives relating to environmental assessment and industrial emissions[5], also implement the Aarhus Convention rights, although these cover relatively defined and specific areas of

[4] See for example "The obligation to have regard to the policy recognises that there may be circumstances when it does not have to be applied to the letter but in my view, there must be very good reasons indeed for not applying it." (Collins J, *Royal Mail Group v Postal Services Commission* [2007] EWHC 1205); "In the absence of a considered decision that there is good reason to deviate from it, it must be followed" (Wilson LJ, *R(G) v Lambeth Borough Council* [2012] PTSR 364; and in the Australian case *Tackman v Chapman* [1995] 133 ALR 226 the 'have regard' duty was interpreted to mean "the decision-maker must engage in an 'active intellectual' process in which the prescribed circumstances receives his or her 'genuine' consideration".

[5] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (as amended) and Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (Recast)

environmental law. Direct transposition of the Aarhus Convention in the UK is piecemeal and incomplete in areas such as the Civil Procedure Rules Part 45, Rules 45.41-45.44 and the Environmental Information Regulations 2004 (*SI 2004/3391*). However, the UK Government has not systematically included the Aarhus Convention provisions in many other areas of environmental law (see, for example, the Environmental Permitting (England and Wales) Regulations 2016 (*SI 2016/1156*), which cover the permitting of a wide range of installations such as waste management facilities).

13. It is UKELA's understanding that the Government intends to continue to be bound by the Aarhus Convention. However, one of the problems is that under the so-called dualist system applicable in the UK[6], any rights under international conventions such as the Aarhus Convention that have not been transposed into national law cannot be invoked before the national courts. Therefore, we recommend that the Aarhus rights of access to environmental information, public participation in environmental decision making and access to environmental justice should be re-incorporated into the Bill under a new section entitled "Environmental Rights". Failing that, the Government should commit to a systematic review of the extent to which the Aarhus Convention rights have been incorporated in current domestic environmental legislation and to make appropriate amendments where they are not.

Non-regression clause

14. In relation to the non-regression of environmental law, UKELA considers that a comprehensive, unqualified, non-regression clause should be included in the Bill. Without this, it is possible that some environmental provisions (whether in primary or secondary legislation, policy, statutory guidance or otherwise) could weaken environmental law and policy. If the Government is not minded to provide an unqualified, non-regression clause in the Bill, then the commitment to this in environmental law and policy should be expressed elsewhere, for example, by way of a Ministerial Statement (although UKELA notes that this would not bind future governments).

15. In particular, the clause 19 statement of "not reducing the level of environmental

[6] The application of the dualist system in the UK was confirmed by the Supreme Court in *Miller v Secretary of State for Exiting the European Union* [2017] UKSC 5. As the court noted, it "is based on the proposition that international law and domestic law operate in independent spheres" (para 55).

protection" should apply to all law (including both primary and secondary legislation[7]) that may have an adverse environmental impact or consequence, and not simply to new primary legislation that, if enacted, would be regarded as environmental law. There may well be proposed legislation that would not ordinarily be described as environmental law, but could have a significant adverse environmental effect if introduced (for example, a Bill to facilitate a major road-building programme or controls on movement and transport as a consequence of social distancing).

The Office for Environmental Protection (clauses 21-40 and Schedule 1)

16. UKELA welcomes the introduction of the OEP and believes that it will help secure the UK Government's objective of ensuring the UK is a world leader in the environment. UKELA considers that the genuine independence, effective accountability and sufficient funding of the OEP are critical. Indeed, unless the OEP is sufficiently funded, independent and accountable, its operational effectiveness may be open to question. However, UKELA considers that the Bill as presented does not currently provide certainty in these areas.

17. On independence, UKELA considers that the OEP's board must comprise an experienced and diverse group that is appointed through an open and transparent appointment process. UKELA suggests that paragraph 2(1) of Schedule 1 be amended so that the appointment of non-executive members (particularly the Chair) must be confirmed by Parliament[8].

18. In terms of accountability, UKELA has consistently supported the principle that the OEP should be reporting to Parliament in compliance with the standards set out in the HM Treasury handbook: *Managing Public Money* (HM Treasury, rev Sep 2019) to ensure financial transparency, accountability and appropriate oversight.

19. In relation to funding, UKELA considers that a commitment within legislation is preferred. UKELA notes that in the Government's response to the Environmental Audit Committee's report on the Draft Bill, the Government gave an assurance that the OEP's funding would be ringfenced for five years and that it would formalise the commitment

[8] In practice, this might be a joint committee of, for instance, the Environmental Audit and EFRA Committees although that would be for Parliament to decide. However, given that the OEP will have some functions in Northern Ireland, the process to appoint a non-executive member from Northern Ireland should also involve the Northern Ireland Assembly.

in Parliament. However, the concern remains that a future government would not be committed to renew the funding, yet a long-term funding commitment is needed for most matters relating to the environment. Indeed, this is something the Government recognises in providing five yearly reviews for the EIPs and in setting a 25 year environment plan.

20. Clauses 22 and 23 explain that the OEP's strategy is to set out how its functions are to be carried on. UKELA broadly welcomes the process in place to develop the strategy, although given the importance of the strategy in relation to the development and efficacy of the OEP's functions and environmental law and policy as they evolve, the development of the strategy should secure meaningful and effective public consultation procedures.

21. At present, clause 23(5) provides that in preparing, reviewing and revising its strategy, the OEP is required only to consult anyone it considers appropriate, leaving the choice of person entirely its own discretion. The OEP's strategy is an important document that will explain how the OEP will exercise its functions and determine its priorities in line with its statutory duties, and it will be key in ensuring public confidence and understanding in how it goes about its work. No doubt in practice the OEP would be well advised to consult widely in developing its strategy, but because it is so significant UKELA feels the legal provisions on consultation should make it explicit that the OEP should seek the widest possible views in its consultation process. This would bring it in line with the legal provisions concerning the strategy of the Equality and Human Rights Commission (that has in many ways provided a model for the OEP), which provide in section 5 of the Equality Act 2006 that before preparing or revising its strategy, the Commission must:

> "*(a) consult such persons having knowledge or experience relevant to the Commission's functions as the Commission thinks appropriate,*
>
> *(b) consult such other persons as the Commission thinks appropriate,*
>
> *(c) issue a general invitation to make representations, in a manner likely in the Commission's opinion to bring the invitation to the attention of as large a class of persons who may wish to make representations as is reasonably practicable, and*

(d) take account of any representations made."

22. UKELA suggests that additional clauses equivalent to sub-sections 5(c) and 5(d) above are introduced in clause 23(5).

23. Providing meaningful consultation, including mechanisms for consulting the public, will help ensure that matters developed within the strategy (for example, how the OEP is to respect the integrity of other statutory regimes, including appeals, under clause 22(6)(c)) will be effective and robust.

24. UKELA welcomes the provisions in clause 25 in relation to the OEP's scrutiny and advice functions, although it notes that sub-clause 25(6) provides the option for the OEP to consider how progress could be improved or to consider the adequacy of the plans. UKELA recognises that it could be the case that the OEP concludes that progress is sufficient. However, at present the clause leaves the option simply to avoid consideration altogether. In the circumstances, UKELA proposes that the word "may" in clause 25(6) should be replaced by "must", to ensure that there is always consideration of the adequacy of the data relating to the clause 15 environmental monitoring provisions[9]. This would be consistent with the other clause 25 provisions and it would remain open for the OEP, if it so concluded, to be satisfied with progress and the adequacy of data.

25. UKELA is concerned about clause 27 requiring the OEP to provide advice to a Minister on any proposed change of environmental law, or any other matter relating to the natural environment should that Minister require this. This role could conflict with that of specialist advisers within government departments, who should be able to provide appropriate legal advice to those departments. The OEP may also be required to advise a Minister against whom it may wish to take enforcement action. UKELA suggests that the OEP should be consulted on new law and have the right to comment should it so wish, but should not be obliged to advise.

26. In UKELA's view, the constraints in clause 35 on the Upper Tribunal's power to issue remedies are unnecessarily restrictive and should be amended to allow the Tribunal to impose such remedies as it sees fit, including financial penalties.

[9] i.e. clause 25(6) should read: "*A progress report for an annual reporting period must include – (a) consideration of how progress could be improved, and (b) consideration of the adequacy of the data* …".

Interpretation (clauses 41-44)

27. UKELA welcomes the fact that there are provisions seeking to define environmental law in some form, in order to ensure that the provisions within the Bill can have some defined scope and purpose. UKELA also recognises that it may be unwise to attempt to provide an all-encompassing and over-arching definition of what "'environmental law" may or may not include. That said, we consider that the term 'environmental law' currently in Clause 43 is narrowly drawn and does not include many areas of law, such as planning and transport, where decisions by public bodies may have significant environmental implications.

28. UKELA understands the rationale for having a reasonably defined definition of environmental law for the purposes of the OEP's enforcement functions, both to prevent overload and to provide some degree of certainty. UKELA notes though that where, say, a planning decision was considered to be in breach of specific environmental laws, such as air quality standards or environmental assessment requirements, that fall within the current definition in clause 43, the OEP would have enforcement jurisdiction in respect of the breach.

29. In respect of environmental law, the OEP has broader functions than solely the enforcement of breaches of public law duties. In particular, it has a duty to monitor and report on the implementation of environmental law (clause 26) and to provide advice to the Secretary of State on changes in environmental law (clause 27 – though please note our comments in paragraph 25 above). UKELA considers that it would be a lost opportunity if the OEP could not consider areas of law falling outside the narrow definition in Clause 43.

30. There are areas of law (such as planning, flood defence, company law relating to environmental reporting, and pension trustees' duties concerning divestment from fossil fuels) that may give rise to genuine environmental problems and where independent investigation and advice from the OEP could be of real value in improving how the law affects the environment. On the current definition where, say, a Parliamentary Select Committee reports that such an area of law is giving rise to real environmental problems, the Secretary of State could not seek advice from the OEP on the issue because the narrow definition applies to all of the OEP's functions. UKELA therefore proposes that clause 43 is amended so that the narrow definition of environmental law is confined to the enforcement functions of OEP. For instance, it could be amended to

state:

"*In relation to the OEP's enforcement functions under sections 28-39, "environmental law" means any legislative provision to the extent that it is (a) mainly concerned with environmental protection…"*.

31. However, a much broader and more flexible definition should apply to the OEP's monitoring and advisory functions in respect of environmental law. For example, it could be amended to state:

"*In relation to sections 26 and 27, "environmental law" means any area of law with the potential to have any or any significant environmental implications*".

32. Finally, on interpretation and definition, UKELA welcomes the fact that climate change law has no longer been excluded from the remit of the OEP.

Environmental governance: Northern Ireland (clauses 45-46 and Schedules 2 and 3)

33. UKELA welcomes the provisions that ensure that environmental improvement plans, environmental principles and the OEP apply to Northern Ireland. UKELA considers that the provisions relating to targets should also apply.

Waste and resource efficiency (clauses 47-68 and Schedules 4-10))

34. UKELA welcomes the new waste and resource efficiency provisions, particularly those that extend producer responsibility and drive towards a circular economy. The enabling powers in the Bill are fundamental to introducing the further and detailed legislative framework to deliver on many of the commitments in the Resources and Waste Strategy, particularly those that extend producer responsibility and drive towards a circular economy. They are also an important contribution to the 2050 net zero carbon target.

35. <u>Producer responsibility (clauses 47-48 and Schedules 4 and 5)</u>. UKELA welcomes the provisions enabling the Government to extend producer responsibility ("EPR") requiring producers to pay the full net cost of managing their products at end of life and to incentivise them to design their products with sustainability and the circular economy in mind. UKELA also welcomes that the provisions enable the Government to promote waste minimisation, reduction, reuse, redistribution, recovery or recycling of products or

materials. UKELA recommends that the Government clearly signals that EPR includes full life-cycle commitments, not only on waste disposal.

36. Resource efficiency (clauses 49-53 and Schedules 6-9). UKELA welcomes the provisions that enable resource efficiency standards to be set for non-energy-related products and will allow for clear labelling to enable consumers to identify products that are more durable, repairable and recyclable. It is important that clear signals are provided to ensure waste minimisation is designed into products from the earliest stages through eco-design. Powers enabling deposit schemes (clause 51 and Schedule 8) are an important development and UKELA suggests that the provisions specify that the relevant powers include introducing an "all-in" deposit scheme for drinks containers of all sizes. It is appreciated that the Government will consult further on the drinks containers return scheme.

37. Concerning the introduction of charges for single-use plastic items (clause 52 and Schedule 9), UKELA recommends that the provisions go further to allow for the introduction of charges for any single-use item, plastic or otherwise. This would provide the Government with future flexibility beyond the immediate obvious issue of plastic waste and would provide an important and clear signal to the packaging and waste management sectors. Any single use (non-plastic) ban regulations that are introduced under the enabling powers would be subject to the safeguard of scrutiny under the affirmative procedure.

38. Managing waste (clauses 54-60). UKELA welcomes the provisions stipulating separation of waste and a consistent set of materials that must generally be collected individually, separated from all households and businesses, including food waste; this is key in working towards a circular economy. The Government announcement accompanying the Bill had referred to additional powers banning exports of waste to non-OECD countries. However, UKELA notes that existing UK commitments under the Basel Convention already impose such a ban.

39. Waste enforcement and regulation (clauses 61-68 and Schedule 10). UKELA welcomes the provisions to prevent waste crime by modernising the regulatory framework and deterring waste crime by ensuring regulators can take effective enforcement action and detect waste crime by allowing for electronic waste tracking. Similarly, it welcomes the provisions relating to improved litter enforcement.

Air quality and environmental recall (clauses 69-74 and Schedules 11 and 12)

40. UKELA welcomes any measures to tackle pollution and improve air quality and notes the provisions in clauses 69-74. UKELA agrees with the Government's concern that air pollution is the top environmental risk to human health in the UK[10]. However, the original introduction of measures in the Environment Act 1995, including the requirement to designate Air Quality Management Areas and associated local air quality management (LAQM) obligations, has not, to date, materially reduced the high level of premature deaths and illness arising as a consequence of poor air quality in the UK[11]. It is therefore unclear how the UK Clean Air Strategy 2019 coupled with the clauses in the Bill will materially resolve matters without more specific legal targets and clearer duties on central government.

41. UKELA welcomes some of the provisions revising the Environment Act 1995's LAQM regime through Schedule 11. In particular, the requirements to review the national air quality strategy regularly (proposed section 80(4A)); the duty on the Secretary of State to report annually on progress in meeting air quality objectives and standards (proposed section 80A)); and the efforts to spread responsibility for air quality control to other public bodies (through the duty to have regard to the air quality strategy, and the creation of 'air quality partners' (proposed sections 81A and 85A)).

42. UKELA is, however, concerned that some of these provisions place responsibility on local authorities to achieve air quality outcomes beyond their sphere of competence (for example, through enhanced duties on local authorities to 'secure' air quality standards, in proposed section 83A), even with the support of air quality partners. This concern about misplaced legal responsibility is partly because there is scope for air quality partners to avoid air quality obligations (for example proposed section 85B(3)) and partly because some air quality measures are best taken at the national level (for example, investment in new air quality technologies, public communication strategies, common vehicle standards and transport solutions).

43. More generally, and relating to Part 1 of the Bill (on targets), UKELA considers there should be progressive, legally binding targets within the Bill to ensure that the UK meets WHO air quality limits as soon as possible and by 2030 at the latest. Reaching

[10] Foreword by the Secretary of State for Environment, Food & Rural Affairs, UK Air Quality Strategy 2019.
[11] See e.g. Royal College of Physicians: *Every breathe we take: the lifelong impact of air pollution* (RCP, 2016) cited in Defra/DfT UK plan for tackling roadside nitrogen dioxide concentrations (overview) (Defra/DfT 2017).

ambitious air quality targets should include an obligation on all levels of government to reduce air pollution in policy adoption and decision making. UKELA acknowledges that there must also be a clear, detailed pathway and adequate funding in place to enable the Government and to empower industries to reach these targets.

Water (clauses 75-89 and Schedule 13)

44. Water is identified as one of the four legally-binding priority targets in clause 1. Clauses 75-89, however, only relate to freshwater and there is virtually no consideration of the marine environment within the Bill as currently drafted. UKELA notes the use of the Water Framework Directive definitions to define water bodies which include rivers, estuaries, coastal waters and groundwater.

45. Water quality is a key consideration, with the majority of marine pollution originating from land via a range of watercourses including rivers, storm drains and sewers. UKELA also notes that clause 1 of the Fisheries Bill (currently before the House of Lords) sets out eight key objectives including the sustainability objective, the ecosystem objective and the precautionary objective, which are likely to overlap with the environmental principles in clause 16 of the Environment Bill. Many protected species are mobile and do not recognise national or administrative boundaries; consequently, their effective conservation cannot be achieved using Marine Protected Areas alone. Conservation of marine biodiversity needs a more holistic approach to the management of activities. Sectorial management in isolation will make it difficult for the UK to meet its international commitments for the marine environment. The international aspect to the marine environment also needs recognising; collaboration with the UK's neighbours will be essential.

46. UKELA considers that it will be vital to ensure that the explicit ambitions relating to the marine environment achieving "good environmental status" as defined in the Marine Strategy Regulations 2010 (*SI 2010/1627*), sustainable use of resources, and marine planning are supported in the Environment Bill and that there is sufficient coordination and connection between secondary legislation derived from the Environment Bill, the Fisheries Bill and the Agriculture Bill.

Nature and biodiversity (clauses 90-101 and Schedules 14)

47. UKELA welcomes the inclusion of biodiversity as one of the four long term legally-

binding priority targets in clause 1, although, as noted above, there are concerns in relation to the operation and application of those targets. Further, it is noted that the Secretary of State is given discretion over whether to consult when setting these targets and there is no requirement for the target to be set more than once. In UKELA's view, consultation should be mandatory and there should be a duty enshrined in the Bill for targets to be set every five years on a rolling basis.

48. It is important for the Bill to define biodiversity in an inclusive and purposive way. A helpful definition is that provided in Article 2 of the UN Convention on Biological Diversity (1992), namely: "*the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems*".

49. UKELA supports the provisions to require biodiversity gain to be a new general condition of planning permissions in England. However, UKELA questions the exclusion of mandatory biodiversity net gain from being a requirement for development consent orders for nationally significant infrastructure projects ("NSIPs") under the Planning Act 2008 and the breadth of the power given to the Secretary of State to define other exceptions. UKELA considers it is important that the requirement for biodiversity gain applies to <u>all</u> land use planning matters and not be limited to those within the scope of the Town and Country Planning Act 1990 alone.

50. UKELA also considers that nationally and internationally designated bio/geodiversity sites including SSSIs, SPAs, SACs, Ramsar sites and ancient woodland should all be treated separately under their existing statutory and policy regimes. Further, UKELA considers that such sites should not be locations where the 10% net gain can be delivered. This is because their separate legislative and policy regimes require those sites to be promoted to achieve their maximum bio/geodiversity potential and in favourable management and condition.

51. The period of 30 years for the delivery of net gain set out in Schedule 14 appears to be arbitrary and has no biodiversity-based justification. Developments almost always result in the permanent loss of biodiversity. To accept replacement that is to operate as "biodiversity gain" for a period of 30 years is simply inadequate. Biodiversity replacement and gain need to be permanent and to be delivered in perpetuity.

52. UKELA considers that it is right that irreplaceable habitat should be excluded from biodiversity gain. A definition of what constitutes irreplaceable habitat is required and UKELA would welcome the opportunity to work with the Government on producing such a definition.

53. UKELA also welcomes the amendment of the Natural Environment and Rural Communities Act 2006 to add "enhance" to the duty to conserve biodiversity, with an obligation on local authorities to prepare plans of the actions needed to fulfil the duty and subsequently report on them. However, UKELA is concerned that the obligation is not to be applied to the regular exercise of local authority functions. UKELA also supports the provisions in clauses 95-99 for a series of Local Nature Recovery Strategies ("LNRSs") to cover the whole of England, although there is a need to strengthen these to ensure that they are taken into account in the exercise of public authority functions, including development control decision-taking (to include biodiversity gain requirements). As currently drafted, a public authority needs only have regard to the strategies when making plans to conserve or enhance biodiversity (clause 89(5)). Changing this language to something more concrete, such as "*act in accordance with*" would strengthen this obligation on public authorities.

54. Further, it is uncertain whether a county level arrangement is a sensible scale. It is understood that DEFRA decided not to look at catchment areas – presumably as they were unlikely to coincide with administrative boundaries. However, providing there are retained provisions to ensure that there is a requirement of designators and drafters of LNRSs to consult with all other relevant bodies including neighbouring county councils, district councils and local councils, then this should be sufficient. The Bill should include a definite time frame for reviewing or republishing LNRSs rather than stipulate "from time to time". UKELA recommends that proposed Ramsar sites, Local Wildlife Sites and potential Special Protection Areas are included in the definition of a nature conservation site in clause 99(3).

Tree felling and planting (clauses 100-101 and Schedule 15)

55. UKELA is concerned at the loss of trees and welcomes the street tree felling consultation obligation inserted into the Highways Act 1980 by clause 101. In paragraph 5.6 of its response to the December 2018 to February 2019 consultation on protecting and enhancing England's trees and woodlands, the Government indicated that reporting on tree felling and planting would be encompassed within the wider

biodiversity reporting system through the Bill. How is this intended to be implemented? In paragraph 6.4 of the response, the Government indicated that best practice guidance on local tree strategies will be published and UKELA recommend that the Secretary of State should be under an obligation to issue and keep up to date such guidance.

Conservation covenants (clauses 102-124 and Schedule 16 18)

56. UKELA welcomes this part of the Bill on conservation covenants and notes that it is based on the Law Commission's draft Conservation Covenants Bill. However, UKELA has concerns that in its current form, a conservation covenant would not act as an effective legal mechanism to secure net gain sites in perpetuity. Paragraph 3(2)(c) of Schedule 16 enables the Upper Tribunal to take account of whether the obligation serves "'the public good"' when considering whether to discharge or modify a conservation covenant. Without any further definition, it is unclear how the Tribunal would interpret "'public good", risking covenants being easily discharged or modified. It is essential that permanence of biodiversity is given primacy in relation to any suggestion that a covenant be modified or discharged. Similarly, paragraph 3(2)(a)(ii) of Schedule 16 allows the Tribunal to consider changes to enjoyment of the land when discharging or modifying a covenant, which may give undue leeway to a landowner to avoid obligations under a covenant.

57. Further, UKELA notes that clause 104(5) has been modified from the Law Commission's draft Bill to enable bodies whose "main activities" relate to conservation to become a responsible body. Under the draft Bill, it was only bodies "'at least one of the purposes or functions" of which was related to conservation. It is difficult to judge whether or not this would make it easier for private companies to become responsible bodies. UKELA recommends a combination of the two, such as: "*bodies whose primary purpose or function relates to conservation*".

Miscellaneous

Cooperation, collaboration and integration with other laws

58. UKELA notes that the application of the provisions to specific nations within the UK varies according to the particular provisions and that this is due either to discrete legal jurisdictions or distinct environmental regimes that are either in place or emerging. However, the environment and, in particular, environmental harm does not recognise

national or administrative boundaries. Therefore, UKELA's view is that it is important to ensure through this legislation that environmental standards and improvement are maintained consistently throughout the UK (and beyond).

59. UKELA is aware that the UK governments have been developing common frameworks across UK policy areas recognising that, at present, EU law creates consistent practices across the UK: see, for example, *Revised Frameworks Analysis: Breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland* (Cabinet Office, April 2019). However, while cooperation and collaboration between bodies involved in implementing the provisions of this legislation may be self-evident, UKELA considers that there should be a duty to cooperate and collaborate between relevant bodies for the purpose of this and any comparable environmental legislation introduced throughout the UK. A duty of cooperation and collaboration will be crucial among the environmental governance bodies that will work across the UK (including the OEP, which will operate in England and Northern Ireland). There should be very clear Memoranda of Understanding ("MOUs") on how the relevant environmental governance bodies across the nations will cooperate. UKELA also considers that similar MOUs should be agreed with the European Commission to cover matters such as transboundary environmental concerns, impacts and effects.

60. As a further preliminary point, UKELA is aware that the Agriculture Bill and Fisheries Bill are both progressing through Parliament alongside the Environment Bill and that these have several environmental provisions. The relationship between the Fisheries Bill and the Environment Bill is outlined in paragraphs 45 and 46 above in the discussion of Part 5 of the Environment Bill. Achievement of the Environment Bill's targets will be, to a large degree, dependent on the ability of the Agriculture Bill's Environment Land Management Schemes provided for in clause 1 of that Bill to deliver environmental improvements. UKELA is concerned at the lack of clear linkages between the three regimes and considers that the associations, connections and linkages should be positive and explicit. If this is not possible within the legislation itself (although UKELA sees no legal or practical reasons why it should not be), then the express connections may be made by way of a Ministerial Statement either prior to or on enactment of the provisions.

UKELA

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For further information please contact:

Dr Paul Stookes
UKELA Working Party and Brexit Advisor
paul@ukela.org
www.ukela.org

Begonia Filgueira
Co-Chair, UKELA Governance and Devolution Group
begonia.filgueira@acuitylaw.com

Angus Evers
Co-Chair, UKELA Governance and Devolution Group
angus.evers@shoosmiths.co.uk

Annex A

UKELA Brexit Reports

- 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)
- 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)
- UKELA Submission to Inquiries by the Environmental Audit Committee and the Select Committee on Environment, Food and Rural Affairs for Pre-Legislative Scrutiny of the Draft Environment (Principles and Governance) Bill (January 2019)
- UKELA's Scottish Working Party response to the consultation paper published by the Scottish Government: Consultation on environmental principles and governance in Scotland (May 2019)
- UKELA's Wales Working Party Response to the Welsh Government Consultation on Environmental Principles and Governance in Wales Post European Union Exit (May 2019)

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