

The Environment Bill (2020) – environmental principles and transparency of environmental protection

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Timeline (1)

- Draft Environment (Principles and Governance) Bill 19.12.18, to comply with s.16 of the European Union (Withdrawal) Act 2018 followed by consultation
- Full Environment Bill first published before 2019 General Election
- See also
 - Environmental Principles and Governance after the United Kingdom leaves the European Union Consultation (May 2018)
 - Summary of responses and government response (19.12.18)
 - Scrutiny of the Draft Environment (Principles and Governance) Bill (Environmental Audit Committee) 25.4.19 (HC 1951) (**Eighteenth Report** of Session 2017–19)
 - Pre-legislative scrutiny of the Draft Environment (Principles and Governance) Bill (Environmental, Food and Rural Affairs Committee) 30.4.19 (HC 1893) (**Fourteenth Report** of Session 2017–19)
- NB the scrutiny reports summarise the representations received and the concerns expressed, some of which remain applicable to the present Bill provisions (including the environmental principles)

Timeline (2)

- Latest version of the Bill introduced in HoC on 20.1.20 (a comparison version is available at <https://publications.parliament.uk/pa/bills/cbill/58-01/0009/Enviro%20Compare.pdf>)
- See also
 - Explanatory Notes to the Bill
<https://publications.parliament.uk/pa/bills/cbill/58-01/0009/en/20009en.pdf>
 - Environment Bill Policy Statement 30.1.20
<https://www.gov.uk/government/publications/environment-bill-2020/30-january-2020-environment-bill-2020-policy-statement>
 - Environmental Governance Factsheet (parts 1 and 2) 10.3.20
<https://www.gov.uk/government/publications/environment-bill-2020/10-march-2020-environmental-governance-factsheet-parts-1-and-2>

Art 191 TFEU

"1. Union policy on the environment shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment,
- protecting human health,
- prudent and rational utilisation of natural resources,
- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. ...

3. In preparing its policy on the environment, the Union shall take account of:

- available scientific and technical data,
- environmental conditions in the various regions of the Union,
- the potential benefits and costs of action or lack of action,
- the economic and social development of the Union as a whole and the balanced development of its regions. ..."

Purpose (1)

- Part of regulatory changes needed to replace EU environmental law on withdrawal from the EU (Expl. Notes)
 - “The Bill sets out the measures needed to ensure that there is no environmental governance gap on withdrawal from the EU. The Bill will require the setting of long-term, legally binding and joined-up targets tailored to England, embed consideration of environmental principles in future policy making and establish the independent Office for Environmental Protection.” (§17)
 - “The Bill legislates for environmental principles to protect the environment from damage by making environmental considerations central to the policy development process across government. The principles work together to legally oblige policy-makers to consider choosing policy options which cause the least environmental harm. The Statement on Environmental Principles will set out how the principles should be interpreted and applied by policy makers.” (§19)

Purpose (2)

- Under the earlier Withdrawal Agreement the principle of “non-regression” was applied by the draft Protocol i.e. that environmental controls post-Brexit would be at least as rigorous as those applicable in the EU, but this was removed from the final Withdrawal Agreement and Protocol. The 2018 Consultation Paper must therefore be read in the light of its production prior to the final WA.
- There nonetheless remains an apparently firm commitment to a high level of environmental protection. See the Explanatory Notes and the January 2020 policy statement which includes –
 - “The Environment Bill will help deliver the government’s manifesto commitment to delivering the most ambitious environmental programme of any country on earth. It is part of the wider government response to the clear and scientific case, and growing public demand, for a step-change in environmental protection and recovery.”

Bill provisions

- Chapter I of the Bill – clauses 16-18
 - See Explanatory Notes §§172-196

The provisions remain substantially similar to the draft provisions in 2018
- Also ss. 19-20 (added in 2020) on
 - statements by ministers about bills containing new environmental law and
 - reports to Parliament on “significant” international protection legislation (added to the 2020 version of the bill)
- See Explanatory Notes §§197-210

What are environmental principles? (1)

- EPs are defined by s. 16(5) –
 - (a) the principle that environmental protection should be integrated into the making of policies,
 - (b) the principle of preventative action to avert environmental damage,
 - (c) the precautionary principle, so far as relating to the environment,
 - (d) the principle that environmental damage should as a priority be rectified at source, and
 - (e) the polluter pays principle.
- These are not further defined by reference to EU law or in the policy guidance but are explained further at §178 of the Expl. Notes which announces
 - *"The meaning of the individual environmental principles is as follows" -*

What are environmental principles? (2)

- *The principle that environmental protection must be integrated into the making of policy: environmental protection must be embedded in the making of policies.*
- *The principle of preventative action to avert environmental damage: preventive action should be taken to avert environmental damage.*
- *The precautionary principle so far as relating to the environment: where there are threats of serious irreversible environmental damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. This applies to issues regarding the natural environment and includes where human changes to the natural environment impacts upon human health, such as air quality.*
- *The principle that environmental damage should as a priority be rectified at source: environmental damage should as a priority be rectified by targeting its original cause and taking preventive action at source.*
- *The 'polluter pays' principle: the costs of pollution control and remediation should be borne by those who cause pollution rather than the community at large. (§178)*

What are environmental principles? (3)

- These principles have played an important role in EU environmental law and their application permeates a great deal of case law. E.g. see the critical role the precautionary principle has played in the application of art. 6(3) of the Habitats Directive by the CJEU (see e.g. **Waddenzee** (C-127/02) [2005] 2 C.M.L.R. 31) or the specific reference to key principles in art. 191(3) TFEU
- 2018 Consultation Paper –
 - *"4. Environmental principles are a specific set of principles which have been used to guide and shape modern environmental law. They are reflected in international instruments such as Agenda 21, a non-binding action plan of the United Nations with regard to sustainable development, and the Convention on Biological Diversity. Environmental principles are also set out in the EU Treaties as the basis for EU environmental law."*

What are environmental principles? (4)

- 2018 Consultation Paper –
 - *"5. Whilst these principles are central to government policy, at a national level we do not currently set them down in one place, or define their role in policy-making or delivery. So, as we leave the EU, we will create a new statutory statement of the environmental principles which will guide us, drawing on the current international and EU environmental principles. It will remain government's responsibility to set policy within the framework of these principles."*
- The Bill leaves open the extent to which Ministers could depart from the EU concepts and what the reference points would be for the application of the EPs given the lack of specific direction in the Bill
- Reference to creating a *"new system which is tailored specifically to a UK context"* in the January 2020 policy statement does not guarantee consistency or even equivalence with the EU principles other than in general statements of intent.

What are environmental principles? (5)

- The **Environmental Governance Factsheet** (10.3.20) Parts 1 & 2 does not add any greater clarity but makes general statements about embedding of the principles "*into domestic law*" (which seems to have a very specific meaning here i.e. into law for policy making), "*innovative solutions*" which will allow the meeting of "*wider government objectives while supporting our environmental ambitions*". The EPs will not be overriding or even necessarily carry presumptive weight when applied proportionately to "*wider objectives*"
- Some control to the extent that the SoS will have to consult on, then lay the draft policy statement before Parliament and will have to "produce a response" if a resolution is passed in Parliament, or a Committee makes recommendations, in respect of the draft (cl. 17(4)) but then must lay the final statement before Parliament which takes effect when it is laid (cl. 17(6)).
- The extent to which Parliament has control over the statement appears political only. No requirement for an affirmative resolution. Follows the model for NPSs in s. 9 of the Planning Act 2008.

What is the role of environmental principles?

- The Bill, as with its predecessors, focuses solely on the making of Government policy – cl. 16(1), (2), (3), 18(1)
- The role of EPs is confined to policy making, in the light of the published policy statement
- Even then, it is left to ministers to formulate the policy statement that explains “**how** the environmental principles **should be interpreted** and **proportionately applied** by Ministers of the Crown when making policy” – this appears to leave a wide discretion to Ministers as to how they propose to interpret and apply the EPs in making policy
- There is no hard and fast definition of the the EPs e.g. by reference to EU law
- Even then, the cl. 18(1) duty is only to “have due regard” to the statement

Does the Bill and EPs achieve equivalence? (1)

- However, even in the current Bill:
 - there is still no equivalent provision to art 191(2) TFEU requiring policy to have the objective of a “high level of protection” of the environment though Government argues that it is seeking to achieve equivalent or better protections than currently applied by the EU;
 - a government policy statement on EPs, which only directly effects policy formulation by Ministers, does not have the same legal effect as enshrining principles in constitutional documents such as the TFEU. The policy document will not bind all public authorities or regulators, can be varied by the Secretary of State when politically convenient, and does not provide interpretative guidance to the courts

Does the Bill and EPs achieve equivalence? (2)

- The provisions on EPs are limited in that they
 - apply only to the formulation of the policy statement under s. 17 and to due regard being had to that statement in formulating other policy
 - Have no direct application to regulators, operators, developers or other parties
 - no direct application of the EPs as a matter of law to processes other than the formulation of policy
 - are not directly guidance to the Court for general interpretation of environmental law, though presumably, through the prism of the Withdrawal Act, the Courts may still be applying CJEU jurisprudence to the legal provisions of environmental law
- The provisions do not accept the pre-legislative scrutiny recommendations in EAC 18th Report §§23-25; 32-33; EFRAC 14th Report §§24-26; 34-36

Does the Bill and EPs achieve equivalence? (3)

- While the interim preservation of EU law and principles through the provisions of the Withdrawal Act will preserve the application of EU EPs at least to some extent and in the short term, this is subject to change introduced into future legislation and the ability to depart from CJEU decisions
- The key cl. 18(1) duty on Ministers is to “have due regard” to the policy statement on EPs when making policy, which is far removed from any duty to give primacy to the EPs in any specific case and leaves open a potentially wide gap between the formulation of policy and the actual application of the EPs in specific cases. The Expl. Notes say (§190) –
 - *“This means that, when making policy, Ministers of the Crown **must have the correct level of regard** to the content of the environmental principles policy statement.”*
- Described by the 14th Report at §34 as “too weak a duty ... risks a possible regression on current standards of environmental protection”

Does the Bill and EPs achieve equivalence? (4)

- Cl. 18(2) – Ministers are not required
 - “to do anything (or refrain from doing anything) if doing it (or refraining from doing it) —
 - (a) would have no significant environmental benefit, or
 - (b) would be in any other way disproportionate to the environmental benefit.”
- The Expl Notes (§192) suggests “significant” means “*not negligible*” and that “disproportionate” means

“situations in which action would not be reflective of the benefit or costs, environmental or otherwise. ... For example, there is no need for a Minister to change a policy in light of the principles policy statement if the cost of this change would be very high and the benefit to the environment would be very low. Equally, if the potential environmental benefit is high, then it is proportionate to take a more significant action based on the policy statement.”
- Is the OEP power in cl. 26 to monitor implementation and to report on “any matter” concerned with environmental law sufficient? Its advisory role under cl. 27 is by request.

Government Response 19.12.18

- Government's response to the criticism of its approach on 19.12.18 paper sidesteps the point that the EPs are embodied in the EU law they are to replace:

"We want the principles to underpin the policy and law-making process, incorporating the consideration of these principles alongside other matters. ...

The government does not currently consider it appropriate to extend application of the policy statement beyond central government. While we recognise the points made by respondents with regards to this issue, central government has primary responsibility for developing the majority of high-level and strategic environmental policies and legislation. Central government also sets the strategy and approach for policies developed by other public bodies. For example, the National Policy Planning Framework sets out a clear framework for all planning authorities' local development plans. Therefore the application of the policy statement to ministers should ensure that the principles are also embedded in the strategic frameworks set for other public bodies."
- The Government's position has not moved on this.

Transparency (1)

- Under cl. 19 where a Minister in charge of a Bill “is of the view that the Bill as introduced ... contains provision which, if enacted, would be environmental law” is required not only to state as such but also make either –
 - a statement under cl. 19(3) to the effect that in the Minister’s view the Bill will not have the effect of reducing the level of environmental protection provided for by any existing environmental law and in doing so
 - may in particular take into account the possibility that a Bill, by making provision that is different from existing environmental law (whether or not in force), might provide for the same or a greater level of environmental protection
 - includes any protection which could be provided for under powers *conferred* by the existing environmental law
- or

Transparency (2)

- a statement under c l. 19(4) to the effect that—
 - the Minister is unable to make a statement under subsection (3), but
 - the Government nevertheless wishes the House to proceed with the Bill
- The Expl. Notes suggest an example of the use of (4) is "*where an existing UK environmental protection is no longer justified by new scientific evidence*"
- The Expl. Notes also state at §197 (and see §366) that
 - "*The requirement does not apply to the wider planning regime, other than explicit environmental legislation such as Environmental Impact Assessments and Strategic Environmental Assessments*"
 - This is questionable notwithstanding cl. 43 definition of "environmental law" ("*mainly concerned with environmental protection*"). Its consistency with the Aarhus Convention is open to doubt.
- See also cl. 20 duty to report on international environmental protection legislation.

Thank you

Questions ?

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