

The Environment Bill (2020)



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“... the government has introduced the landmark Environment Bill to enhance and protect our natural environment by making sure that we leave the environment in a better state than we inherited it - and that future governments continue to do so.”

(Defra, 16.10.19)

- 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
 - *A Green Future: Our 25 Year Plan to Improve the Environment* (HMG, January 2018)
 - *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 representations received and make recommendations regarding a number of concerns, many of which remain applicable to the present Bill e.g. over environmental principles the the OEP

Timeline cont.

- Latest version of the Bill introduced in HoC on 30.1.20 (a comparison version is available at <https://publications.parliament.uk/pa/bills/cbill/58-01/0009/Enviro%20Compare.pdf>)
- Second Reading – 26.2.20 - when it was committed to a Public Bill Committee
- Public Bill Committee has sat so far from 10.3.20 to 19.3.20
- As of 23.6.20 “the sittings of the Committee have been suspended until further notice. The Committee is now scheduled to report by Tuesday 29 September 2020.”
- See
 - 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 Factsheets (5 in total) covering the various aspects of the Bill 10.3.20
<https://www.gov.uk/government/publications/environment-bill-2020>

Bill structure

- **Chapter 1** – environmental targets. Improvement plans, monitoring, environmental principles (EPs) (Sched 2)
- **Chapter 2** – Office for Environmental Protection (OEP) (Sched 1)
- **Chapter 3** –
 - Part 1 interpretation
 - Part 2 environmental governance in Northern Ireland (Sched 3) including modification to OEP functions)
 - Part 3 Waste and resources supply (Sched 4 to 10)
 - Part 4 air quality (Sched 11 and 12)
 - Part 5 water (Sched 13)
 - Part 6 nature and biodiversity (Sched 14 and 15)
 - Part 7 conservation covenants (Sched 16)
 - Part 8 miscellaneous and general (Sched 17-19, including Crown application)
- Commencement and transitionals – clauses 131-132.

Bill objectives

- Part of regulatory changes to replace EU environmental law on Brexit (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)
 - “The Bill also creates a new public body – the Office for Environmental Protection (OEP) – as a domestic independent watchdog who will be responsible for taking action in relation to breaches of environmental law....” (§20)
- However, “across government” does not mean across all branches of government, at least directly and no direct equivalent to art. 191 TFEU.

Bill objectives cont.

- 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 a 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.”

Chapter 1 – environmental principles

Environmental principles

- EPs are listed in s. 16(5) but are not further defined by reference to EU law or in the policy guidance but are explained further at §178 of the Expl. Notes
 - *“The meaning of the individual environmental principles is as follows” -*
 - *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.*

Environmental principles cont.

- *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)*
- These principles play an important role in EU environmental law and their application runs through the case law, e.g. **Waddenzee** (C-127/02) [2005] 2 C.M.L.R. 31). In the 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.”*

Environmental principles cont.

- 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 does not regulate the extent to which Ministers can depart from 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.
- NB the Bill focuses the role of EPs only in the making of Government policy and issuing a policy statement – cls. 16(1), (2), (3), 18(1)

Environmental principles cont.

- The **Environmental Governance Factsheet** (10.3.20) Parts 1 & 2 makes general statements about embedding the EPs “*into domestic law*” (specifically into law for policy making), “*innovative solutions*” which will allow the meeting of “*wider government objectives while supporting our environmental ambitions*”. EPs not to be generally overriding/determinative.
- Limited control - 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)).
- Parliamentary control over the statement appears largely political. No requirement for an affirmative resolution (compare NPS process in s. 9 of the Planning Act 2008).
- Ministers will formulate the policy statement that explains “**how** the environmental principles **should be interpreted** and **proportionately applied** by Ministers of the Crown **when making policy**” – wide discretion to Ministers with regard to the interpretation and application of EPs in making policy
- cl. 18(1) duty is only to “**have due regard**” to the statement in any event

Does the Bill provisions on EPs achieve equivalence?

- The EP provisions are limited in scope -
 - no corresponding general duty as in Art. 191 TFEU
 - 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. No direct application as a matter of law otherwise, e.g. to decision-making
 - no direct application to regulators, operators, developers or other parties
 - not directly provide guidance to the Courts for the 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

Equivalence? cont.

- While the interim preservation of EU law and principles through the provisions of the Withdrawal Act (as amended) 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 when making policy - far removed from any duty to give primacy to the EPs in any specific case and leaves open a potentially wide gap between the policy making and 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”

Equivalence? cont.

- 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.”
- Very wide areas of judgment therefore proposed
- 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 rejected the criticism of its approach on 19.12.18 paper and sidesteps the point that EPs form part of 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.

Chapter 2 – Office for Environmental Protection

- HMG's 2018 **25 Year Plan** acknowledges concerns over loss of role of European Commission, CJEU and European Environment Agency, and commits to “setting up a new body to hold Government to account” as well as the new provisions in Chapter 1
- The OEP proposals in Chapter 2 of the 2020 Bill resemble the 2018 Draft Bill model but embody a number of changes (also in the 2019 version) especially with regard to “environmental review” and judicial review
- Wide-ranging report on the 2018 Draft Bill by the **Environmental Audit Committee: Scrutiny of the Draft (Environmental (Principles and Governance) Bill**, 18th Report of Session 2017-19 which sets out the views of consultees, including some prominent environmental commentators and makes recommendations
- See **Environmental Factsheet Parts 1 & 2** which states *“the OEP will provide scrutiny and advice on the implementation of environmental law. It will also monitor and report on progress against Environmental Improvement Plans and targets. The OEP can receive and investigate complaints on alleged serious breaches of environmental law by public authorities. It can also take legal action if necessary as a last resort.”*

The OEP

- Chapter 2 of the Bill (with modifications for NI in Chapter 3 Part 2 and Sched 3)
- Cl. 21 establishes the OEP as a body corporate, with further provision in Schedule 1
- Cl. 22 provides that the “principal objective of the OEP” is “to contribute to”:
 - “environmental protection”, and
 - “the improvement of the natural environment”
- The OEP must act “objectively”, “impartially”, “proportionately” and “transparently”. It must set out a strategy to achieve its aims, and avoid overlap with the Committee on Climate Change
- Two main sets of functions:
 - “Scrutiny and advice functions” (cls. 25-27)
 - “Enforcement Functions” (cls. 28-38)
- The OEP is not a “regulator” and its role differs from that of the Environment Agency. OEP is to oversee conduct by public authorities, including but not limited to the Environment Agency itself

The OEP cont.

- Although the creation of the OEP is partly to replace the oversight and enforcement role of the EU Commission, the OEP will not be the Commission and will lack its powers. Its focus is inevitably on compliance with domestic environmental law by sub-national bodies not compliance with environmental principles/standards by the UK as a whole.
- The conclusions of the Environmental Audit Committee remains relevant:
 - *“Under the accountability framework set out in the Bill, local authorities or arm’s-length bodies, who may have limited control over their budgets, could be held to account for failings outside their control. **The whole of Government should be accountable for the achievement of environmental standards and targets, rather than individual public authorities, unless the OEP deems that a specific body is at fault. This would ensure collective accountability and cross-Government working to resolve environmental failures.**”*
 - *“Another departure from the Commission’s approach is that the Bill makes individual public authorities responsible, rather than the Government as a whole. Professor Scotford said, since environmental problems are often collective with multiple causes and multiple agencies needed to remedy breaches, it was “strange” to make individual public authorities accountable.”*

The OEP cont.

- Under cls. 25-27, the OEP has three **scrutiny and advice** functions:
 - Monitoring and reporting on environmental improvement plans and targets (cl. 25)
 - Monitoring and reporting on environmental law (cl. 26)
 - Advising on changes to environmental law, where requested by Minister (cl. 27)
- Reports under cls. 25-26 must be laid before Parliament, and “advice” under cl. 27 may be laid before Parliament if the OEP thinks fit
- **Enforcement powers:**
 - Cls. 28-38 makes provision about functions of the OEP “in relation to failures by public authorities to comply with environmental law” (cl. 28(1))
 - Broadly two sets of functions and powers given to OEP to enforce against “*failure of public authorities to comply with environmental law*”:
 - Investigation followed by environmental review (clauses 29-35)
 - Judicial review by OEP itself

OEP – “failure to comply with environmental law”

- “Failure to comply with environment law” means (cl. 28(2)):
 - **“unlawfully failing to take proper account of environmental law when exercising its functions”**
 - or
 - **“unlawfully exercising, or failing to exercise, any functions it has under environmental law”**
- Formulated as a type of *Wednesbury* test, whether public body has acted within its powers in a public law sense and not applying its own judgment to the facts. This is supported by the Government’s response to the Environmental Audit Committee:
 - *“It is our assessment, however, that it is not necessary or appropriate in this context to go beyond the Wednesbury test in relation to the review of discretionary decisions as the Committee has recommended”*
- This could represent a watering down of the “manifest error of assessment” level of scrutiny provided by the Commission which has appeared at least in some instances to have conducted a very detailed analysis of the facts and the national assessment. See e.g. ***Commission v Poland (Białowieża Forest)*** (Case C-441/17) EU:C:2018:255. See §§8-9 of Professor Richard Macrory’s written evidence to the Environmental Audit Committee

OEP – complaints against “public authorities”

- “Public authority” who the OEP can investigate and oversee includes a person carrying out any function of a public nature but *excludes* a function “that is not a devolved function, a parliamentary function or a function of any of the following persons” –
 - “(a) the OEP;
 - (b) a court or tribunal;
 - (c) either House of Parliament;
 - (d) a devolved legislature;
 - (e) the Scottish Ministers, the Welsh Ministers, a Northern Ireland department or a Minister within the meaning of the Northern Ireland Act 1998.”
- Focus is on individual actions by individual public bodies, not on conduct of government as a whole
- Under cl. 29, anyone may complain to the OEP of a failure by a public authority to comply with environmental law.

- Under cl. 30, the OEP may investigate a failure to comply with environmental law on the making of a complaint or of its own motion, provided that it thinks the failure may be “serious”.
- Duties to keep complainants informed (cl. 32), to require information (cl. 33)
- uncertain whether OEP has a fact-finding role beyond one equivalent to the admin court
- Cl.33 provides for “decision notices”, where the OEP is satisfied “on the balance of probabilities” that there has been a “serious” failure to comply with environmental law
- Decision notice must (cl. 33(2)):
 - Describe the failure and
 - Set out “the steps the OEP considers the authority should take in relation to the failure (which may include steps designed to remedy, mitigate or prevent reoccurrence ...”)
- NB:
 - Decision notice is not *binding* on public authority, either as to breach or remedy;
 - Remedy cannot include taking steps which authority has no power to take – i.e. cannot undo a decision in respect of which it is *functus officio*

OEP – review procedure

- Where OEP has given a decision notice under cl. 33, it may apply to the Upper Tribunal for an *environmental review* (NB no need for authority to have refused to comply with remedy)
- The subject matter of an environmental review is “a review of” -
 - “alleged conduct ... described in the decision notice” as failure to comply with environmental law; or
 - Similar conduct occurring after the notice was given.
- The review is not about a failure to accept remedy or take the steps set out in a (non-binding) decision notice
- UT will:
 - Apply ordinary judicial review principles to consider whether alleged unlawful act is unlawful, and
 - If so, grant ordinary JR remedies, subject to considering hardship/prejudice to third parties (cl. 35(8)). Prejudice may not be hard to show especially if the review comes a longer time after the decision complained about, having regard to normal JR time limits

OEP – power to bring JR

- Separate to env. review, OEP is empowered to bring its own claim for judicial review under cl. 36, in respect of a “serious” failure to comply with environmental law.
- It should only do so where OEP thinks it is “necessary ... to prevent, or mitigate, serious damage to the natural environment or human health”
- The case proceeds as ordinary claim for JR in all respects, with OEP as claimant, save that the court cannot refuse relief on basis that outcome would be “highly likely” to be the same (sections 31(2A), (3C) and (3D) of Senior Courts Act 1981).
- Court can grant ordinary relief (quashing etc.), but in addition, where a claim succeeds, the defendant public authority must within 2 months publish a statement that sets out the steps it intends to make in the light of the finding.
- Unlike investigation/environmental review, there is no direct role for OEP/court in that statement or later review, though presumably the statement or review could themselves be challenged in due course

OEP: summary of issues

- Concerns have been expressed on the basis that the scheme of OEP's enforcement functions still seems to lack coherence and there is a mismatch between scope and remedies of OEP investigation and the UT review –
 - While OEP to investigate failure to comply with environmental law. Issue over scope of investigation and report, whether limited to JR principles, but in practice and intent seems to be wider than JR but UT env. review is on JR basis and not more intensive scrutiny
 - On remedies, OEP cannot recommend or require authority to undo acts where the authority is *functus officio*, but can make wide-ranging recommendations for the future. On the other hand, UT can quash decisions though the body is *functus officio*, but has no power to make recommendations
- Important to note that environmental review does not provide a means of enforcing OEP's recommendations and conclusions at the investigation stage.
- Ironically, if OEP dissatisfied with the response to its recommendations, it may be more appropriate to bring JR rather than environmental review under cl. 35
- Unclear relationship between (a) investigation/environmental review and (b) JR under cl. 36
- The EU Commission's key powers of scrutiny/enforcement are not replicated by the Bill any more than the general legal duties found in TFEU are replicated.

Thank you for listening
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