

# Legal Architecture of the Part 1 of the Environment Bill

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## Outline

1. The Architectural Nature of Environmental Law
2. Background to the Environment Bill
3. Overview of Part 1, Ch 1 as it currently stands (15 Sept 2021)
4. Three Problems
  - A. A disjointed architecture
  - B. An executive architecture
  - C. A 'weak' architecture
5. Risks



## 1. The Architectural Nature of Environmental Law

- Environmental problems are collective action problems
  - Socio-politically controversial
  - The necessity and limits of science
  - The controversial role of the state
- The architectural nature of environmental law
  - legislation - stable, justiciable, and constituting a frame
  - administration – applying, enforcing, assessment
  - courts – dispute resolution, enforcement, and accountability
  - accommodating disagreement through separation of powers



## An Antipodean Example: A Working Legal Architecture

### **Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority [2021] NSWLEC 92**

Section 9(1) Protection of the Environment Administration Act 1991 (NSW)

The Authority is required to—

- (a) develop environmental quality objectives, guidelines and policies to ensure environment protection, and
- (b) monitor the state of the environment for the purpose of assessing trends and the achievement of environmental quality objectives, guidelines, policies and standards.



## 2. Background to the Environment Bill

- 80% of UK environmental law derived from EU law
  - Directives and National Implementation
  - National Courts and the CJEU
  - Commission and enforcement
- Brexit
  - European Union (Withdrawal) Act 2018
- Post Brexit
  - Filling holes or creating a new architecture?





### 3. Ch 1 of Part 1 of the Bill – An Overview

- Cl 1 – purpose and declaration – biodiversity and climate emergency
- Cls 2-8 Environmental targets (and note interim targets – cl 12)
- Cls 9-16 Environmental improvement plans
- Cl 17 Environmental monitoring
- Cls 18-20 Policy statements on environmental principles
- Cl 21-22 Statements and reports

Note evolution of Bill since Dec 2018



## 4. Three Problems

### A) A Disjointed Architecture

- The Act is more than about the ‘purpose of the Act’ in cl 1.
- No explicit relationship between the Bill and retained environmental law
- Target setting (cl 2) has no priority setting
- No ‘environmental logic’ guiding environmental improvement plans

## B) An 'Executive' Architecture

'Make provision about targets, plans, and policies for improving the natural environment' (Short title of the Bill)

- Ch 1, Part 1 vests considerable power in the hands of the Secretary of State to articulate the norms (principles), aspirations (targets and EIPs), and accountabilities (monitoring and reporting)
- Discretionary powers over public duties



## C) A 'Weak' Architecture

- Many of the SS's powers rest on a requirement to establish an environmental benefit
- Aspirations are those set by the SS in targets and EIPs
- There is little legislative 'obligation' that is enforceable
- Environmental principle policy statements – cl 20(1)

## Examples from the Bill and EIPs

- 1 Purpose and declaration of biodiversity and climate emergency
  - (1) The purpose of this Act is to address the biodiversity and climate emergency domestically and globally.
  - (2) As soon as reasonably practicable and no later than one month beginning with the day on which this Act is passed, the Prime Minister must declare that there is a biodiversity and climate emergency domestically and globally.
  - (3) The Government must have regard to this purpose and declaration when implementing the provisions of this Act.

## 2 Environmental targets

- (1) The Secretary of State may by regulations set long-term targets in respect of any matter which relates to –
  - (a) the natural environment, or
  - (b) people's enjoyment of the natural environment.
- (2) The Secretary of State must exercise the power in subsection (1) so as to set a long-term target in respect of at least one matter within each priority area.
- (3) The priority areas are –
  - (a) air quality;
  - (b) water;
  - (c) biodiversity;
  - (d) resource efficiency and waste reduction;
  - (e) soil health and quality.

## 5 Environmental targets: process

- (1) Before making regulations under sections 2 to 4 the Secretary of State must seek advice from persons the Secretary of State considers to be independent and to have relevant expertise.
- (2) Before making regulations under sections 2 to 4 which set or amend a target the Secretary of State must be satisfied that the target, or amended target, can be met.

## 2. Clean and plentiful water

**We will achieve clean and plentiful water by:**

- Improving at least three quarters of our waters<sup>3</sup> to be close to their natural state<sup>4</sup> as soon as is practicable by:
  - Reducing the damaging abstraction of water from rivers and groundwater, ensuring that by 2021 the proportion of water bodies with enough water to support environmental standards increases from 82% to 90% for surface water bodies and from 72% to 77% for groundwater bodies.
  - Reaching or exceeding objectives for rivers, lakes, coastal and ground waters that are specially protected, whether for biodiversity or drinking water as per our River Basin Management Plans.
  - Supporting OFWAT's ambitions on leakage, minimising the amount of water lost through leakage year on year, with water companies expected to reduce leakage by at least an average of 15% by 2025.
  - Minimising by 2030 the harmful bacteria in our designated bathing waters and continuing to improve the cleanliness of our waters. We will make sure that potential bathers are warned of any short-term pollution risks.



A Green Future: Our 25 Year Plan to  
Improve the Environment



## 5. Risks (For Everyone)

- **Legal Uncertainty**

‘Businesses will always seek to maximise clarity and certainty’ (Mineral Product Association, Written Evidence)

- **Lack of Rigorous Basis**

‘The Bill fails to set out what criteria or evidence government must consider when setting new air quality targets. The Bill provides no meaningful or transparent role for independent expert health advice in the government’s decision-making.’ (British Lung Association)

- **Not Fit for Purpose**

‘The Environment Bill is a landmark constitutional bill’ (ClientEarth, written evidence).



## Thank you!

- Environment Bill and associated documents - <https://bills.parliament.uk/bills/2593>
- Elizabeth Fisher, 'Executive Environmental Law' (2020) 83 Modern Law Review 163 – Comment on Draft Environment Bill 2018
- Elizabeth Fisher, 'Towards Environmental Constitutionalism: A Different Vision of the Resource Management Act 1991' (2015) Resource Management Theory and Practice 63