GREENER UK

Wildlife and Countryside LINK

Environment Bill: briefing for Lords Committee Day 2

22 June 2021

Summary

This briefing is on behalf of the environmental coalitions Greener UK and Wildlife and Countryside Link and covers **Clauses 16 to 18** on environmental principles and **Clause 19** on statements about bills containing new environmental law.

The Environment Bill sets out five important environmental principles in law: integration, prevention, precaution, rectification and 'polluter pays'. These must function as foundational guiding principles for the government. The integration principle should require environmental protection requirements to be built into policy development, including at early stages, leading to more holistic policy making. The precautionary principle is vital in enabling regulatory or other action to be taken when there is an absence of scientific certainty about environmental harm. Prevention requires action to avoid environmental damage before it occurs, while rectification requires environmental damage to be addressed at source to reduce the impact of damage by delaying remediation. Finally, the principle that the polluter must pay should ensure that policy makers factor pollution costs into their thinking and policy implementation. **The bill does not yet provide an adequate route to ensuring that these important legal principles fully function to achieve these aims.**

The clauses on environmental principles are largely unchanged from the draft Environment (Principles and Governance) Bill, despite very clear evidence that emerged during pre-legislative scrutiny, including from leading academic experts, on the need for these clauses to be strengthened. These experts concluded that the bill does not maintain the legal status of environmental principles as they have come to apply through EU law and that the "almost total relegation of the role of environmental principles to the Policy Statement ... undermines their legal influence to the greatest extent possible ... To fail to articulate their legal effect in any substantive way in the draft Bill is to fail to give environmental principles the kind of overarching legal role [that they currently have]".

Despite listing the principles on its face, the bill constitutes a significant weakening of the legal effect of the principles because there is no duty on government ministers or public authorities to act in accordance directly with the principles, only a duty to have "due regard" to a weak and heavily caveated policy statement.

Clause 16 requires the Secretary of State to prepare a policy statement on environmental principles. Only ministers, not public authorities, must have "due regard" to this statement when making policy and the requirement is subject to wide ranging exemptions in Clause 18(2) and (3). These seem to absolve HM Treasury, the Ministry of Defence and, indeed, those "spending…resources within government" from considering the principles at all.

The bill also states that the policy statement need only be applied "proportionately" when making policy. This may allow the government to trade off environmental principles against socio economic considerations, thus weakening environmental protections.

We therefore support amendments that would remove the sweeping exemptions for defence and spending and place a duty on all public authorities to have due regard to the principles rather than only a weak policy statement.

Amendments we strongly support

Amendment 76: extension of the duty on environmental principles to cover public authorities as well as ministers (Baroness Parminter)

We strongly support amendment 76, which would extend the applicability of the policy statement on environmental principles to public authorities as well as ministers of the crown.

Clause 18(1) limits the scope of the "due regard" duty to ministers of the crown, which ignores the important policy created by many public authorities. This undermines the existing role of the principles in routinely guiding and shaping day to day administration affecting the environment. The impact of the environmental principles in UK law has historically gone beyond guiding only ministers in the making of policy.

In our view, restricting the "due regard" duty to ministers represents a weakening of UK law. The impact of the principles has extended deeply and routinely into administrative decision making, often having a binding effect on the public bodies directly delivering measures – including for example in respect of GMOs, pesticides, waste regulation and water regulation.

It is vital therefore that the duty applies to all public authorities. The principles must be taken account of in the formation of policy, implementation, in public authority decision making and many other stages of environmental management.

Our understanding is that the government intends for the "due regard" duty to "trickle down" to arm's length bodies (ALBs) in those instances where ALBs are developing policy on behalf of a minister of the crown. We assume that this would include policies such as the Environment Agency's National Flood and Coastal Erosion Risk Management Strategy for England, although this is far from clear.

While the consideration of principles may well "trickle down" to some extent from ministers, this will not be sufficient to ensure these important principles are fully considered by public authorities in their own policy development.

Amendment 77: direct application of environmental principles (Baroness Jones of Whitchurch)

We **strongly support amendment 77** which would require all public authorities to apply the environmental principles rather than to have "due regard" to a weak policy statement that can easily be changed by future governments. We note that Section 14 of the Scottish Continuity Act requires Scottish ministers to have **direct and due regard** to the guiding principles on the environment in developing policies, including proposals for legislation. It also places additional requirements on public authorities to have direct and due regard to the principles when carrying out strategic environment assessments of plans, policies and programmes. **UK government ministers must therefore explain why they believe their proposed approach is superior.**

We also support **amendment 73** (Baroness Jones of Moulsecoomb) which would extend the "due regard" duty in this Act to cover all public bodies and authorities and apply it directly.

Amendment 78: the proportionality limitation and the exceptions for armed forces, defence policy, tax, spending and resources (Baroness Parminter)

In its pre-legislative scrutiny report, the Environmental Audit Committee concluded that:

> "The exclusions set out in the Bill are so broad that the principles will not continue to have a meaningful influence on the development and application of environmental policy and law". (Paragraph 32)

We **strongly support amendment 78** which would remove ministerial estimates of proportionality and exceptions relating to the armed forces, defence, tax and spending as limitations on the application of the policy statement on environmental principles.

Proportionality

Clause 16(2) of the Environment Bill explains that the policy statement should be "proportionately applied" by ministers when making policy and Clause 18(2) provides a further proportionality instruction in relation to the "due regard" duty. These create a 'proportionality loophole', which would allow future governments to trade off environmental principles against socio-economic considerations, thus weakening environmental protections.

These concerns are heightened given the government's proposed draft policy statement on environmental principles, which contains repeated, excessive references to proportionality. In general, the policy statement takes a wholly disproportionate approach to proportionality, with mentions of "proportionate/proportionality" (19) on a par with "protect" (20) but greatly outweighing "enhance" (7) and "improve" (4). While policy makers will not be counting words when they come to apply the statement, they will nevertheless be greeted by a blizzard of proportionality steers. This will result in policy hesitancy and a tentative approach to the principles and increases the risk that they will be ignored, disregarded or downplayed in policy making.

This, allied with the wording in the bill, sends completely the wrong message to policy makers. It risks proportionality being deployed as a tool to deprioritise environmental measures. It encourages a culture in which the policy statement will be seen as a burden rather than driver of policy making. Instead, the government must ensure that the bill and the policy statement are used to ensure that environmental matters are properly accounted for in decision making.

Proportionality in process and action is often helpful, if used properly. Proportionality requires that action taken does not go beyond what is necessary to achieve the objective(s) aimed for. It provides a framework to guide action when there are competing demands on decisions being made by public bodies. However, it should not guide whether – or how closely – the statement should be read, nor if it is 'proportionate' to consider environmental principles at all.

In the absence of a clear objective for ministers in relation to how they are to discharge their duty to have due regard to the policy statement, what is proportionate will be at the discretion of ministers, allowing a much wider array of political factors to be considered, and potentially undermining environmental protection as the central concern.

By removing the reference to proportionality in the bill and adopting a more balanced approach in the policy statement, the government would be able to meet its aim of "a system that places environmental considerations at the heart of policymaking".

Exceptions for armed forces, defence and national security
Clause 18(3)(a) relates to policies relating to the armed forces, defence or national security. While this may be reasonable were it to be confined to decisions relating to urgent military matters, it is not drafted as such and appears to offer a blanket exclusion for the Ministry of Defence, the Defence Infrastructure Organisation and the Armed Forces. The Ministry of Defence has said that this is a "targeted exemption"; however, it is not drafted as such and is very widely cast.

Given the highly sensitive environments in which several military training areas and exercises are located and the associated policy processes (for example, byelaw reviews, planning applications, contract and procurement decisions and applications for live firing and use of heavy artillery), this clause needs to be tightened considerably.

International environmental law and national requirements such as Environmental Impact Assessment already apply to the Ministry of Defence (MoD). It controls many areas nationally designated for their conservation or landscape value and carries out activities to support nature on its land, rendering this blanket exclusion even more perverse. Consideration of the principles in related policy would only support the MoD in fulfilling these requirements. Failure to consider them could lead to incoherencies in policy development and would be detrimental to good governance.

These exclusions also appear to contradict the MoD's own enthusiasm for the principles – see, for example, this Introduction to Environmental Management in the MoD Acquisition Process (an official document, from 2018, aiming to help MoD employees 'control, minimise, and mitigate environmental impacts arising from the MoD's procurement decisions'), which seems to be an explicit endorsement of the prevention principle and explains quite clearly how it will benefit the military:

> "Environmental problems are often dealt with retrospectively, after the damage has been done and at great cost. By introducing environmental considerations as part of the culture and overall management strategy it will help achieve effective environmental management without the sense that there has been an extra burden.
>
> Environmental management does not have to unduly restrict the military by making regulatory compliance an overriding burden; it should be better viewed as an opportunity to save money, freeing it to be reallocated to operational activities. For instance, protecting the quality of land in training areas will ensure the availability of future training opportunities, and have financial benefits such as reducing energy costs and clean-up, disposal or litigation costs, and improve public relations."

As the Environmental Audit Committee recommended (paragraph 33) in its pre-legislative scrutiny report,

> "Any exclusions to the application of the principles ought to be very narrowly defined. The Bill should specify that the Ministry of Defence as a landowner is not excluded, nor should general taxation or spending be omitted since many environmental measures depend on changes to the tax system."

Exceptions for tax, spending and or the allocation of resources within government
Similarly, Clause 18(3)(b) appears to offer a blanket exclusion for HM Treasury or any matter which might entail government spending or resource allocation.

In response to media coverage of concerns about the wide exclusions on the face of the bill, Defra offered some clarification on spending, including that "It is not an exemption for any policy that requires spending". While welcome, the problem remains that these wide exemptions remain in the legislation, meaning policy makers are less likely to apply the policy statement in relation to the policy on defence and financial matters without explicit instruction otherwise. Furthermore, so far as the allocation of resources between departments is undertaken without regard to environmental principles, the principles are liable to be applied too late in the process to have real impact.

Excluding "Spending or the allocation of resources within government" will severely limit departments' ability to develop the best policies for the environment. As the development of individual policies will be subject to the "due regard" duty, policy makers will need to consider environmental principles in creating policy and implementing funded policies. However, they will not be able to put a case to Treasury, as part of a departmental submission ahead of a spending review, for the policies that have the biggest benefit or most adhere to the principles – and nor will the Treasury be required to factor environmental impacts holistically into overall allocation of funds.

Taxation is a key lever for government to drive environmental improvement. Yet currently. the tax system often does not embody environmental principles, which causes perversities and makes governments' environmental aims more difficult to achieve.

However, many fiscal policies enacted partially or entirely for environmental ends would still fall under the definition of taxation (while other, non-environmental fiscal measures, not fitting the definition, would in theory be subject to the requirement to have due regard to the policy statement. This lack of clarity is confusing to say the least.

In its report on environmental tax measures the Public Accounts Committee highlighted the importance of leadership and coordination on environmental matters and recommended that HM Treasury assess the environmental impact of every tax change considered. The tax system interacts with environmental policy areas which are the responsibility of other government departments. Given HM Treasury's cross government remit, environmental principles must feature in its policy making.

At the same time, the National Audit Office has identified five large tax reliefs that work against the government's environmental goals while together costing the state £16.8 billion in lost revenue in 2019-20. This includes the reduced rate of VAT on supply of domestic fuel and power, the zero rate of VAT on domestic passenger transport, and accelerated capital allowances on plant and machinery for the oil and gas sector. These all encourage higher GHG emissions by lowering the price of fossil fuels, making the government's net zero goal harder to achieve.

It is baffling, therefore, that the government has excluded tax policy from this part of the Environment Bill.

The concept of environmental tax reform, which is supported by the IMF, the World Bank and the OECD, advocates for an ambitious use of environmental taxes, calling for a dramatic shift from taxing 'goods' like labour and investment to taxing 'bads', like resources, pollution, waste and consumption. Yet taxes with a positive environmental impact account for only seven per cent of UK tax revenue, and taxes with an explicit environmental purpose only 0.5 per cent. Seven per cent is fairly average for OECD countries but falls well short of potential demonstrated by countries like South Korea or Croatia, where 11 per cent of revenue is generated from environmental taxes.

The exemption for taxes in this bill will do nothing to encourage a more sustainable tax system and does not sit comfortably with a government promising to lead on both the climate and nature emergencies.

Comments on other amendments

Amendment 75: definitions of environmental principles (Baroness Jones of Moulsecoomb)

Amendment 75 replicates and expands upon the principles listed in Clause 16(5)(a) to (e) and then adds six additional principles.

The expanded definitions of the existing principles are helpful and superior to their equivalents in the draft environmental principles policy statement, on which we have expressed serious reservations.

We note that the amendment seeks to reinstate the principles of public participation enshrined in the Aarhus Convention in the bill. As these are rights rather than principles, and given the weak framework proposed by the government, we would not support the Aarhus rights being included in this part of the bill.

Regarding the additional principles, while we understand the intent behind their proposed inclusion, our preference is for the bill to focus on the five principles already listed and for the legal framework underpinning these to be strengthened.

Government amendments 80, 298 and 299: environmental principles and reserved matters in Scotland (Lord Goldsmith)

The UK government proposes, by amendment (**299**) to Clause 138, to extend Sections 16 to 18 of the Environment Bill to Scotland. **Amendment 80** to Clause 18 adds three subsections that ensure that the duty in Clause 18(1) applies to reserved matters only. The new Clause 18(5) puts on a statutory basis the UK government's assertion that the provisions in the Scottish Continuity Act do not apply to these reserved matters.

We welcome the attention given to reserved matters in Scotland, and the apparent wish of both the UK and Scottish governments to legislate to ensure that ministers exercising reserved powers are subject to a duty to have due regard to environmental principles. We have no position on the constitutional issue of which Parliament should legislate for this issue; the priority is for this 'governance gap' to be filled effectively.

Whether either approach is preferable from an environmental perspective depends on the quality of the respective policy statements to be used in applying the duty. At present, it is not possible to make such a judgement – as the UK government's policy statement is still being formulated (although we have expressed serious concerns about the draft that was published for consultation) and the Scottish government's proposed guidance is yet to be published for consultation.

Amendments 79 and 81: environmental principles and reserved matters in Wales (Lord Wigley)

Clauses 16 to 18 of the bill currently seek to introduce five EU environmental principles into domestic law. This, however, is limited in extent to England and Northern Ireland (the latter subject to commencement by the NI Assembly).

In Scotland and Wales, such matters, in relation to devolved matters, are for the Scottish Parliament and Senedd Cymru to determine. This, however, potentially leaves a "gap" in relation to matters affecting Scotland and Wales but reserved to UK ministers.

For Scotland, this issue may be addressed by The UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021. This introduces the concept of environmental principles to Scots law, and s.14(2) of the Act could apply the principles to UK ministers in respect of reserved matters. Alternatively, government amendments 80, 298 and 299 to the Environment Bill, adding new subsections to Clause 18 and amending the extent of these clauses in Clause 138, also provides for such a solution.

The Welsh government has committed to legislate on environmental governance and, given the proposed UK Government **amendment 278** to the Government of Wales Act 2006 (via this bill), this could address reserved matters. However, it is unlikely that a Welsh bill would be enacted until 2022, given that the Welsh government's legislative programme is yet to be published and bearing in mind the time that it would take for a bill to pass through Senedd Cymru.

We **welcome amendments 79 and 81**, which seek to fill, in part, that temporary gap by extending the provisions of Clause 18 to Wales for policy made by ministers of the crown in relation to reserved matters in Wales. It would cease to apply once specific Welsh legislation has been passed to address the issue.

The UK government has committed on many occasions that will be no governance gap following our departure from the EU. **This amendment provides an opportunity for the UK government to clarify what, if any, agreement has been reached with the Welsh government on how this gap in relation to ministers of the crown and reserved matters in Wales will be addressed.**

Amendment 81A: statements about bills containing new environmental law (Lord Hope of Craighead)

We welcome the tabling of **amendment 81A** which allows for some discussion of Clause 19, which requires ministers to publish a statement before the second reading of any bill, which contains environmental law provisions. This should state that, in the minister's view, the bill will not have the effect of reducing the level of environmental protection provided by any existing environmental law.

At first glance, this measure appears to be common sense and part of good administration. However, we are concerned that restricting this clause to bills containing environmental law provisions risks excluding legislation and policy which could have significant environmental impacts.

Clause 19 would have more utility were it to be modelled more closely on the Human Rights Act, on which it appears to be loosely based. That legislation involves a more rigorous process in which the Joint Committee on Human Rights scrutinises every government bill for its compatibility with human rights. A new Joint Committee on Environmental Standards could be established to undertake a similar role, or it could be undertaken by one of the existing environmental select committees. The statement should be published before the bill is introduced or as part of any consultation on the proposed legislation.

These matters are all the more important because the governance structure which sits behind statements of compatibility under the Human Rights Act (namely that fundamental rights are enforceable by the courts) does not obviously apply to primary legislation related to environmental protection.

Regression is unlikely to emanate very often from primary legislation. Instead, regressive changes will probably be tucked away in the small print of trade agreements, secondary legislation or detailed policies. The scope of this provision should, therefore, be extended to cover secondary legislation.

The government should also clarify why the statement is only to be published before second reading, given that the amending stages of bills come after second reading. How will the statement take account of subsequent amendments that may have the effect of reducing the level of environmental protection?

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