GREENER UK

Wildlife and Countryside LINK

Environment Bill: briefing for Lords second reading

June 2021

Summary

This briefing is on behalf of the environmental coalitions Greener UK and Wildlife and Countryside Link. Our members have been working on this important legislation since 2017. The briefing covers all parts of the bill apart from the provisions on air quality, which are being co-ordinated by the Healthy Air Campaign.

The bill will establish a new environmental governance system for England and Northern Ireland, including a new oversight body, the Office for Environmental Protection. The government has promised to put the environment at the heart of policy making, through a new set of improvement targets and a policy statement on environmental principles. It wants this "landmark" bill to turn the tide on nature's decline, transform the way we manage waste, protect precious water resources and improve water quality.

The bill will have its work cut out to deliver these lofty ambitions. The dismal decline of our nature is well documented in what the RSPB has called a lost decade for nature, with the UK at the bottom of the G7 league table for how much biodiversity it has left. Our rivers are in a dire state and many people regularly breathe toxic air. UK consumption is now such that the average UK citizen will have a greater carbon footprint in twelve days than citizens in seven other nations will have in a year. Litter is wreaking havoc on British wildlife, killing millions of mammals every year and choking our seas with plastic. To supply the annual UK demand for just seven forest commodities a land area of 88 per cent of the size of the UK – a total of 21.3 million hectares – is required.

The stakes could not be higher, therefore, for this first dedicated Environment Bill in over twenty years.

The government is aiming high and wants the "most ambitious environmental programme of any country on earth" and a "world-leading" bill. There are glimmers of this. For example, the government has hailed its promised 2030 species recovery target as "…the Net Zero equivalent for nature, spurring action of the scale required to address the biodiversity crisis".

Ultimately though, the success of this bill, including the welcome 2030 target, will depend on whether it puts in place the right building blocks and action is pursued at the necessary pace and level. The foundations are there but lack surety. Timescales have in many cases slipped. This briefing sets out the main improvements needed to:

- Drive environmental improvement through binding interim targets and stronger delivery plans.
- Provide effective oversight on environmental law and progress by strengthening the independence and enforcement function of the Office for Environmental Protection.
- Ensure environmental principles are at the heart of all government policy making and reverse the current 'tick box' approach.
- Place nature's recovery at the heart of policy making: major infrastructure projects should be part of biodiversity 'net gain', with a stronger role for Local Nature Recovery Strategies.
- Reduce the UK's global footprint and our contribution to global deforestation.

The bill grants ministers many powers, some of which are very widely cast, and would allow future governments to change important laws on habitat protection, water quality and chemicals safety through regulation. Some of these do not yet have appropriate controls to ensure they are always pursued transparently, are subject to consultation and further, rather than undermine, current levels of environmental protection.

Part 1: Environmental governance

Clauses 1 to 14: Environmental targets and improvement plans

The inclusion of a target setting framework is a welcome part of the bill. The long term nature of environmental matters makes this particularly important. Environmental improvement cannot be achieved over the short time frame of a political cycle.

Putting targets into law gives them certainty and clarity that benefits everyone and drives long term investment in environmental improvements. While the framework to set targets is welcome, it must be strengthened to be effective and durable.

Clause 4 places a welcome duty on the Secretary of State to ensure that targets are met. However, there is nothing to compel governments, including future ones, to start taking action now required to meet targets, or to take remedial action where targets are missed. **The Secretary of State should be required to meet interim targets.** This matters, given the number of voluntary targets that have been missed or abandoned.

The government has previously suggested that non-binding interim targets are appropriate because the environment "…is an ever-changing, flexible scene". However, while we recognise that change towards long term goals, and progress towards meeting them, does not always happen in a linear way, that is not an argument to fail make the interim targets legally binding. It is an argument for the government to apply some flexibility in the type of interim targets it might set.

Binding interim targets can provide near term certainty for businesses, creating the sort of stable environment which encourages investment in their workforce, and in green products and services. They would focus businesses on planning the trajectory towards the long term targets and help drive innovation in their business model.

The vital link between targets and Environmental Improvement Plans should be strengthened by ensuring that plans include measures that will enable the targets to be met. Currently, the bill is not explicit that plans must include measures capable of achieving the targets, or that those measures must be carried out. Without this connection, the bill provides no impetus for successive governments to bring forward specific time-bound measures, as part of the relevant Environmental Improvement Plan, to ensure that policies are in place to deliver the targets and progress remains on track.

The announcement of a 2030 species recovery target is a potential watershed moment for wildlife. This could inspire legal targets for wildlife around the world in talks at the Convention on Biological Diversity in October. The UK was a driving force of the Leaders' Pledge for Nature which commits to reversing biodiversity loss by 2030. Placing a 2030 binding target in domestic legislation ahead of the October talks will strengthen the UK's hand in the negotiations and help to drive up global ambitions.

The design of the 2030 target matters: its drafting must not shirk in its purpose. It should cover as many species as possible, with measures that lead to greater abundance and diversity of wildlife at land and sea. An action plan for delivery, clear reporting to Parliament and active oversight from the Office for Environmental Protection will all be needed to make sure it is successful.

The bill rightly recognises the need for a new legally binding target for $PM_{2.5}$, but currently only commits the UK to setting a $PM_{2.5}$ target by October 2022. It does not say anything about the level of ambition this target should strive towards to better protect people's health. This leaves space for a less robust target to be set further down the line, and a further delay in action to reduce this harmful pollutant in the meantime. A government that is serious about protecting people's health must commit now to meeting World Health Organization guideline levels of $PM_{2.5}$ by 2030 at the very latest.

Clauses 16 to 20: Environmental principles

The bill sets out five important environmental principles: integration, prevention, precaution, rectification and 'polluter pays'. These must function as important 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. Rectification requires environmental damage to be addressed at source to reduce the impact of damage by delaying remediation, while prevention requires action to avoid environmental damage before it occurs. Finally, the principle that the polluter must pay should ensure that policy makers factor pollution costs into their thinking.

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]".

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 with the principles, only a duty to have "due regard" to a 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 does not apply to decision making and 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 other matters, thus weakening environmental protections.

The government has recently consulted on a draft environmental principles policy statement. Our response highlights the flaws in the government's approach, including a lack of ambition, many caveats and carve outs and a reductive approach to the principles themselves.

We note that Clause 14 of the Scottish Continuity Act places a direct duty on Scottish ministers in relation to the environmental principles in developing policies, including proposals for legislation. Public authorities are also bound by this duty in relation to their functions on environmental assessment.

The bill should therefore be amended to require public authorities to apply the environmental principles rather than to have "due regard" to a weak policy statement and the sweeping exemptions for defence and spending must be removed.

Clauses 21 to 29: Office for Environmental Protection (OEP)

The OEP will only be effective if it is sufficiently independent from government. There has been strong support in Parliament for the principle of the OEP's independence, including during the pre-legislative scrutiny of the draft bill.

The EFRA Committee concluded that it is essential that "every step is taken to ensure the Office for Environmental Protection is as independent from the Government as possible, to give the public confidence that the Government will be properly held to account on its duty to protect the environment".

Although the government has included some safeguards in the bill, several further changes are needed to ensure enduring independence for the OEP and to meet the government's aim of a world leading watchdog.

These include providing a greater role for Parliament in the appointment of the Chair and the other board members and giving a legal basis to the commitment to provide the OEP with a multi annual budget ring fenced for each spending review.

The Institute for Government and the Environmental Audit Committee recommended that the OEP should have the same appointments process as the Office for Budget Responsibility, where the Chair and members are appointed by the Chancellor, but must have the consent of the Treasury Select Committee.

On funding, the government has agreed that the OEP should have a separate line in Defra's Estimate. A more transparent and effective approach would be to allow the OEP to negotiate and publish its own Estimate. **Clarity should be provided on when the first multi annual budget will commence.**

Ultimately, the OEP's independence is constrained because of its nature as an arm's length body in the Defra family, rather than as a more independent entity such as the National Audit Office. The government has raised concerns that establishing the OEP on a similar basis to the National Audit Office would be constitutionally inappropriate as it would result in a 'parliamentary body' being given the power to initiate legal enforcement proceedings against the government. This constitutional smoke screen seeks to distract parliamentary attention away from justifiable and appropriate measures to strengthen the OEP's independence.

Clauses 30 to 40: The OEP's enforcement functions

Clauses 30 to 40 of the bill establish the OEP's enforcement functions. In addition to taking enforcement action relating to potential breaches of environmental law by public authorities, the OEP will monitor and report on environmental progress and targets and monitor, report and advise on changes to environmental law.

These enforcement functions are particularly important. Having left the EU, the UK will no longer benefit from the environmental oversight and governance provided by EU institutions including the European Commission (the 'Guardian of the Treaties') and the Court of Justice of the European Union.

Overall, whilst we welcome the establishment of the OEP, the government's current proposals for the enforcement process are inadequate and undermine much of the OEP's potential value. In our view the most concerning issues are:

- The Secretary of State's guidance power which fundamentally undermines the ability of the OEP to take independent enforcement action.
- The restriction on the court's ability to grant a remedy following a finding of unlawfulness. This is deeply concerning, undermining the entire enforcement process.
- The lack of clarity about the role of expert decision makers in the new court process.
- The OEP's inability to take strategic action by combining related issues into single environmental review proceedings.
- The objective test applicable when the OEP is determining whether a case is sufficiently urgent that it requires an application for judicial review rather than proceeding with the new OEP-specific enforcement process.

We will provide additional briefing on these issues for Lords Committee but set out below further detail on the most concerning aspects.

Clause 24: Guidance on the OEP's enforcement policy and functions

The OEP is required to prepare a strategy that explains how it intends to exercise its functions. Its strategy must contain an enforcement policy that sets out how it will approach its enforcement role.

Pursuant to Clause 24, the Secretary of State is empowered to issue guidance to the OEP on various matters including its enforcement policy. This could cover how the OEP ought to determine whether potential failures to comply with environmental law are "serious" how the OEP ought to determine whether damage to the natural environment or to human health would be "serious" and how the OEP ought to prioritise cases. The OEP "must have regard" to this guidance from the Secretary of State.

There is a serious risk that this broad guidance power will impede the OEP's ability to perform its role independently. The matters included in the OEP's enforcement policy really matter – they will fundamentally shape the OEP's remit, work and approach.

Clause 37: Environmental review

The bill establishes a new legal mechanism for the OEP: environmental review. The OEP can apply to the court for an environmental review where it has issued a decision notice and (a) it is satisfied, on the balance of probabilities, that the authority has failed to comply with environmental law; and (b) it considers that the failure, if it occurred, is serious.

Through environmental review, the court can review the public authority's alleged conduct. If the court finds that the authority has failed to comply with environmental law, it must make a statement declaring this through a 'statement of non-compliance'. The court may – in some circumstances – grant any remedy (other than damages) that it could grant in the context of judicial review. And, when deciding whether to grant a remedy, the court must apply the principles applicable in the context of judicial review.

However, this power – and the discretion usually afforded to judges in the judicial review context – are subject to some further significant caveats: the court can only grant a remedy where it is satisfied that to do so would not (a) be likely to cause substantial hardship to, or substantially prejudice the rights of, any person other than the authority; or (b) be detrimental to good administration.

The remedies and sanctions available through the environmental review process are therefore too weak and the court's ability to grant them is unjustifiably restrained in an unprecedented fashion. The constraints imposed on the court through Clause 37(8) severely limit its ability to grant meaningful remedies, undermining the entire enforcement process. The court should retain its usual ability to grant a remedy wherever it deems it appropriate.

Involvement of experts

To ensure the efficacy of environmental review, the process must include scope for an appropriate role for experts. Environmental law and the issues which it seeks to address and manage are complex and often technical. Given this, it is widely recognised that establishing a meaningful and coherent role for experts in determining environmental cases is of real value and "crucial to successful decision-making in complex environmental cases".

It is worth noting that the government itself had recognised the value in this. In fact, in shifting environmental review from the Upper Tribunal to the High Court in its Commons Committee stage amendments, the government has reversed its own logic.

As set out in its response to the EFRA Committee's pre-legislative scrutiny report recommendations on enforcement (our emphasis):

> "The approach [of establishing environmental review in the Upper Tribunal] will have a number of benefits compared to that of a traditional judicial review in the High Court. In particular, taking cases to the Upper Tribunal is expected to facilitate **greater use of specialist environmental expertise…"**

The government has not provided any compelling rationale for this U-turn. The bill should make clear that the environmental review process will include the possibility of environmental and scientific experts sitting as judges, rather than simply enabling experts to assist the court through the provision of evidence.

Part 2: Environmental governance in Northern Ireland

Schedule 2 includes provision for environmental improvement plans and a policy statement on environmental principles in Northern Ireland. These provisions are broadly parallel to those in Part 1 that relate to England, albeit with some technical differences to reflect the different legal and policy contexts.

However, there are two key omissions: firstly, there is no requirement to set plans for a specified time, and secondly there is no power or duty on DAERA to set and meet legally binding targets.

Legally binding targets are needed to help halt the significant loss of biodiversity in Northern Ireland. **The exclusion from Schedule 2 of provisions akin to those in Clauses 1 to 6 is a fundamental omission that will hinder the protection and improvement of Northern Ireland's environment.**

Our earlier comments on the environmental governance measures in Part 1 of the bill also apply to the measures in relation to Northern Ireland. However, uncertainties remain. We would welcome clarity on when the consultation on Northern Ireland's environmental principles policy statement will be published. This must provide guidance on how the principles relate to the Northern Ireland Protocol.

Schedule 3 makes provision for the functions of the OEP in terms of its activities in Northern Ireland. **We strongly support the inclusion of Northern Ireland within the remit of the OEP.**

However, we are concerned by the inclusion of a broad power for DAERA to issue guidance to the OEP on various matters including its enforcement policy. **This will affect the OEP's ability to perform its role independently and does not take sufficient account of the power sharing nature of the Northern Ireland Executive.**

Clarity is needed on the following matters:

- There is no clear timescale on when the provisions relating to the OEP in Northern Ireland will come into force as they are subject to a secondary approval process from the Department of Agriculture, Environment and Rural Affairs and the bill does not specify a timescale for that. The OEP is being established on an interim basis from 1 July 2021, with the body expected to be formally established in England at the end of 2021, subject to the timing of Royal Assent of the bill. Given that there will be a delay until the formal approval processes in Northern Ireland are complete, **what contingency measures are planned and how will this gap be filled?**
- The bill makes welcome provision for the appointment of a Northern Ireland member on the board of the OEP. The Northern Ireland member will be appointed by the Northern Ireland Department after consulting the Secretary of State and the Chair. **What is the timetable for appointing the first Northern Ireland member?**
- **What resource is to be allocated to enable the OEP to carry out its statutory functions in Northern Ireland**, including to ensure sufficient staff expertise on Northern Ireland law, policy and science?
- **How will the OEP co-operate with the European Commission** on matters of environmental law included within the Northern Ireland Protocol?

Part 3: Waste and resource efficiency

The UK is currently using and wasting resources at unsustainable levels, contributing to simultaneous climate and ecological breakdowns. UK consumption is now such that the average UK citizen will have a greater carbon footprint in twelve days than citizens in seven other nations will have in a year. Litter is wreaking havoc on British wildlife, killing millions of mammals every year and choking our seas with plastic.

We welcome that Part 3 of the bill proposes several measures designed to bring our throwaway culture under control. These include the introduction of a new producer responsibility scheme, deposit return schemes and resource efficiency product requirements. However, these measures are too focused on recycling and 'end of life' solutions to waste. To be fully effective, there must be an increased emphasis on reducing resource use and encouraging design for resource efficiency, including through reuse. Reducing resource use will ensure a more efficient economy, reduce the effects of extraction and disposal on wildlife and ecosystems, and contribute to the delivery of achieving net zero greenhouse gas emissions by 2050.

Schedule 8: Deposit schemes

Schedule 8 outlines the powers for the Secretary of State to introduce a Deposit Return Scheme. This government consultation confirms that the introduction of a deposit return scheme in England, Wales and Northern Ireland will not be until late 2024 at the earliest. This delay has been criticised by MPs and campaigners, who have also called for consistency across the UK.

'All-in' deposit return schemes (drinks containers of all sizes and materials) offer the best financial return, achieve the best recycling return and constitute the clearest system for the public to use. This was confirmed by a series of impact assessments, undertaken by the government in 2019, which found that an 'all-in' DRS would offer substantial financial benefits, and collect a greater proportion of containers, compared to a more limited system that only covered so-called 'on-the-go' drinks containers.

It is also the most likely to offer opportunities for scaling it up to a refill system in the future. Furthermore, an 'all-in' deposit return scheme would ensure compatibility across the UK, setting out a system for England that would work in harmony with Scotland's plans, which would especially benefit those who live near to the border between England and Scotland and anyone travelling between, while ensuring the systems do not undermine one another financially or environmentally. Likewise, this approach would facilitate a simple rollout to Wales and Northern Ireland.

Schedule 9: Charges for single use plastic items

Schedule 9 seeks to reduce the consumption of single use plastic by allowing charges to be imposed. However, the provision for charges to only apply to single use plastic items risks merely shifting the environmental burden, as alternative materials may be used with equal environmental recklessness. Risks of material substitution are many and have been documented by the EFRA Committee and can be viewed in these reports from Greenpeace and Green Alliance. As the Green Alliance report sets out, switching all current consumption of plastic packaging (1.6 million tonnes) on a like for like basis, to the other materials currently used for packaging in the UK, could almost triple associated carbon emissions from 1.7 billion tonnes CO_2 equivalent to 4.8 billion tonnes CO_2 equivalent. **The problem lies with the single use throwaway culture, not with plastic per se.**

The short-sightedness of this approach was recently highlighted by a statement in the government's consultation on introducing a new regime for extended producer responsibility for packaging. In section 6 on disposable single use cups, the consultation asserts that the government may look to encourage reduction later through Environment Bill powers to charge for single use plastic items. However, without amendment, the government will not be able to institute charges for all such disposable cups.

The bill only allows charges for items made partly or wholly of plastic. Disposable cups that contain no conventional or plant-based plastic whatsoever are already on the market. It would not therefore be possible to use the bill powers to charge for those paper cups. That will unnecessarily limit the impact of any charges the government brings in and could see the market simply switch to unnecessary paper cups, instead of driving reuse and reduction as the government intends. This is far from the only example where the limited power will hamper future environmental improvements. **This clause must be amended to future proof government action on reduction and reuse.**

Clause 61: Transfrontier shipments of waste

Clause 61 amends the Environmental Protection Act 1990 to give the Secretary of State new powers to regulate the export of waste from the UK. In principle, this clause is welcome as a rich country like the UK should not be exporting polluting waste to developing countries.

However, international commitments mean it is already illegal for the UK to send 'polluting' waste to non-OECD countries. The international Basel Convention obliges signatories, including the UK, to prohibit export of waste to developing countries "if it has reason to believe that the wastes in question will not be managed in an environmentally sound manner". This convention will be strengthened in 2021, when most plastic will become subject to even stricter hazardous waste controls. The UK has struggled to fulfil its international obligations in this area, although the Environment Agency in England has recently tried to increase its preventive work.

For this power to be exercised effectively, the government will need to put in place and fund an adequate regulatory and enforcement system to ensure that it meets its current and future obligations on waste shipments.

Part 5: Water

Part 5 of the bill sets out welcome changes to water management, enabling more strategic thinking to protect our water environment, and greater consideration of how water management can contribute towards wider environmental targets.

Clause 77: Water resources management plans and drought plans

Government guidelines create the expectation for companies to "work in regional groups to meet the challenge and together develop a cohesive set of plans". Plans produced by individual companies have not always reflected this in practice. Clause 75 therefore enables the Secretary of State to direct companies to prepare and publish joint proposals and to place regional plans on a statutory footing. **The government should set out the circumstances under which the Secretary of State intends to use these powers and how company adherence to regional plans will be assured.**

In combining and condensing requirements currently set out in relation to these plans, detailed sections of existing legislation requiring consultation during plan preparation have been lost. **The government should clarify that it will, through regulation, require and undertake consultation with a comprehensive list of stakeholders.**

Clause 78: Drainage and sewerage management plans

Whilst the management of water supplies has long been subject to statutory requirements for long term, strategic planning, the same is not the case for wastewater. This has contributed to the chronic underinvestment in drainage and sewerage infrastructure that underlies issues such as the vast number of sewage discharges into rivers recorded last year. Clause 78 inserts new sections into the Water Industry Act 1991 to require each sewerage undertaker to prepare, publish and maintain a drainage and sewerage management plan (DSMP). This is welcome and would enable companies to take the strategic approach to wastewater management that is so clearly needed.

However, the bill could go further to clarify that environmental benefit is recognised as a legitimate outcome of DSMPs, and that investment to achieve this will be supported by the industry's economic regulator Ofwat.

Tackling sewage in rivers

In response to the significant public support for the proposals in Philip Dunne's Sewage (Inland Waters) Bill, the government confirmed that measures to reduce sewage discharges from storm overflows will be added to the Environment Bill. **While welcome, the government's proposals look set to fall far short of the ambition of the Private Members' Bill** and will focus on the production of and reporting on an action plan, and the publication of water company data. **Clauses could be further strengthened by placing a duty on water companies to take all reasonable steps to ensure that untreated sewage is not discharged into inland waters.**

Clause 82: Water abstraction, no compensation for certain licence modifications

Historically, licences for abstraction from rivers and other water sources were issued with limited consideration of their ecological impacts. Some action has been taken to limit these impacts, such as by amending water company licences. However, much more needs to be done as data shows that nearly a fifth of surface waters, and over a quarter of groundwaters still do not have enough water to protect the environment, and to meet the needs of fish and other aquatic life.

This is because the requirement to pay non-water-company licence holders compensation when damaging licences are amended or revoked, is preventing the alteration of all but the most severely damaging licences. This creates unfairness, where a minority of licence holders can profit at the expense of the environment, while others operate within environmental limits.

Clause 82 would enable the Environment Agency to remove or change environmentally damaging licences without the need to pay compensation, and to do the same with unused capacity within licences.

This power is extremely welcome, and necessary, both to protect the environment, and to ensure that newer abstractors are not disadvantaged. However, the timescale proposed in the bill is too long as the changes will apply to licences "revoked or varied on or after 1 January 2028". Over-abstracted rivers and groundwater-dependent habitats will therefore continue to suffer for at least a further seven years, threatening habitats and public water supplies. **The 2028 date should be brought forward to 2022.**

Clause 83: Water quality: powers of Secretary of State/ Clause 85: Water quality: powers of Northern Ireland department

Clause 83 gives the Secretary of State a wide ranging power to amend the regulations that implement the EU Water Framework Directive, particularly relating to the chemical pollutants that should be considered under the regulations, and the standards to be applied to them. Clause 85 gives the same power to DAERA.

The Commons Committee raised several concerns on this power, including on the lack of opportunity for stakeholder involvement in decision making.

Minister Pow responded by confirming that, in consultation with the Environment Agency, updates to the list will be based on the latest science and monitoring data, and that these currently suggest a potential increase in the number of substances that will be subject to the provisions of the implementing regulations, rather than a reduction.

Further reassurance from the minister and DAERA confirming that wider consultation will be undertaken would be welcome. It will be especially important to ensure that input is sought from the expert UK Technical Advisory Group.

Clauses 88 to 91: Land drainage

These clauses remove barriers to the creation of new Internal Drainage Boards (IDBs). These local public bodies manage water levels in certain areas for land drainage and flood management purposes. However, without appropriate safeguards, such work can be environmentally damaging, harming biodiversity and contributing to climate change through the release of carbon dioxide. A recent National Audit Office report into IDBs noted that their environmental expertise is often lacking.

This bill proposes to enhance the biodiversity duty set out in the Natural Environment and Rural Communities Act 2006. As bodies which carry out management of the environment, it is both appropriate and necessary that IDBs are subject to this requirement.

Any moves to suggest that IDBs should be exempt from the strengthened biodiversity duty provision of the bill must be immediately quashed.

Part 6: Nature and biodiversity

Clauses 92 to 94: Biodiversity gain in planning

Done well, biodiversity gain could help contribute to the restoration of biodiversity, deliver the ambitions of the 25 Year Environment Plan and help respond to the climate and ecological emergencies, if it operates and is assessed against a national plan to restore nature and ecosystems.

We are concerned that newly created habitat, as part of developers' biodiversity gain requirements, could be destroyed after 30 years.

Habitats secured under biodiversity gain must be maintained in perpetuity, rather than the 30 years currently specified in the bill.

If delivery of biodiversity gain is to contribute to the 25 Year Environment Plan commitment to a Nature Recovery Network, and to provide carbon sequestration which could support the net zero target, these areas must be secured and maintained for the long term. This will ensure that they can be enjoyed by future generations, secure nature's recovery for the long term and play a role in assisting nature to adapt to climate change.

Currently, the bill does not extend the requirement for biodiversity net gain to major infrastructure developments delivered through the Nationally Significant Infrastructure Projects (NSIPs) regime.

This exemption will result in habitat loss on a large scale, due to the large size of major infrastructure developments. It could potentially lead to the destruction of irreplaceable habitat, increased fragmentation of remaining habitats and the local extinction of endangered species. For example, HS2, a major infrastructure project without biodiversity net gain, put at risk 108 ancient woodland sites, 33 Sites of Scientific Interest (SSSIs), and 693 Local Wildlife Sites. HS2 was not delivered through the NSIP regime but is comparable in scale to future major infrastructure projects that will be delivered in this way.

The environmental risks posed by the NSIP exemptions are exacerbated by the government's planning reforms, which propose expanding the use of Development Consent Orders under the NSIP regime to permit large housing developments. If the reforms are implemented, the current loophole for NSIPs means that many large housing developments will be lifted out of the requirements for biodiversity net gain, in addition to the transport and power developments currently covered by the NSIP regime. This report from Wildlife and Countryside Link highlights how the exemption of NSIPs from net gain would undermine the government's work to reverse the decline of nature in England.

Large developments should therefore be brought within the scope of biodiversity net gain. This would not just reduce the risk of habitat destruction from major infrastructure projects, but also provide significant opportunities for nature's recovery. If appropriately planned, located, designed and built, major infrastructure projects can deliver biodiversity gain at a large scale.

Clauses 97 to 101: Local Nature Recovery Strategies

Local Nature Recovery Strategies have the potential to be an extremely effective tool for coordinating nature's recovery, but as drafted this potential will not be realised because of the very weak duty to apply the strategies in decision making. Local Nature Recovery Strategies must actively influence the important day to day decisions that affect nature.

Local Nature Recovery Strategies are intended to co-ordinate the actions of multiple stakeholders, including directing the use of biodiversity gains from the planning system, Environmental Land Management systems and other sources, helping to build and maintain ecologically coherent networks of nature recovery sites.

However, as drafted, the duty to use Local Nature Recovery Strategies is very weak – it is a duty to "have regard" to the strategies in complying with the general duty to "have regard" to the need to enhance nature. There is no duty to apply strategies in critical day-to-day decisions that impact on nature, such as planning and spending. This risks creating obligations to develop Local Nature Recovery Strategies, expending precious local resources, only to see this effort wasted by failing to give the strategies any influence on real decision making.

The duty to use Local Nature Recovery Strategies must be strengthened so that they are at the heart of all public authority strategic planning and decision making.

Clause 102: Species Conservation Strategies

Clause 102 would provide a legal basis for Natural England to prepare Species Conservation Strategies (SCSs), in consultation with relevant local planning authorities and others. The government has said that these strategies would support and encourage the design and delivery of strategic approaches for the protection of species, particularly in locations where this can also help resolve planning issues.

Although Defra has stated that an SCS "is a new mechanism to safeguard the future of particular species at greatest risk", the details of the proposal suggest that the primary driver for the SCSs is to streamline process for development.

Strategic approaches could lead to positive conservation results for some species if rigorous and well monitored. However, they also bring a high degree of risk that habitat on which species rely for survival is lost, and that vital protection for species is loosened to make way for development.

The bill should be amended to clarify that these strategies must contribute to nature recovery, and all measures set out within them should be designed to contribute to the enhancement of the conservation of the species which they concern.

Future consideration of strategic licensing systems should only be considered as part of a wider conservation strategy for species and only progressed where a thorough assessment of the conservation status of a species, its needs and amenability to strategic approaches has confirmed that this is appropriate.

Clauses 105 and 106: Habitats Regulations

At Commons Report stage, the government amended the bill to give the Secretary of State the power to amend the Habitats Regulations. The government says it needs this power because it wants the legislation to adequately support its ambitions for nature and free up technical expertise in Natural England from being distracted by what it regards as highly prescriptive legal processes. These "legal processes" include crucial safeguards in decisions concerning the protection of species and habitats, which should not be stripped away in the name of simplification.

We agree that laws for the protection of habitats and species should be aligned with the ambition to halt the decline of nature by 2030. However, the government's proposal for regulations that could replace the existing purposes of the Habitats Regulations risks losing important protections for wildlife.

The Environment Bill is not a replacement for the Nature Directives. They serve two distinctive purposes:

- The Environment Bill sets an overarching ambition for nature's recovery.
- The Nature Directives provide protection for certain species and habitats, including particular local populations and individual specimens.

The powers would enable the government to change the law in such a way as to ensure overall environmental protection but could allow damage to important wildlife.

For example, the Regulations could weaken protection for individual species or sites (such as Great Crested Newts or Special Areas of Conservation), or for particular local populations of those species, with significant damage to wildlife being "covered up" by overall trends.

Clause 106 gives an exceptionally broad power to the Secretary of State to amend Part 6 of the Habitats Regulations. Progressing this ahead of the publication of the expected Green Paper on reforms to the habitats regulations later this year seems both premature and presumptive, particularly in the absence of any consultation.

The bill should therefore be amended to clarify beyond doubt that the Habitats Regulations can be amended to contribute to new objectives in addition to and not instead of existing objectives. This could allow the Regulations to be aligned with the new Environment Bill objective of overall environmental improvement, without allowing the specific protection for specific sites and species or populations to be weakened.

We also urge the government to remove the ambiguity from these clauses to ensure that the verbal assurances given by the Secretary of State are hard wired into the legislation and guide future ministerial exercising of these powers.

Both clauses require the Secretary of State to "have regard to the particular importance of furthering the conservation and enhancement of biodiversity" when exercising these powers. While this sentiment is welcome, a stronger construction than "have regard" is appropriate in this instance.

The clauses also require the Secretary of State to be satisfied that they do not reduce the level of environmental protection provided by the Habitats Regulations before exercising this power. This subjective test should be converted into an objective requirement, with the Secretary of State required to consult experts such as the OEP and Natural England.

The government has said that it will take a "measured approach" to reform and will consult with the OEP and conservation groups on any proposals it develops before any regulatory changes are made (although we note there was no prior consultation or engagement with stakeholders on the scope or detail of these powers).

While welcome, these consultation pledges are not specified in the new clauses, which merely require the Secretary of State to consult with "such persons as the Secretary of State considers appropriate". While the current Secretary of State may decide to consult with the OEP and conservation groups, future ministers may hold a different view.

Schedule 16: Use of forest risk commodities in commercial activity

The Global Resource Initiative (GRI) Taskforce recommended in March 2020 that the government should urgently introduce a mandatory due diligence obligation on companies that place commodities and derived products that contribute to deforestation (whether legal or illegal under local laws) on the UK market. The GRI called on the government to ensure that similar principles are applied to the finance industry.

The GRI also recommended that since not all businesses have begun to commit to and implement sustainable supply chains, a legally binding target to end deforestation in UK supply chains would provide the necessary signal for a shift in industry behaviour.

In 2020, the government undertook a consultation on whether the UK government should introduce a new law designed to prevent forests and other important natural areas from being converted illegally to agricultural land. The consultation revealed strong public support for action.

Ninety per cent of respondents stressed that the proposal could go further, with a significant number of responses highlighting that relevant local laws may not be as strong as international or industry standards and that the proposal should be expanded to cover all deforestation, other natural ecosystems and take an integrated approach to the impact of supply chains on the environment and human rights more widely.

The government amended the bill in the Commons and Schedule 16 of the bill includes a new prohibition on the use of certain commodities associated with illegal deforestation and requirements for large companies to undertake due diligence and reporting. However, the provisions do not go far enough in taking on the GRI recommendations or the level of action demanded by the consultation or that is necessary to tackle the growing problems caused by deforestation.

Due diligence legislation is only part of the comprehensive approach that will be needed to deliver deforestation free supply chains. A mandatory due diligence framework should formalise and obligate responsible practices throughout UK market related supply chains and finance, to ensure comprehensive accountability and help prevent deforestation and other global environmental damage.

While a welcome first step, the proposed forest risk commodities framework should also:

- Commit the government to introducing a legally binding target to significantly reduce the UK's global footprint by 2030.
- Address all deforestation linked to UK forest risk commodity supply chains, whether regarded as legal or illegal under local laws.
- Include a mechanism to progressively improve the framework, its implementation and enforcement.
- Establish equivalent obligations for financial institutions.
- Ensure the right to free, prior and informed consent of affected Indigenous Peoples and local communities is respected.
- Establish clear and effective due diligence requirements, including clarity on the acceptable level of risk (negligible risk), public reporting, and the requirement that regulations made to specify further requirements for the new due diligence system (paragraph 3, Schedule 16) should be subject to the affirmative procedure.

We welcome DAERA's decision to extend the due diligence provisions within the bill to Northern Ireland and call on the minister to clarify how Northern Ireland's unique position will be accounted for.

Part 8: Miscellaneous provisions including REACH legislation

Schedule 20: Amendment of REACH legislation

Schedule 20 provides the Secretary of State with wide powers to amend the UK REACH (Registration, Evaluation, Authorisation and restriction of Chemicals) and the REACH Enforcement Regulations 2008. This would allow the government to amend the main text of UK REACH law and lists several protected provisions which cannot be modified.

Amendments to UK REACH would be made through regulations. Schedule 20 states these can only be made if they are consistent with Article 1 of REACH, which sets out its aims and scope. Paragraph 1(6)(b) of Schedule 20 says the Secretary of State must, before consulting on any regulations, publish an explanation of why they are consistent with Article 1, in "the manner which the Secretary of State considers appropriate".

While we do not object to the principle of an amending power on UK REACH, as currently drafted it could be used to reduce the level of protection for the public and the environment from hazardous chemicals.

The principle of establishing "protected provisions" is welcome. The government has said the proposed protected provisions have been selected to preserve the "what" of the aims and principles of REACH, but to avoid freezing the detail of "how" it operates. However, certain key articles are excluded from the table in paragraph 6 of Schedule 20.

Articles 32, 33 and 34 are essential public policy safeguards on transparency and consumer rights and should be added to the list of protected provisions.

Article 32 and Article 34 relate to consumer information and rights and establish a duty to communicate information down and up the supply chain, while Article 33 enshrines consumers' right to know about substances of very high concern in everyday products.

Recent developments on data provision have also given us cause for concern on how protected the founding principles will be. Some parts of the chemicals industry, under significant financial pressure following Brexit, have urged the government to lower requirements for companies to submit safety data on potentially harmful substances.

Ministers are set to rule imminently on whether to stick with the protections set out in the bill or to accept industry proposals that would lower data requirements. This could see full safety data only available for chemicals designated as priority substances by the UK regulator, which would significantly reduce the ability of the regulator to identify and control risks from harmful chemicals.

Although REACH Article 5, "No data, no market" is a protected provision in the bill as it stands, the fact that such deregulatory proposals are being considered by ministers highlights the importance of ensuring that the powers sought by the Secretary of State through the bill are subject to appropriate controls.

It remains the case that the proposed UK system does not provide the same level of protection for the public and the environment from harmful chemicals as the REACH Regulation. This is the most advanced regulation system in the world, managed by the European Chemicals Agency (ECHA). Instead, the UK should negotiate continued participation in this, via associate membership of or very close co-operation with ECHA.

Clause 139: Commencement

The provisions for commencement of the various provisions in the bill are set out in Clause 139. As is commonplace for a long and varied bill, commencement is staggered, with most of the bill's provisions coming into force on "such day as the Secretary of State may by regulations appoint" meaning the exact timescale is unclear.

The OEP and the environmental principles policy statement are urgently needed to close the governance gap that exists until the bill has received Royal Assent, the OEP has been established as a legal entity and is ready to exercise its statutory functions and the policy statement has been approved by Parliament.

Normal conventions on commencement should not apply in relation to time critical measures. For example, Section 100 of the Climate Change Act 2008 provided for Clause 32, which established the Committee on Climate Change as a legal entity, to be commenced on the day the Act was passed.

In his response to the letter from the two Commons environmental select committees, the Secretary of State provided this welcome assurance on the OEP:

> "We are seeking to establish the Office for Environmental Protection as soon as practical after Royal Assent, with no delay longer than is necessary. We anticipate that clause 21, which establishes the Office for Environmental Protection as a legal entity, would be commenced within a few days of Royal Assent."

Subsequently Defra has said that the OEP is expected to commence "shortly after Royal Assent". There is no clarity on when the provisions on environmental principles will be commenced. The draft policy statement, first promised in 2018, and eventually published for public consultation on 10 March, is silent on this issue.

Given the repeated delays to the Environment Bill, which was first announced by the Prime Minister in July 2018, the government should clarify when it intends to commence the provisions relating to the OEP and the environmental principles policy statement. These should both proceed with the greatest urgency.

For more information, please contact:

Ruth Chambers, senior parliamentary affairs associate, Greener UK
e: rchambers@green-alliance.org.uk
t: 020 7630 4524

On behalf of Greener UK and Wildlife & Countryside Link

GREENER UK