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Environment Bill: briefing for Commons Committee

20 November 2020

Briefing on New Clauses

Environmental standards: non-regression (NC2)

The government has frequently stated a desire to improve the quality of our environment and to protect our existing environmental standards. An essential step in doing this is enacting an unambiguous and binding requirement to not regress on existing rules. Not only would this provide clarity and certainty for all stakeholders, including business, but it would also send a clear signal globally about the UK's seriousness and scale of ambition for environmental protection. This is not about staying tied to EU rules, but rather ensuring the UK rules get better and better over time and protecting them from deregulatory pressure.

Non-regression is an exciting and emerging norm of environmental law. It requires a positive trajectory for environmental standards with the ultimate goal of progressively improving the health of people and planet. Non-regression can be found explicitly in international instruments such as the 2015 IUCN Draft International Covenant on Environment and Development, the 2017 Draft Global Pact for the Environment and the 2018 Escazú Agreement that mirrors the Aarhus Convention for the Americas. The 'ratcheting' of Paris Agreement NDCs is underpinned by the same idea, and France has recently incorporated non-regression into its Environmental Code, with the courts issuing a number of judgments on the application of the principle.

A meaningful legal commitment to non-regression in this bill would be a powerful endorsement of the government's ambitions to be world leaders on environmental matters. It would create an authoritative platform from which the UK can seek to improve global green governance.

For further details, please see our briefing on non-regression and the Environment Bill.

Environmental and human rights due diligence: duty to publish draft legislation (NC5)

New Clause 5 would create a duty on the government to publish draft due diligence legislation within six months of the Environment Bill receiving Royal Assent.

Due diligence should cover all environmental and human rights risks and impacts associated with the activities of (specified) bodies (to include business, finance and public authorities). The new piece of legislation envisaged in **New Clause 5** would require full traceability and transparency, and the prevention of any good being placed on the UK market that causes adverse environmental and human rights impacts, including deforestation, forest degradation, and ecosystem conversion and degradation. We welcome the ambitious approach underpinning this new clause.

Since the new clause was tabled, the government has undertaken 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: 99% of respondents agreed that the government should introduce legislation to make forest risk commodities more sustainable.

In its response to the consultation, the government said it would introduce an amendment to the Environment Bill placing new responsibilities on larger businesses using forest risk commodities in their supply chains. Following this, it proposed **New Schedule 1**, which would introduce a prohibition on the use of illegal forest risk commodities and requirements relating to due diligence and reporting. This new schedule will already have been discussed by the bill committee.

Nevertheless, the principles of New Clause 5 remain important as its wider scope means it would have greater impact and would help end our complicity in deforestation.

There is a compelling evidence base on the need for the government to take firm action on deforestation. The Global Resource Initiative Taskforce recommended in March 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 and to take action to ensure similar principles are applied to the finance industry.

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. It should ensure comprehensive accountability and help prevent deforestation and other global environmental damage, as well as ensuring that finance does not enable or support the carrying out of such activities.

New Schedule 1 proposes a limited approach of merely requiring compliance with relevant laws of the country of origin. As this proposal only tackles illegal deforestation, it would not prevent all of the things we eat and buy still being associated with deforestation, nor even ensure that deforestation and conversion caused by the production of the commodities to which it relates is brought to an end. **As the government has its sights set on a world leading new law, its ambition should be strengthened by the adoption of the principles of New Clause 5.**

Waste Recycling: Duty to maintain an end use register (NC7)

New Clause 7 would introduce a requirement for the Secretary of State to maintain a register of the end use of all recycled waste created, collected or disposed of in England. Currently, only voluntary policies exist for monitoring the end use of recycled material, which does not provide sufficient data to understand recycling rates and end markets. During its inquiry into food and drink packaging the EFRA committee highlighted this lack of data, stating "In order to make evidence based policies and assess their impact, the government needs access to reliable data. It is shocking that it does not know how much plastic packaging is placed on market in the UK, nor how much is really recycled."

A new end use register for recycled waste would improve existing data allowing the government to make evidence based policies and to better understand the end use of recycled material. This information could help improve transparency, reduce waste crime and in turn, increase public confidence in the recycling system which has been damaged by growing awareness of waste exports and confusion caused by inconsistent recycling schemes across England.

The register would replace the current voluntary registers, representing a consolidation of information, rather than a multiplication of data. This should be developed as part of the promised National Materials Datahub, which the government has indicated it will support and which would be much more transformative than what is currently proposed.

OEP: Penalty Notices (NC10)

The remedies and sanctions available through the environmental review process are too weak and the court's ability to grant them is unjustifiably restrained in an unprecedented fashion.

Remedies must be meaningful, dissuasive and effective and they must include, where appropriate, scope for the imposition of financial penalties, just as the Court of Justice of the European Union could issue.

It is established in EU law that review procedures for environmental issues must provide "adequate and effective remedies". We are not confident that, without some form of financial penalty, environmental review meets this requirement.

The government has confirmed in written correspondence that fines would not be among the available remedies with respect to the Office for Environmental Protection (OEP) enforcement process or environmental review but that where a public authority failed to comply with a court order in relation to a breach of environmental law and was found to be in contempt, a fine could be imposed by the court. Our research on contempt of court proceedings suggests that they are extremely rare and unlikely to be deployed as a regular or effective deterrent to non-compliance by public authorities.

We support **New Clause 10** which would enable the OEP to impose fines. The OEP's important role and functions are currently undermined by its inability to enforce its determinations or require public authorities to take specific steps to remedy non-compliance with environmental law.

Enabling the OEP to issue penalty notices would help to give its investigatory work a degree of clout and serve as a meaningful contribution to efforts to improve public authorities' compliance with environmental law.

Duty to follow recommendations (NC12)

New Clause 12 would introduce a new requirement on public authorities to usually follow the course of action set out in recommendations issued by the OEP in connection with its scrutiny and advice functions.

This introduction of this duty would reinforce the content of the OEP's reports on environmental improvement plans and targets (clause 25) and its reports on matters concerned with the implementation of environmental law (clause 26). The duty would add weight to these reports, making them more meaningful and effective.

Without this duty, there is a very real risk that the OEP's reports and any recommendations they contain will go unimplemented. Not only would this undermine the efforts and expertise of the OEP, but it would also mean that a new route for better and more accountable environmental decision making and, by extension, the improvement of the natural world itself, goes unrealised.

OEP register (NC13)

The government has said that it will ensure that the relationship between the OEP and Defra is as transparent as possible and that specific mechanisms which aim to achieve adequate transparency are captured in the supporting Framework Document.

A Framework Document would set out the broad framework within which the OEP operates and cover matters like governance and accountability arrangements but there is little scrutiny or transparency concerning Framework Documents with no consultation, parliamentary scrutiny or stakeholder involvement.

Experience of other Framework Documents is that they often become more constraining over time and can be vehicles for government to seek to exert stricter controls over public bodies, which can undermine their independence. **Transparency mechanisms must therefore be set out in legislation and not left to as yet unwritten Framework Documents.**

Schedule 1 should be amended to provide that all significant communication between the OEP and government ministers is recorded and published by the OEP. This could be achieved by requiring the OEP to maintain and publish a register of significant communications with the government.

This is especially important in light of the government's New Clause 24 in which the Secretary of State is seeking a new guidance power in relation to the OEP's enforcement functions. Significant concerns have been raised about the impact that this will have on the OEP's independence and effectiveness.

We support **New Clause 13** which would require the OEP to keep a public register of correspondence with the government, as this would be an appropriate and proportionate safeguard on independence. This is similar to the log of substantive contact that the OBR maintains and publishes, which ensures that details of contact between the OBR and ministers, special advisers, private office and opposition MPs is published.

Primary duty to secure resilience (NC14)

New Clause 14 would make environmental protection a key duty for Ofwat in its regulation and management of the water industry. The closest such duty that currently applies to Ofwat is the 'resilience objective' created under the Water Act 2014, which considers the environment only as an external factor rather than an underpinning feature that needs to be protected.

This is a missed environmental opportunity. Giving Ofwat an explicit duty to consider environmental protection would ensure that water management decisions contribute to wider environmental objectives. As Water UK noted in its submission to the EFRA committee pre-legislative scrutiny of the draft bill in November 2019, the bill "needs to include provision to ensure all regulators of environmentally important activities, such as the water sector, are required to ensure environmental targets are fully factored in to their operation over their sectors; for example, when Ofwat makes decisions in relation to price reviews."

New Clause 14 would address this missed opportunity on water management, giving Ofwat, as a body whose decisions have significant environmental impacts, a duty to contribute to the achievement of wider environmental targets set under the bill.

It would also help to promote the use of nature based solutions within the sector, such as treatment wetlands, biodiversity-rich sustainable drainage schemes, and other solutions that help to increase the resilience of the environment upon which the sector depends.

Reservoirs: flood risk (NC15)

This would require the Secretary of State to make regulations giving the Environment Agency additional powers to require water companies and other connected agencies to manage reservoirs to mitigate flood risk. These regulations would be subject to the affirmative procedure and require the consent of both Houses of Parliament.

Water companies are currently encouraged to follow expert guidance on preventing flooding from reservoirs, including this material from the Environment Agency. **New Clause 15** would give the Environment Agency powers to enforce compliance with such guidance, and beyond just preventing flooding from reservoirs should look to identify opportunities where existing and proposed reservoirs can be used to provide flood storage capacity, along with other multiple benefits.

Public authorities: environmental duty (NC18)

New Clause 18 would introduce a new duty on all public authorities to ensure that all levels and arms of government play their part in achieving the environmental targets set under the bill through their decision making. This need has been identified for each of the priority areas covered by the bill: air quality, water, waste and biodiversity.

This new duty would imbue the targets with meaningful relevance across all public authorities from day one, bolstering the effect of Clause 4 (Environmental targets: effect). Without this, the bill does not require nor sufficiently clarify the need for action across all levels of government and other public bodies.

On air quality, for example, although Part 4 of the bill provides some welcome new powers for local authorities and some useful clarification of their existing responsibilities, the bill does not contain what is needed to ensure that a comprehensive approach is taken across all levels of public decision making. It instead risks putting the burden of responsibility solely on local authorities. Air pollution does not respect boundaries, and local action alone will not be enough to tackle all sources. In relation to air quality, this new duty would spread the onus across central and local government as well as other public bodies, requiring them to contribute to providing solutions on a national and regional scale to protect human health now. This is key to avoid repeating the ongoing examples of delay and inaction from public bodies that hold key influence over major pollution sources.

The new clause would have a similar impact in the other priority areas. It would help to ensure that responsibility for achievement of the targets and delivery of the environmental improvement plans is shouldered by all public authorities and properly integrated into their decision making processes.

State of nature target (NC20)

At next year's Conference of the Parties to the Convention on Biodiversity (CBD COP15) in Kunming, China, the international community is expected to agree a new set of global goals for 2030 to replace the 2020 Aichi biodiversity targets. It is vital that the next decade sees a turnaround in the prospects for our diminishing wildlife and that the last decade's failure to achieve global biodiversity targets is not repeated.

As a driving force of the Leaders' Pledge for Nature which commits to reversing biodiversity loss by 2030, the UK should be a key advocate for translating this into fully accountable and measurable targets in the post-2020 global biodiversity framework. Signalling the intention to set a target in domestic legislation that reflects international commitments in advance of the Conference would strengthen the UK's hand in negotiations and help drive global ambition.

The bill contains a framework for setting long term legally binding targets, but the timeframe does not align neatly with the 2030 commitment that will emerge from CBD negotiations.

Therefore, we support **New Clause 20** which would require the setting of a state of nature target that takes account of the appropriate domestic effort to contribute to improving the global state of nature.

It would also ensure that this headline target to reverse the decline in the state of nature is underpinned by measurement of the significant components of biodiversity, namely species abundance, species extinction risk and the extent and condition of habitats.

Co-operation between the Office for Environmental Protection and devolved environmental governance bodies (NC21)

We support **New Clause 21** which would enhance the provisions for co-operation between the Office for Environmental Protection (OEP) and any bodies with similar functions in Scotland and Wales (described as a "devolved environmental governance body" by Clause 24(4)). While such a body is now proposed in Scotland through the Scottish Continuity Bill (Environmental Standards Scotland), there is, as yet, no formal proposal for such a body in Wales, although it has been recommended. The Welsh government undertook a consultation in 2019 and the environment committee of Senedd Cymru has called for legislation.

Clause 24(4) requires the OEP to consult such a devolved governance body if it considers its work "may be relevant" to their functions. Likewise, s.19(3) of the Scottish Continuity Bill requires Environmental Standards Scotland to consult the OEP or other such body in similar circumstances. These mutual consultation requirements do not, however, amount to a requirement to co-operate when necessary, albeit this is not explicitly prevented.

Given the cross boundary issues that may arise, either across geographic borders, or across the devolved/reserved divide, **New Clause 21** seeks to require some planning for such co-operation. It makes co-operation a specific duty on the OEP and highlights the purposes and means for such co-operation.

Such co-operation duties have been supported by committee witnesses Lloyd Austin, Alison McNab and John Bynorth in the oral evidence session on 12 March 2020.

Application of environmental principles (NC22)

The bill sets out five important environmental principles in law: 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 must require policy makers to assess environmental risk through a science based approach and to take appropriate action depending on the level of uncertainty. 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 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 current legal effect of the principles because there is no duty on government ministers or public authorities to apply the principles, only a duty to have "due regard" to an, as yet, unpublished policy statement.

A duty to apply would ensure that the principles are actively incorporated into policy and decision making, as they are currently. Instead, the proposed "due regard" duty explicitly allows the government to redefine these principles through policy and to choose to introduce specific legislation which does not apply relevant principles, with the justification that due consideration had been given to the policy statement. We are concerned that the bill is, therefore, relegating these vitally important legal principles to little more than creatures of policy.

Up to this point, environmental principles have been binding on all public authorities including in individual administrative decisions. This legal obligation on all public authorities to apply the principles, whenever relevant, will be undermined through the bill.

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 socio economic considerations, thus weakening environmental protections.

We therefore support **New Clause 22** which would require public authorities to apply the environmental principles rather than to have "due regard" to an as yet unpublished policy statement. We note that Clause 10 of the Scottish Continuity Bill 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.

Smoking related waste (NC30)

The aim of this new clause is to ensure that the government creates a producer responsibility scheme for smoking related waste.

The government clarified in February 2020 that tobacco packaging is covered by the current Producer Responsibility Regulations, which require companies to recycle a proportion of the packaging waste they place on the market.

In the Resources and Waste Strategy, the government committed to looking into and consulting on Extended Producer Responsibility (EPR) for five new waste streams by 2025, and consulting on two of these by 2022. The five priority waste streams are: textiles, fishing gear, certain products in construction and demolition, bulky waste and vehicle tyres.

The producer responsibility powers in the bill enable the government to set up an EPR Scheme for cigarette litter but as the government has not identified this as a priority area for EPR, it would be helpful if the committee could seek clarification on likely timescales for this.

Cigarette butts are estimated to account for five per cent of ocean plastic, so **the government should set out a clear action plan and timetable in response to this proposed new clause.**

Biodiversity Gain (NC32)

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 Environment Bill 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.

New Clause 32 would close this NSIP exemption, bringing large developments 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.

Biodiversity net gain is achievable for NSIPs. National Policy Statements that guide NSIPs contain some encouragement for projects to deliver no net loss and to move towards a net gain for biodiversity. This move to biodiversity gain is already being planned for by several NSIPs and major civil engineering organisations (e.g. East-West Rail).

We therefore support **New Clause 32**, which would protect habitats from destruction and ensure that major developments contribute to achieving biodiversity net gain.

Review of Act (NC33)

The government's central commitment under post-legislative scrutiny is that the responsible department will, within the period three to five years after an Act has received Royal Assent, submit to the relevant Commons departmental select committee a memorandum reporting on certain key elements of the Act's implementation and operation. While helpful, as can be seen from the recent experience of reviewing certain aspects of other legislation (for example, the Modern Slavery Act 2015 – see below), non-statutory reviews place no requirement on governments to act within specified timescales, meaning they can often falter.

A further example of this is the length of time it has taken for the government to address the deficiencies in the Natural Environment and Rural Communities Act (2006) Section 40 biodiversity duty. Many reports, including from a dedicated select committee, pointed to the ineffectiveness of the measure and it took the government until 2019-20 to accept this and agree to revise the duty through the Environment Bill.

Mandatory review mechanisms are reasonably commonplace in other legislatures, for example Canada and Germany (eg see pages 24-29 of this Law Commission report).

We therefore support the principle of building in a requirement to review the impact of this important legislation within two years of Royal Assent.

While the Environment Bill already places a number of reporting obligations on the Secretary of State, we consider that **New Clause 33** would add value to these as the proposed duty to review includes taking account of resources. The government has made the welcome commitment to make this the first generation to pass on the natural environment in better condition. However, this will not be achieved without a significant investment in the implementation of the measures in the bill, for example priority habitat creation, restoration and maintenance and nature based solutions.

Timeline of reviewing the Modern Slavery Act 2015

The Act had no in built review clause and a review was undertaken mainly in response to pressure from civil society and others.

In July 2018 the government commissioned an independent review of the Act by Frank Field MP, Maria Miller MP and Baroness Butler-Sloss. This considered how the Act is operating in practice, how effective it is, and whether its legal framework for tackling modern slavery is fit for purpose.

The independent review was published in May 2019. The government responded to the independent review and published a consultation in July 2019 which ran until September 2019. The government published its response to this consultation in September 2020, over two years since the review was first committed to.

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