Wildlife & Countryside Link evidence for pre-legislative scrutiny of the draft Environment (Principles and Governance) Bill

January 2019

Introduction

Wildlife and Countryside Link is a coalition of 49 voluntary organisations concerned with the conservation and protection of wildlife and the countryside. Its members practice and advocate environmentally sensitive land management, and encourage respect for and enjoyment of natural landscapes and features, the historic and marine environment and biodiversity. Taken together its members have the support of over 8 million people in the UK and manage over 750,000 hectares of land.

This document complements the Evidence submitted by Greener UK, which we support.

This response is supported by the following organisations:

A Rocha; Bat Conservation Trust; British Canoeing; Butterfly Conservation; Campaign for National Parks; Campaign to Protect Rural England; ClientEarth; Friends of the Earth; Institute for Fisheries Management; Marine Conservation Society; National Trust; Naturewatch Foundation; Open Spaces Society; Plantlife; Rewilding Britain; RSPB; RSPCA; Salmon and Trout Conservation; Wildfowl and Wetlands Trust; Wildlife Gardening Forum; Woodland Trust

Summary

Given the need to ensure the continuity of effective governance arrangements on the UK's departure from the EU, this important Bill should be progressed at the earliest Parliamentary opportunity. Link welcomes the intention to put environmental ambition and accountability at the heart of Government and establish a world-leading environmental body to maintain standards of protection as we leave the EU.

However, we have a number of concerns about the Bill as presently drafted:

- Taken as a whole, the proposals manifestly fail to provide equivalence with EU mechanisms and are in conflict with the Withdrawal Agreement.
- The section on environmental principles is weak and potentially undermines existing obligations on participatory rights under international and EU law.
- While the process of creating Environmental Improvement Plans has been put on a legal footing, the Bill must expand on this by enshrining legally binding objectives that are more ambitious than those contained in the current 25YP.
- The potential effectiveness of the Office for Environmental Protection (the "OEP") is undermined by a lack of independence and a narrow remit.
- The OEP needs a variety of powers to fulfil its enforcement functions. These include legally binding Decision Notices and an enhanced system of Judicial Review (JR) to prevent regression from EU standards and ensure access to justice.

- The Bill is narrower in scope than the 25 Year Plan, as the Bill does not capture the historic environment and access and enjoyment within the broad definition of the environment. This risks future Environmental Improvement Plans also excluding it.
- As the Bill only covers England and reserved matters, the interaction with devolved matters is unclear. We urge all four nations to work together to address the governance gap and shared environmental challenges.
- Part II of the Bill is of critical importance and is necessary if an improvement in environmental conditions and the pioneering system of green governance promised by the government are to be realised.

Q. 1 Does the proposed constitution of the oversight body provide it with enough independence to scrutinise the Government?

No. While the OEP will report to Parliament (Sch.10), the allocation of its budget (Sch.9) and the appointment of the Chair and non-executive members (Schs. 1 and 2) are under the jurisdiction of the Secretary of State. While the OEP has a duty to prepare, and lay before Parliament, annual accounts containing an assessment of whether it has been provided with sufficient sums in order to carry out its functions (Sch.11), it will ultimately be at the behest of Government in relation to its budget and direction. Moreover, it is vulnerable to emasculation through budget cuts or the application of political pressure with regard to its strategy.

There are precedents for other bodies enjoying both independence and security. Firstly, the Press Recognition Body (PRP) is wholly independent of any other body or influence. Essentially, board members can only be removed by the unanimous agreement of the other board members. It is established by Royal Charter, which gives the board members security of tenure, and can only be amended by a two thirds majority of each of the House of Commons, the House of Lords and the Scottish Parliament, and with the unanimous agreement of the Board itself. It received guaranteed funding from the Treasury for the first three years of its operation (and, crucially, the Treasury had no control over how the PRP spent that money). The National Audit Office's funding model, where it receives funding directly from Parliament, is another example.

In comparison, the OEP is susceptible to budget cuts, external influence and, ultimately, dissolution if it displeases Government. We refer, for example, to published concerns about Natural England in the 2017-19 Report of the House of Lords Select Committee on the Natural Environment and Rural Communities Act 2006 here and oral evidence given by Andrew Sells, former Chairman of Natural England to the EFRA Committee, on 21st November 2018 here.

Q.2 Does the proposed oversight body have the appropriate powers to take 'proportionate enforcement action '?

Firstly, we welcome the definition of "public authorities" *in the Act to mean "a person carrying out any function of a public nature*" (c.17 (3)) with respect to the OEP's enforcement functions.

However, while the Bill provides for an escalating enforcement process, we fear the OEP will be less effective and dissuasive than current EU enforcement mechanisms. In order to provide equivalence and ensure adequate access to justice, the OEP will require a range of powers that can be deployed as necessary and appropriate. These powers include:

- The ability to issue legally binding Decision Notices against all public authorities including Secretaries of State. These notices should be produced transparently and be enforceable by an appropriate court or tribunal
- The power to refer cases for adjudication after following the steps set out in c22-24 or directly where appropriate. The most appropriate forum for this could be the Environmental Tribunal operating an improved system of Judicial Review with tailored rules on standing, costs, intensity of review and remedies and in which specialist judges (possibly with technical advisers) could sit. We expand on some of the ways in which JR would need to be improved below; and

- The ability to intervene in relevant JR proceedings initiated by claimants directly with no exposure to costs.

We also have a number of concerns about the remit and proposed *modus operandi* of the OEP as highlighted below:

Scope

The Bill excludes climate change from the OEP's remit (c.12 (3) (b)) and the position with regard to planning matters is unclear (see here). These omissions are significant and conflict with the definition of "environmental information" in the UNECE Aarhus Convention (here[1]), as subsequently embodied in Directive 2003/4/EC on Public Access to Environmental Information (here) and transposed into domestic legislation in the Environmental Information Regulations 2004 (here).

Similarly, the definition of "environmental impact" in Directive 2014/52/EC on Environmental Impact Assessment extends beyond "*population and human health, biodiversity, land, soil, water, air and climate*" to include "*material assets, cultural heritage and the landscape … and the interaction between these factors*" (see here). We note also that Government spending and taxation decisions are exempt from enforcement. Excluding such matters from the remit of the OEP represents a regression from EU law[2] and opens up the possibility of costly and time-consuming satellite litigation around the remit of the OEP's activities.

We also have a general concern about the operation of clauses 17 and 31 of the Bill, which together seek to unduly narrow the remit of the OEP. In particular, clauses 31 (meaning of "environmental law") defines environmental law as "… *this Act, regulations made under it and any legislative provision …*

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[1] Article 2(3) of the Aarhus Convention states: *"Environmental information" means any information in written, visual, aural, electronic or any other material form on:*
(a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
(b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;
(c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above;"

[2] This concern also applies in the context of question 7, in which we note that the definition of the environment in the 25 year plan is broader than the definition in the Bill

that - (a) is mainly concerned with an environmental matter", thereby excluding legislation that may include (but is not primarily concerned with) an environmental matter from the OEP's remit. So, if a complainant wished to challenge, for example, the manner in which Natural England had exercised its duty to have regard to the desirability of promoting economic growth under the Deregulation Act 2015[3], such an issue could be exempt from the OEP's remit because the Deregulation Act 2015 is not mainly concerned with an environmental matter.

We would prefer clause 17(1) to confirm that the enforcement functions of the OEP relate to failures by public bodies to comply with their environmental obligations (defined to include environmental policies) and clause 31(1)(a) be amended to encompass legislation that "relates to" an environmental matter.

Failure to capture the historic environment within scope

One of the main positive features of the 25 Year Environment Plan is that it recognises the interlinked nature of the historic and natural environments (for example, historic buildings can often be home to rare species of wildlife). Similarly, historic and natural features can often be affected by the same threats. The definition of the natural environment in the Bill excludes buildings and other structures and downgrades people's access to, and enjoyment of, the environment and landscapes (in particular the Explanatory note states that access and enjoyment are explicitly not covered by environmental law). Failure to capture the historic environment and access and enjoyment within the broad definition of the environment means that the Bill is narrower in scope than the 25 Year Plan. This risks narrowing the scope of subsequent environmental improvement plans and placing the historic and natural environment on unequal footings, failing to recognise the linked nature of both.

The nature of complainants

Clause 18(4) of the Bill prohibits any person making a complaint whose functions include those of a public nature. As this would prevent Parish Councils from being able to submit a complaint, we would ask that clause to be amended accordingly.

Time limits

Unlike the EU complaints system, the Bill requires complaints to be brought within certain time limits (c.18 (6)). This could be problematic with regard to historic and ongoing breaches (e.g. compliance with statutory targets for air or water pollution) and introduces an additional hurdle for potential complainants.

Meaning of "serious"

The OEP may escalate the enforcement process through different stages only where, in its view, the failure to comply with environmental law is "serious" (cs.19 (1), 22(1) (b) and 23(1) (b)). The Commission has no such arbitrary threshold, which unhelpfully imposes an obligation on the OEP to explain how this subjective requirement has been met in each case. We request more clarity around the meaning of "serious" in the above clauses of the Bill.

[3] See s.108(1) Deregulation Act 2015 here

Own initiative action

The Bill should explicitly empower the OEP to commence an investigation of its own volition (c.19 (1)). This is currently an important function of the EU mechanism and has been used on many occasions to identify systemic and/or strategic breaches of environmental law.

Information

The Bill only obliges the OEP to keep complainants informed about the status of the initial investigation (c.20). However, there is no obligation to keep the complainant informed about further steps, unlike the EU complaints process, which – crucially – also gives the complainant the opportunity to comment before a case file is closed. Opportunities for transparency and public participation are, therefore, significantly reduced.

The Government should look to build a truly world-leading institution in this area by designing the OEP to work as closely and iteratively as possible with stakeholders. For example, the views of complainants should be sought at important points in the decision-making process and the OEP should be required to provide complainants with a reasoned decision where it decides not to escalate enforcement provisions to the next stage. The views of the wider public should also be sought on the OEP's strategic direction. Such measures will maximise public support and buy-in to the OEP's activities.

Improving the current Judicial Review Process

We welcome the inclusion of a review process in clause 25 of the Bill. However, the existing process of Judicial Review (JR) needs to be strengthened as follows in order to prevent a regression from EU standards of governance:

- **The permission stage -** where the OEP decides to make a review application, the High Court must still decide whether to grant permission for the application to proceed (c.25 (4)). As there is no such requirement in the CJEU, we recommend that cases referred by the OEP proceed straight to a substantive hearing.

- **Intensity of JR –** the CJEU applies a proportionality test in environmental cases. This is quite different to the intensity of review applied in domestic environmental JR, which - in the absence of illegality or procedural impropriety - turns on *Wednesbury* unreasonableness (or irrationality) as the usual test for administrative action. However, demonstrating that a decision is *Wednesbury* unreasonable is an extremely difficult threshold to reach, particularly when the decision-maker has discretion to balance a number of competing considerations. Thus, in the majority of cases, the court's view is that it is entirely for the decision maker to attribute to the relevant considerations such weight as it thinks fit. If, for example, there was some information on a particular point (such as an environmental impact), the court will not entertain any challenge to

the question of whether the information was capable of leading to a sound conclusion on the point (with challenge only being possible if the court considers that the decision-maker acted irrationally – that same very high threshold – in deciding it had enough information on the point).

The corollary of these limitations is that claimants tend to rely almost wholly on procedural, as opposed to substantive, grounds. This can render JR a time-consuming, expensive and blunt instrument as the decision-maker can simply rectify any procedural flaws when forced through legal action to revisit the decision.

The Aarhus Convention Compliance Committee has previously questioned whether the UK provides the necessary standard of review to comply with the Convention (see here, paras 123-127). In 2017, three environmental NGOs and a law firm specialising in public law submitted a Communication to the Compliance Committee arguing that the intensity of review in the UK does not comply with the Convention (see here). The Compliance Committee determined the Communication admissible in March 2018.

- **Fines –** where a Member State fails to comply with a judgment of the CJEU, the Commission can refer the case back to the Court - which can impose substantial fines. Lump sum fines of €15,000,000 and daily penalties of €62,000 are not uncommon and act as a powerful incentive for Member States to take infringement proceedings seriously, as witnessed in proceedings against the UK in respect of the high costs of legal action (see Q.6, below).

Q.4 As drafted are the principles legally enforceable? What will need to be included in the National Policy Statement to interpret the application of the principles?

This section of the Bill has been considerably weakened following public consultation. The **principles should aim at achieving a high level of environmental protection**. This will require the introduction of an overarching duty in the bill to secure the maintenance, recovery and restoration of the environment as set out in Greener UK's recommended content for the Environment Bill. [1]

In its consultation response, Link pressed for the Bill to impose a duty on public bodies (which encompasses bodies performing public functions) to comply with the Principles when exercising their statutory functions (as in the Human Rights Act s.6 (1)). Failing that, public bodies should have "special" or "due regard" to the Principles (as in the Equality Act 2010 s149) combined with an additional duty to act in accordance with the associated policy statement.

We are therefore disappointed that the Bill fails to impose a direct duty on public bodies with regard to applying the Principles and imposes only a weak duty on Ministers of the Crown with regard to the associated policy statement (to " … *have regard to the policy statement … when making, developing or revising policies dealt with by the statement*", c.1(2)). We also wish to see a duty on public bodies to report how they have applied the policy statement in the exercise of their statutory functions.

The Bill also gives the Secretary of State the power to exclude policies from the Statement where in his/her opinion "… *applying the environmental principles to making, developing or revising the policies would have no significant environmental benefit*" (c.1 (5) (b)). Similarly, Ministers are exempt from taking action (or refraining from taking action) where it would have no significant environmental benefit (c.4 (2) (a)). We believe the inclusion of this subjective requirement is unhelpful, particularly

when considering the precautionary principle applies a risk based approach and especially as benefits could be incremental over time.

We assume the failure to require the Secretary of State to consult and lay before Parliament any revisions of the policy statement (c.3 (6)) is a typographical error (i.e. the procedure for revising the statement is intended to operate in the same manner as clauses 13(1) and (2)).

We are also disappointed that there appears to be no mechanism for adding (but not removing) principles to the list in clause 2. There are principles that could usefully be considered now (such as the principles of non-regression and a high level of environmental protection) and it is always possible that the importance of new principles will be recognised in the future.

Finally, we are concerned that duties in respect of principles in clause 2.(g), (h) and (i) may conflict with existing obligations on public bodies to comply with the participatory rights of access to information, public participation in decision-making and access to justice arising from the UK's ratification of the UNECE Aarhus Convention. Public bodies are currently under various obligations to comply with these rights (arising both from the Convention itself and from the incorporation of provisions of it into EU law such as Directive 2003/4/EC on Public Access to Information, Directive 2014/52/EC on Environmental Impact Assessment, Directive 2001/42/EC on Strategic Environmental Assessment and Directive 2003/35/EC on Public Participation). It is unclear how the principles of access to information, public participation and access to justice in clause 2(g), (h) and (i) of the Bill sit alongside these duties.

One way to address this would be for the Bill to explicitly confirm that any reference to the Aarhus Principles should be taken to further the realisation of the rights of access to environmental information, public participation in decision-making and access to justice in environmental matters as set out in the UNECE Aarhus Convention.

Q.5 Are there any conflicts with other legislators or legislation, for example the Scottish Continuity Bill?

Geographical scope

The Bill is currently intended to cover England and reserved matters only. A gap will exist across all four nations of the UK regarding environmental governance and the application of environmental principles must be urgently addressed by each government. There has been recognition that the governance solution could be UK-wide, but only if proposals are genuinely co-designed and co-owned. Whether through a single body serving the four countries (and accountable to their legislatures), or through individual new bodies, or some combination of this, it is critical that the governments develop a coherent approach for the whole of the UK. This requires urgent progress to be made during the pre-legislative scrutiny period for this Bill as- if the body is to apply to more than one country- the Bill will require significant amendment to secure accountability to the legislature of each country involved and ensure genuine co-design. In addition, the Bill must be clear that governments and public bodies would be held to account to the legislation of whatever country the body were operating in.

Furthermore, the interaction between this legislation and devolved matters is complex and the lines between reserved and devolved legislation are not always that clear, nor the obligations of bodies

operating under both. For example, Welsh legislation places some specific duties on 'reserved' public authorities operating in Wales, such as the Crown Estate.

Likewise, the impacts of trade negotiations and other international agreements (including the future relationship with the EU) on the UK's environmental requirements and obligations (across all four countries) is another complex issue. To ensure international agreements made across all four countries of the UK are robust and deliverable and to address environmental challenges that do not recognise political boundaries, we continue to urge all four nations of the UK to work together. Likewise clarification of reserved matters and how the OEP will operate with regards to these issues is needed.

The Scottish Continuity Bill has not received Royal Assent and therefore is not an Act. However, should the Scottish Government wish to address the Supreme Court's concerns so the Bill can receive Royal Assent, then it is expected that the duty to consult on principles and governance set out in section 26A would stand. In such a scenario, it is important to note that the Scottish Continuity Bill provides that governance arrangements for ensuring compliance with law and implementation of policy relating to the environment must include "functions equivalent to those carried out before exit day by the European Commission, the European Court and any other EU institution". But as already noted, the OEP functions as proposed are not equivalent to current EU governance arrangements.

What is more, as regards the operation of the OEP, paragraph 104 of the Explanatory Notes to the Bill states that the remit of the OEP will be limited to England in respect of matters that are devolved, while acting UK-wide in respect of reserved matters. It clarifies that the definition of a public authority for the purposes of the act depends on function. Therefore, a devolved authority could fall within the definition of a "public authority" for the purposes of the Bill and therefore fall within the ambit of the OEP's enforcement powers if it was implementing environmental law in respect of reserved matters, but not in respect of devolved matters (see Clause 17(3)). It therefore seems possible that some public bodies delivering reserved functions, such as the Crown estates, will fall within OEP in respect of some of their functions.

Therefore, if the OEP is to exercise its functions in Scotland as they currently stand, it could be in conflict with the Continuity Bill. It should be noted that the Scottish Government intends to put forward its consultation on principles and governance, in line with the relevant section in the Scottish Continuity Bill, by early February.

Parallel procedures for review

It is unclear how any applications for JR initiated by the OEP will align with cases brought outside the complaints process. This situation is highly likely to occur given that complainants will be aware that the OEP has discretion as to whether to launch an investigation and that applications for JR must be brought within demanding timescales (a three month backstop in non-planning cases and within six weeks for decisions under the Planning Acts).

The practical ramification of this is that people may feel obliged to initiate both processes for fear of losing the opportunity to challenge potentially unlawful decisions, acts or omissions. This raises the question as to whether the OEP would refrain from pursuing a review application if the complainants

(or others) had initiated JR proceedings on that issue – or if complainants would be precluded from challenging issues on which they had submitted a complaint to the OEP through JR proceedings. This is not a problem with the EU complaints process because cases are referred to entirely different courts (and often operate on very different timescales) but here they would be referred to the same court (the High Court) and would be under similar time constraints. More thought needs to be given to how these two processes would align.

Q.6 Does the Bill meet the government's commitment to non-regression from EU environmental standards?

No. We have a number of concerns about the capacity for environmental standards to decline in the absence of oversight from the European Commission and the CJEU.

We have significant concerns arising from the loss of the EU citizens' complaint mechanism, which our members use to highlight breaches of EU environmental law. Indeed, given the resources needed to pursue legal action in the UK, many individuals, civil society groups and NGOs regard the EU complaints process as an essential component of their ability to achieve access to justice at affordable cost. Some examples include:

- In 2005, WWF-UK submitted a complaint to the EU on the high costs associated with taking legal action in the UK. The complaint resulted in a judgment against the UK in 2013 that costs were prohibitively expensive (Case C-530/11, *Commission v UK*) and led to the introduction of Environmental Costs Protection Regimes in all jurisdictions of the UK. Similarly, in 2012, WWF-UK submitted another complaint to the EU regarding the UK's failure to designate Special Areas of Conservation for the harbour porpoise under the Habitats and Species Directive. The complaint resulted in a judgment against the UK (Case C-669/16, *Commission v UK*). There are now seven large marine SACs proposed for this species (see here); and

- The RSPB has an ongoing complaint in relation to the damaging practice of burning blanket bogs within English Special Areas of Conservation (SACs) in the absence of appropriate assessments, as required by the Habitats Directive. The European Commission is taking steps to require appropriate action by UK authorities to address this; failure to do so could end in referral to the CJEU.

As outlined above, the domestic complaints mechanism set out in the Bill does not provide a suitable replacement for the loss of the EU complaints mechanism.

Q.7 Is there anything else missing that should be included to meet the enforcement, governance and other gaps in environmental protection left by leaving the European Union?

Targets and underpinning of the 25 Year Plan - Legally binding objectives

The Bill does not currently make provision for legally binding and scientifically robust objectives - the only legal requirements are to create and report on the achievement of the 25 year plan, with no legal recourse if the plan objectives are not met.

New duties are needed to ensure that ambitious and legally binding environmental objectives are achieved, including the establishment of mechanisms needed to deliver this. An overarching objective is also needed to make sense of the proportionality requirements contained in the draft Bill.

While we welcome the existing provisions concerning review and monitoring of the Environmental Improvement Plan in the draft Bill (c.7), it is vital that any programme of monitoring is adequately resourced in order for it to be meaningful. Long standing data sets, such as the UK Butterfly Monitoring Scheme, provide the best evidence to monitor the environment. Part of the Secretary of States arrangements for obtaining data should include commitment to continue providing funding for monitoring schemes to ensure they can continue effectively.

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