



Environment, Food and Rural Affairs Committee and the Environmental Audit Committee Inquiry: Pre- legislative scrutiny of the Environment (Principles and Governance) Bill

Woodland Trust submission

The Woodland Trust is the UK's leading woodland conservation charity. We welcome the opportunity to submit written evidence to this inquiry. Our vision is of a UK rich in native woods and trees, for people and wildlife. We own and manage over 1,250 sites, covering 26,000ha and have over 500,000 members and supporters across the UK.

Introduction

We welcome the Government's stated intention to put environmental ambition and accountability at the heart of government. We were pleased to see the ambitious approach to the environment as set out in the 25 year plan and look forward to seeing how this is implemented at the launch of the second half of the Environment Bill later this year. We also warmly welcome the Government's commitment to establish a robust new system of green governance post Brexit and the commitment of the Prime Minister that our EU exit will not see a weakening of environmental protections, and to not only maintain our current protections but surpass them¹.

However, the draft Environment (Principles and Governance) Bill² as currently drafted fails to meet the UK Government's stated aims. We have a number of concerns about the provisions in the bill, which can be summarised as follows:

- The proposals represent a minimalist approach to environmental governance and are not equivalent to EU mechanisms. They are also in conflict with the commitments in the Withdrawal Agreement on environmental matters and in particular the principle of non-regression.
- The independent status of the new oversight body – The Office for Environmental Protection (OEP) – has several weaknesses. Whilst it will report to Parliament, it will be funded by DEFRA and its Chair and non-executive members will be appointed by the Secretary of State. There are existing bodies and governance models such as the Equalities and Human Rights

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766849/draft-environment-bill-governance-principles.pdf

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766849/draft-environment-bill-governance-principles.pdf

Commission (EHRC) and the Press Recognition Body (PRP) which might offer better solutions.

- The limited enforcement powers of the OEP, including litigation powers which are restricted to judicial review, the restrictive 12 month time limit attached to the complaints mechanism, and the absence of powers to levy fines for non-compliance. We would like to see provisions for the OEP to proactively take action against breaches of environmental law and not merely in response to complaints
- We believe that the OEP should be strengthened through a commitment to multi-annual budgets and a greater role for Parliament on approving funding and appointments
- The omission of climate change (greenhouse gas emissions) and planning from the remit of the OEP – this is in conflict with definitions of environmental information and environmental impact in EU law
- The apparent exclusion of forestry from the scope of “environmental law”, according to the explanatory notes, along with flooding, access to, and enjoyment of, the natural environment and cultural heritage is at odds with both international obligations and the expressed desire to underpin by law the delivery of the 25 Year Plan
- The complaints process for breaches of environmental law states that the OEP may carry out an investigation, issue decision and information notices if it receives a complaint that indicates that the failure is “serious”. There is no such threshold for cases brought to the European Commission
- We would like to see provisions for the OEP to take action for non-compliance of its own volition and not merely in response to complaints
- Provisions in the bill on environmental principles are inadequate – they do not apply to public bodies and the duty on Ministers is a weak duty of regard. The bill also includes unacceptable get caveats on their application
- There remains ambiguity regarding the geographical extent of the bill and therefore environmental governance arrangements across the UK post Brexit. The scope of reserved matters and other anomalies in the draft bill and the explanatory notes relating to devolved matters require clarification and refinement.
- Despite commitments in the Withdrawal Agreement to ensure “effective remedies, including interim measures, ensuring that any sanctions are effective, proportionate and dissuasive and have a real and deterrent effect” the provisions in the bill do not achieve this, and there is no clarity regarding the Government’s plans for interim arrangements.

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

No. The UK Government has stated that it intends for the Office for Environmental Protection to be a world leading, statutory and **independent** body³. Whilst the draft Bill proposes that the oversight body – the Office for Environmental Protection – will report to Parliament (Schedule 10), its funding

³ Draft Environment (Principles and Governance) Bill (Foreword):
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766849/draft-environment-bill-governance-principles.pdf

(Schedule 9), and the appointments of its Chair and non-executive members will be under the jurisdiction of the Secretary of State (Schedules 1 and 2). The independent status of the new body is fundamental to good environmental governance and the body's ability to hold Government and public authorities to account. It is fair to say that there has been a diminution of environmental governance in the UK in terms of the independence of government sponsored bodies and the abolition of over 100 non departmental bodies including the sustainable development commission and the royal commission on environmental pollution.

Suggested measures to strengthen the independent status of the OEP:

- Board members can only be removed by unanimous agreement of the other board members
- The body could be established by Royal Charter, giving board members security of tenure, as is the case with the Press Recognition Body
- Receiving grant aid from the Treasury or receiving grant aid from Parliament as with the National Audit Office's funding model
- As currently drafted Section 12 of the bill on the exercise of the OEPs functions only requires that the body must **have regard** to the need to act objectively, impartially, proportionately and transparently. This could be amended with a more robust duty that the body **must** act objectively, impartially, proportionately and transparently.
- Schedule 1(4) states that the Secretary of State must, in appointing the non-executive members, have regard to the desirability of the members (between them) having experience of – (a) Law (including international law) relating to the natural environment (b) environmental science (c) environmental policy, and (d) investigatory and enforcement proceedings. The “have regard” clause could be further strengthened to ensure that the appointed non-executive members have relevant expertise. With regard to funding there are three matters that must be addressed: it should be for the OEP to decide what is sufficient funding to carry out its functions not the Secretary of State; there must be a government commitment to multi-annual budgets; the OEP should be subject to its own estimate – as currently happens for the National Audit Office, the Electoral Commission and the Independent Parliamentary Standards Authority

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

No. Whilst the bill does include an enforcement process, the provisions do not represent a strengthening or an equivalent to the functions of the EU complaints process, in contradiction with the Government's stated aims. The areas where the proposals represent a weakening of existing arrangements can be summarised as follows:

Remit and definitions

- Section 31 (Meaning of “environmental law”) excludes emissions of greenhouse gases (within the meaning of the Climate Change Act 2008), and the bill excludes climate change (Section 12 (3) (b) Exercise of the OEPs functions)

- The bill excludes planning (Information paper on the policy statement on Environmental principles⁴). This conflicts with the existing definition of “environmental information” in international and EU law including the UNECE Aarhus Convention⁵ which forms the basis for what is meant by the “environment” in Directive 2003/4/Econ Public Access to Environmental Information⁶ as transposed in the Environmental Information Regulations 2004⁷
- We are concerned that Flooding, forestry, town and country planning, people’s enjoyment of or access to the natural environment, and cultural heritage are excluded from the scope of the definition of “environmental law” and the remit of the OEP according to the paragraph 212 of the Explanatory Notes.
- We are concerned about the omission of climate change law from the scope of the bill and remit of the OEP. Section 31 (Meaning of “environmental law”) excludes emissions of greenhouse gases (within the meaning of the Climate Change Act 2008), and the bill excludes climate change (Section 12 (3) (b) Exercise of the OEPs functions)
- Similarly the definition of “environmental impact” in Directive 2014/52/EC on Environmental Impact Assessment extends beyond “population and human health, biodiversity, land, soil, air and climate” to include “material assets, cultural heritage and the landscape....and the interaction between these factors”⁸. The decision to exclude environmental matters from the remit of the OEP is a retrograde step and conflicts with the EU position
- The definition of “environmental law” in the bill also excludes non-compliance with environmental policy from enforcement
- The complaints process as set out in (s. 19(1) 22(1) (b) 23 (1) (b) states that the OEP may carry out an investigation, issue decision and information notices if it receives a complaint that indicates that the failure is “serious”. There is no such requirement for cases brought to the European Commission
- We would support the inclusion of provision for the OEP to take proactive action on compliance without the need for a complaint to be submitted, as is the case with the EU complaints mechanism
- The litigation powers of the OEP are limited to applications for judicial review. This is far more restricted than the powers currently available to the European Commission. Furthermore a more appropriate enforcement model already exists in the Equality Act 2006⁹. The Equality Act 2006 gives the Equality and Human Rights Commission (EHRC) the power to issue compliance notices to any public body who it thinks has failed to comply with equalities or human rights duties, requiring them to comply with the duty. If the public body fails to comply with the requirements of the compliance notice, the EHRC has the power to apply to the courts for an order requiring the public body to comply.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766299/env-bill-information-paper.pdf

⁵ <https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>

⁶ <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF>

⁷ <http://www.legislation.gov.uk/uksi/2004/3391/contents/made>

⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0052>

⁹ <https://www.legislation.gov.uk/ukpga/2006/3/contents>

- Financial penalties. Under EU arrangements failure to comply with a judgement of the CJEU can lead to fines imposed, acting as a powerful incentive for compliance.
- The complaints procedure is constrained by a 12 month time limit (18(6)), which is not the case in relation to making complaints to the European Commission. This time limit is prohibitive and should be removed.

3. Are there any conflicts of interest or overlap with existing government bodies?

There remains ambiguity about the geographical extent of provisions in the bill, and therefore arrangements for intergovernmental working, the scope of reserved matters, common frameworks, environmental governance, and the scope and application of environmental principles across the UK post Brexit.

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?

The inclusion of environmental principles in the bill is welcome although as currently drafted the relevant provisions (Policy statement on environmental principles 1-4) represent a regressive move as to their application. The provisions relating to their interpretation and application are weak and are limited to England, indicating that environmental principles, their definitions, interpretation and application will differ across the UK. There is a need for greater clarity on the geographical extent of provisions in the bill and processes for agreeing and co-designing a common framework for how environmental principles will be applied across the UK.

The duty on Ministers in relation to their application is a weak duty to have regard to the Policy Statement on principles when making, developing or revising policy (4(1)), and the bill lacks clarity on the timescales and processes for drafting, consulting on, publishing and reviewing the policy statement. Related provisions include a number of troubling get out clauses as to their effect. The exceptions include exempting taxation, spending or the allocation of resources within Government from the policy statement on environmental principles 1(6)(b); and a power to the Secretary of State to exclude by regulation 'any other matter' 1(6)(c).

We would support the following revisions to the bill

- The duty on environmental principles (4(1)) must apply to the principles themselves as set out in the bill and not to the policy statement, which is open to revision.
- The duty must be strengthened from a weak duty of regard to a duty to act in accordance with the principles.
- The principles should apply to public authorities as well as Ministers of the Crown.
- The duty should include all decision making as well as policy making

- There should be an overarching purpose that principles should aim to achieve a high level of environmental protection as is the overall aim of EU environmental policy (TFEU Article 191(2))¹⁰
- A series of measures are required to strengthen the provisions including the application of principles to public authorities as well as Ministers of the Crown, including a requirement on those authorities to evidence and report on how they have taken them into account in their decisions and policies.
- Provisions should be amended to include Parliamentary scrutiny and approval of the any revisions to the policy statement.

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

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

No. Not only do the current provisions represent a weakening of current EU measures and are therefore by definition regressive, but there is a clear conflict with the Withdrawal Agreement¹¹ on the issue of non-regression. The agreement commits the UK to non-regression in the level of environmental protection but the draft bill does not include any provisions in this regard. This issue is acknowledged by the Government in the Explanatory notes (page 34, paragraph 12)¹² where it is stated that “There are some environmental elements of the Withdrawal Agreement which our current proposals do not cover, namely those concerning the independent body’s scope to enforce implementation of the “non-regression” clause. We will consider these provisions of the Withdrawal Agreement ahead of publishing the final Bill.”

Despite commitments in the Withdrawal Agreement to ensure “effective remedies, including **interim measures**, ensuring that any sanctions are effective, proportionate and dissuasive and have a real and deterrent effect” the provisions in the bill do not achieve this, and we are unclear as to what interim arrangements the Government is planning.

There remains ambiguity about the territorial extent of the bill and the scope of ‘reserved matters’, which need to be defined. This clarity is necessary to meet the commitment in the Withdrawal

¹⁰ <http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-the-functioning-of-the-european-union-and-comments/part-3-union-policies-and-internal-actions/title-xx-environment-climate-change/479-article-191.html>

¹¹ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council on 25 November 2018:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759019/25_November_Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf

¹² https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766849/draft-environment-bill-governance-principles.pdf

Agreement to UK wide non-regression, particularly given that the devolved administrations are yet to consult on their own proposals for environmental governance and principles.

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?

Clearly, as the UK's leading woodland conservation charity, we are concerned by the apparent exclusion of forestry from the scope of environmental law and the remit of the OEP according to the paragraph 212 of the Explanatory Notes. Flooding, town and country planning, people's enjoyment of or access to the natural environment, and cultural heritage are also excluded. This appears to be in conflict with the 25 year plan which covers the historic environment, people's access to and enjoyment of the environment and landscapes, and should be rectified.

We are also concerned about the exclusion of the historic environment in Clause 30 on the meaning of "natural environment." One of the main positive features of the 25 year Environment Plan is its recognition of the interlinked nature of the historic and natural environments – an important consideration in terms of the protection of ancient woodland, ancient and veteran trees.

Finally, like others, we are concerned about the omission of climate change law from the scope of the bill and remit of the OEP. Section 31 (Meaning of "environmental law") excludes emissions of greenhouse gases (within the meaning of the Climate Change Act 2008), and the bill excludes climate change (Section 12 (3) (b) Exercise of the OEPs functions)

Additional Comments

Whilst the bill seemingly aspires to place the 25 year plan on a statutory footing, at present 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. The emerging legal framework must also include legally binding targets, objectives, an overarching environmental duty and a commitment to nature recovery. In terms of delivering on the latter, we need a unified Nature Recovery Map in statute as a shared vision to motivate action for nature's recovery and re-connect people to nature. This should be underpinned by a) a requirement on Unitary and County Authorities to ensure the production of their own Nature Recovery Maps according to national guidance and b) through a new duty on all relevant authorities to pursue nature's recovery and to ensure that decisions regarding land use and management take account of these maps.

Finally, the Woodland Trust would particularly like to see the inclusion of a statutory requirement for a Tree Strategy for England which would bring England into line with Scotland and Wales.

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