

Legislating for change: giving the green light

Martin Baxter & Safia Iman outline the challenges ahead for environmental legislation in a post-Brexit UK

IN BRIEF

▶ The forthcoming Environment Bill comes at a critical time for the UK, when the gaps in environmental policy—previously driven by the EU—must be closed.

▶ The devolution settlement adds an additional layer of complexity in the development of a new environmental governance framework.

The forthcoming Environment Bill comes at an important time as the UK prepares to leave the EU: in effect, it is being viewed as an environmental constitution. The Bill will be substantial and include important aspects of environmental principle and governance, as well as legislating in areas which have significant public interest such as air quality and plastic waste. Parliamentary arithmetic suggests that the passage of the Bill will offer plenty of opportunities for amendment, not just from the opposition but also from the government, given that only part of the Bill has been subjected to pre-legislative scrutiny. A high level of scrutiny will be welcomed if it leads to a better outcome, as the prize of a progressive new Environment Act which provides the legal framework for enhancing the natural environment over a generation is one that everyone should want to see.

Background

For 45 years, environmental policy in the UK has been driven by the EU. The forthcoming Environment Bill therefore comes at a critical time, not simply as a means to replace key governance functions that will be lost as the UK leaves the EU, but to meet the challenges of poor air and water quality, declining biodiversity and the plastics crisis. Given the environmental context and enhanced public environmental awareness, recreating the status quo isn't an appropriate policy or political response.

The EU (Withdrawal) Act 2018 (EU(W) A 2018) includes important environmental requirements. Section 16(1) required the Secretary of State to publish a draft Bill within six months of EU(W)A 2018 receiving Royal Assent containing:

- a) a set of environmental principles (listed in s 16(2) EU(W)A 2018);
- b) a duty on the Secretary of State to publish a statement of policy in relation to the application and interpretation of those principles in connection with the making and development of policies by ministers of the crown;
- c) a duty which ensures that ministers of the crown must have regard, in circumstances provided for by or under the Bill, to the statement mentioned in paragraph (b);
- d) provisions for the establishment of a public authority with functions for taking, in circumstances provided for by or under the Bill, proportionate enforcement action (including legal proceedings if necessary) where the authority considers that a minister of the crown is not complying with environmental law (as it is defined in the Bill); and
- e) such other provisions as the Secretary of State considers appropriate.

The draft Environment (Principles and Governance) Bill was published by the Department for the Environment, Food and Rural Affairs (Defra) on 19 December 2018, and has completed pre-legislative scrutiny.

In broad terms, the draft Bill contains:

- i) environmental principles and provisions for their inclusion in a policy statement;
- ii) measures relating to Environmental Improvement Plans (EIPs); and
- iii) the creation of a new Office for Environmental Protection (OEP) with the remit to monitor the implementation of environmental law and, where public authorities fail to comply with environmental law, take appropriate action including the power to take action through the courts.

Proposals in the initial draft Bill and outlined in plans for greater ambition, taken together, raise important questions, including:

- a) whether proposals for environmental principles and for the OEP fill the environmental governance gap when the UK leaves the EU;



- b) the interface between UK and devolved governments with respect to respective competences for environmental policy and regulation;
- c) whether a framework of cross-cutting targets can provide long-term certainty for investment in environmental protection and improvement; and
- d) non-regression.

Governance gap

Environmental principles are set out in Art 191 of the Treaty on the Functioning of the EU, and are binding on how environmental policy is developed, ie EU policy on the environment (2) 'shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay'. The draft Bill frames the application of environmental principles in a broader way than that in the treaties; rather than focusing on the development of solely environmental policy which is the responsibility of Defra, it is proposed that now all ministers of the crown will have to 'have regard to the policy statement on environmental principles when making, developing or revising policies' (ie not just environmental policy).

Much of the pre-legislative scrutiny regarding the principles has been



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on whether the term ‘have regard’ is sufficiently strongly worded. Giving the policy statement more weight—for example ministers ‘having special regard’ or ‘acting in accordance with’ the principles—is an active issue, and will no doubt be keenly debated as the Bill passes through Parliament.

A key stakeholder concern in terms of governance is the loss of the oversight role undertaken by the European Commission, in relation to the implementation of EU environmental law by member states and receiving complaints from citizens. The proposed new OEP is intended to replicate these functions in a UK context. Concerns expressed by stakeholders with the draft Bill are mainly in two areas: how independent the OEP will be given that the Secretary of State will appoint the chair and allocate resources; and the nature and extent of its enforcement powers. On the latter point, escalation of enforcement action from notices through to judicial review would probably benefit from cases being heard in First or Upper Tier Tribunals; the inclusion of climate change enforcement, (currently outside the scope of the independent Committee on Climate Change), would also close a potential loophole in terms of wider environmental considerations.

UK & devolved nations

Much of environmental policy and law in

the UK is devolved to the home nations. In developing a new environmental governance framework as the UK leaves the EU, the devolution settlement adds an additional layer of complexity, particularly as England, Scotland, Wales and Northern Ireland are each at different stages in implementing/formulating their own environmental policies and legislation. For example, the Wellbeing of Future Generations (Wales) Act 2015 and the Environment (Wales) Act 2016 already cover some of the environmental principles in the EU treaties, whereas other parts of the UK have a wider legislative gap to fill.

The draft Environment (Principles and Governance) Bill applies to UK reserved matters and England. Department of Agriculture, Environment and Rural Affairs officials have requested, in the absence of a government in Northern Ireland, that the scope of the Bill be extended to include Northern Ireland regarding the remit of the OEP and the application of environmental principles. The Scottish and Welsh governments are separately consulting on options for environmental principles and ways to hold public authorities to account for failure to implement environmental law.

This raises important points of consistency of approach, given that river catchments, for example, follow geographical rather than national boundaries (approximately half of the river catchments in Wales are shared with England). Differences in approach to the development of environmental policy and standards for shared natural assets need to be avoided if we are to maintain high levels of environmental protection and coherence in environmental management.

Environmental targets

The commitment by the government to explore options for environmental targets in the Bill is welcomed. Meeting the government’s commitment to leaving the environment in a better state will depend to a large extent on private sector activity and innovation. However, for all sectors to play their full part in a way that is also consistent with business success, there needs to be a coherent and predictable legal framework. The draft Bill seeks to place the government’s 25-year environment plan on a statutory basis; however, the five-year review mechanism means that in effect, substantial changes can be made which reduces certainty for investment.

Given the speed with which the Bill is being developed, it is unlikely that specific targets will be included in primary legislation; the Bill is more likely to set out the process by which

long-term environmental targets will be established in regulation. This raises many questions, including whether targets for different parts of the environment can be standardised regarding dates for completion.

Non-regression & alignment of environmental protections

The prime minister and members of the government have made a number of statements to the effect that the UK will continue to set high standards of environmental protection and that there will be no lowering of environmental standards when the UK leaves the EU. Non-regression is written into the UK/EU Withdrawal Agreement backstop arrangements, requiring both the EU and UK to ‘ensure that the level of environmental protection provided by law, regulations and practices is not reduced below the level provided by the common standards applicable within the Union and the United Kingdom at the end of the transition period’ (Art 2 (1)).

More recently, in a business statement to Parliament on 6 March 2019, Secretary of State for Business, Energy and Industrial Strategy Greg Clark stated that: ‘The Government will also legislate to ensure that where future Bills could affect environmental protections, a Minister of the Crown will make a statement of compatibility to Parliament and provide explanatory information. We will also create a new statutory duty on the Government to monitor any strengthening of environmental protections and regulations by the EU, and to report regularly to Parliament about the Government’s intended course of action in those areas. That will give Parliament the information it needs to consider whether or not domestic protections need to be strengthened accordingly’ (Hansard 655, col 981).

The Environment Bill is expected to be the legislative route for the government to implement the non-regression and alignment considerations relating to environmental protection. The Institute of Environmental Management and Assessment (IEMA) will be watching the debates through Parliament carefully to ascertain whether the aspirations for this Bill will be borne out, and will provide updates for *New Law Journal*.

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