Essex CHAMBERS

THE ENVIRONMENT BILL 2020

Contents

OVERVIEW

An Environment Bill (the "Bill") was introduced in October 2019, before the December election, to replace EU-based environment law. The Bill's progress has been halted, first by the general election and then by COVID-19.

The Bill entered the committee stage in the House of Commons on 10 November 2020.

Descriptions of the Bill vary enormously depending on who you ask. The Government has called it "The landmark and world-leading legislation which will transform how we protect and enhance our environment" claiming that it "sets out a comprehensive and world-leading vision to allow our environment to prosper for future generations and ensure that we maintain and enhance our environmental protections". Environmental groups have a different take. The Green Party has described proposed amendments to the Bill as a 'get out jail free' card for the UK Government, Greenpeace UK has been busily finding loopholes in the draft legislation and Friends of the Earth has called upon the government to significantly strengthen the Bill's proposals.

Who is right?

Four environmental law specialists at 39 EC, Stephen Tromans QC, Richard Wald QC, Ruth Keating and Gethin Thomas have been taking a look at the principal provisions of the Bill as it passes, slowly, through Parliament, to see whether it is possible to get a sufficiently clear reading of the legislative runestones to understand which of these competing visions for what will become the UK principal environmental law Act, is correct.

We hope you find our review helpful and interesting and would very much welcome any views, comments, questions or queries which occur to you as you read. These may be sent to marketing@39essex.com or shared on our LinkedIn page. We intend to keep the document updated as the Bill continues on its parliamentary journey and we are keen to include in our consideration of the emerging legislation the input of our readers.

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ENVIRONMENTAL TARGET PROVISIONS

Overview

A key aspect of the Bill, are environmental target provisions. The Queen's Speech of 2019 reiterated her government's commitment to an environment bill thus:

> *"My government will continue to take steps to meet the world-leading target of net zero greenhouse gas emissions by 2050. It will continue to lead the way in tackling global climate change, hosting the COP26 Summit in 2020. To protect and improve the environment for future generations, a bill will enshrine in law environmental principles and legally-binding targets, including for air quality.*[1]*"*
> (emphasis added)

These environmental targets form a core part of the Bill. The relevant draft provisions and key potential issues are as follows.

Draft provisions relating to environmental targets

Part 1 of the Bill sets out the framework for legally-binding targets. The main provisions, as currently drafted are Clauses 1-6:[2]

- **Clause 1 – environmental targets:** provides that the Secretary of State may by regulations set long-term targets in respect of any matter which relates to (a) the natural environment, or (b) people's enjoyment of the natural environment. Under Clause 1 the priority areas are identified as (a) air quality; (b) water; (c) biodiversity; and (d) resource efficiency and waste reduction. A target set under this section must specify (a) a standard to be achieved, which must be capable of being objectively measured, and (b) a date by which it is to be achieved.
- **Clause 2 – particulate matter:** provides that the Secretary of State must by regulations set a target ("the PM2.5 air quality target") in respect of the annual mean level of PM2.5 in the ambient air.
- **Clause 3 – process:** before making regulations under section 1 or 2 the Secretary of State must seek advice from persons the Secretary of State considers to be independent and to have relevant expertise. The Secretary of State may make regulations which

[1] Queen's Speech (19 December 2019), <https://hansard.parliament.uk/lords/2019-12-19/debates/C9EB1C3B-3551-473B-8C30-864B8B020409/Queen%E2%80%99SSpeech> accessed 12 May 2020.
[2] A tracked changed version of the Bill dated 6 March 2020 can be accessed at: <https://publications.parliament.uk/pa/bills/cbill/58-01/0009/Enviro%20Compare.pdf> accessed 12 May 2020.

revoke or lower a target (the "existing target") only if satisfied that (a) meeting the existing target would have no significant benefit compared with not meeting it or with meeting a lower target, or (b) because of changes in circumstances since the existing target was set or last amended the environmental, social, economic or other costs of meeting it would be disproportionate to the benefits. Before making regulations, which revoke or lower a target the Secretary of State must lay before Parliament, and publish, a statement explaining why.

- **Clause 4 – effect:** it is the duty of the Secretary of State to ensure that targets set under section 1 (currently Clause 1) are met, and (b) the PM2.5 air quality target set under section 2 (currently Clause 2) is met.
- **Clause 5 – reporting duties:** on or before the reporting date the Secretary of State must lay before Parliament, and publish, a statement containing the required information about the target i.e. whether the target has been met or not and if the Secretary of State is not yet able to determine whether the target has been met, the reasons for that.
- **Clause 6 – review:** the Secretary of State must review targets set under section 1 (currently Clause 1) and the PM2.5 air quality target set under section 2 (currently Clause 2) in accordance with this section. The purpose of the review is to consider whether the "significant improvement test" is met. The significant improvement test is met if meeting (a) the targets set under sections 1 and 2, and (b) any other environmental targets which meet the conditions in subsection (8) and which the Secretary of State considers it appropriate to take into account, would significantly improve the natural environment in England. The conditions in subsection (8) are that (a) the target relates to an aspect of the natural environment in England or an area which includes England, (b) it specifies a standard to be achieved which is capable of being objectively measured, (c) it specifies a date by which the standard is to be achieved, and (d) it is contained in legislation which forms part of the law of England and Wales.

Commentary on the draft provisions

The environmental target provisions were introduced in the version of the Bill published on 15 October 2019. Previously, in the draft Bill (December 2018), there was a conspicuous absence

of any legally binding targets and therefore a conspicuous presence of a significant gap in environmental protection.[3]

However, even the new draft provisions contain a number of significant weaknesses in terms of environmental protection. These include:

- **No set targets:** As quoted above, the Queen's speech emphasised that the purpose of the Bill would be to *"protect and improve the environment for future generations…[and] enshrine in law environmental principles and legally-binding targets, including for air quality"*. Most fundamentally in respect of the targets, the Bill does not itself introduce any legally binding targets and so that work is left to later stages. Indeed, much of the emphasis in the draft provisions is unsurprisingly on targets being 'met'. The effect of this might be that unambitious targets are set precisely with this outcome in mind, so that targets will tend to be less progressive or protective of the environment than many hope for.
- **The process:** Clause 3 of the Bill requires the Secretary of State to seek advice from persons s/he considers to be independent and to have relevant expertise. Notably this requirement extends only to seeking advice but not necessarily to following it.
- **Changes in circumstances:** as outlined above under Clause 3(3):
  "[t]he Secretary of State may make regulations under section 1 or 2 which revoke or lower a target (the "existing target") only if satisfied that— (a) meeting the existing target would have no <u>significant</u> benefit compared with not meeting it or with meeting a lower target, or (b) because of changes in circumstances since the existing target was set or last amended the environmental, social, economic <u>or</u> other costs of meeting it would be disproportionate to the benefits."
  (emphasis added).

  There is a clear conflict which arises between these factors based on the current drafting of Clause 3(3).
  - First, under (a) in order to retain the more ambitious existing target it must offer a "significant" benefit. It is not clear either what the meaning of the word

[3] December 2018 version of the Bill: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766849/draft-environment-bill-governance-principles.pdf> accessed 12 May 2020.

significant would be in this context or by which the benchmark such an improvement would fall to be judged.

- Second, the preconditions of sub clause (b) i.e. environmental, social, economic or other costs are expressed to be disjunctive rather than conjunctive. This means that an existing target may be abandoned where it would result in any of these types of costs which are considered to be disproportionate to the benefits. Given how easy it is likely to be to argue one or other of these forms of disproportion, the current drafting will offer precious little protection against the loss of ambitious targets.

Conclusion

The Bill itself is silent on the content of environmental target provisions and therefore on how ambitious they will be. Furthermore the current drafting which allows targets to be revoked or lowered relatively easily because of social and economic costs may mean that environmental protection will continue to be viewed as a luxury in times where it can be afforded rather than the necessity it actually is. Overall the latitude permitted to the discretion of the Secretary of State in the setting and maintenance of environmental targets, in marked contrast to the position which has prevailed hitherto with environmental standards which derive from EU legislation or those contained in domestic legislation such as in the Climate Change Act 2008, will leave the door wide open to the regressive weakening of environmental standards where the politics of the day support such a course.

THE NEW OFFICE FOR ENVIRONMENTAL PROTECTION

Overview

A core part of the Bill is the establishment of an environmental watchdog, the Office for Environmental Protection ("OEP"). The Government's stated ambition is to create *"a new, world-leading, independent environmental watchdog"* to hold Government to account on its environmental ambitions and obligations.[4]

The OEP's enforcement powers, dealing with breaches of environmental law duties by public bodies, are designed largely to fill the hole left by the supervisory powers of the European Commission following Brexit. The OEP's constitution is not set out in the Bill, but its statement of impacts explains that it will be an arm's length body and its explanatory notes provide that the OEP is to be a non-Departmental public body.[5] Environmental groups and Parliament itself have both, however, and with some justification, expressed concerns that the gaps which will be left by the loss of the Commission's monitoring and enforcement role have not been filled by the current provisions of the Bill.

We will look first at the relevant provisions of the Bill as currently drafted and then consider some issues with the currently proposed framework.

Draft OEP provisions

This indicates amendments to the Bill as introduced (in the House of Commons on 15 October 2019 – Bill 3) made during its passage through Parliament (now Bill 9).

The key provisions, as currently drafted, include the following:

- The OEP is established, by clause 21.
- *OEP's objective:* The principal objective of the OEP is said to be to *"contribute to—(a) environmental protection, and (b) the improvement of the natural environment"* (clause 22(1)). The OEP must act objectively and impartially (clause 22(2)).
- **Strategy:** The OEP must also prepare a strategy which sets out, amongst other things, how it intends to exercise its functions (clause 22(3)) and that strategy must contain its

[4] Scrutiny of the Draft Environment (Principles and Governance) Bill, The Office for Environmental Protection <https://publications.parliament.uk/pa/cm201719/cmselect/cmenvaud/1951/195107.htm> accessed 12 June 2020.
[5] Draft Environment (Principles and Governance) Bill, clause 11 draft explanatory note and Statement of Impacts, 8; Institute for Government (DEB0030).

enforcement policy (clause 22(6)). This strategy must be laid before Parliament and published. It may be revised at any time.

- **Scrutiny and advice:** The Bill also lays out the OEP's scrutiny and advice functions, which include monitoring and reporting on environmental improvement plans and targets. The OEP must—(a) arrange for its reports under this section to be laid before Parliament, and (b) publish them. The Secretary of State must—(a) respond to a report under this section, and (b) lay before Parliament, and publish, a copy of the response (clause 25).
- **Monitoring and reporting:** Clauses 27 to 28 deal with monitoring and reporting on environmental law.
- **Advising:** Clause 29 covers the OEP advising on changes to environmental law.
- **Enforcement:** Clause 28 relates to the OEP's enforcement functions where there is a failure of public authorities to comply with environmental law.
- **Complaints:** A person may make a complaint to the OEP under this section if the person believes that a public authority has failed to comply with environmental law (clause 31).
- **Investigations:** The OEP may carry out an investigation under this section if it receives a complaint made under section 29 (clause 32).
- **Information notices:** The OEP may give an information notice to a public authority if—(a) the OEP has reasonable grounds for suspecting that the authority has failed to comply with environmental law, and (b) it considers that the failure, if it occurred, would be serious (clause 34).
- **Decision notices:** The OEP may give a decision notice to a public authority if the OEP is satisfied, on the balance of probabilities, of (a) and (b) above. The recipient of a decision notice must respond in writing to that notice (clause 35).
- **Environmental review:** Where the OEP has given a decision notice to a public authority it may apply to the Upper Tribunal for an environmental review. Where the Upper Tribunal makes a statement of non-compliance it may grant any remedy that could be granted by the court on a judicial review other than damages, but only if satisfied that granting the remedy 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 (clause 37).

- **Judicial review:** The OEP may apply for judicial review, or a statutory review, in relation to conduct of a public authority (whether or not it has given an information notice or a decision notice to the authority in respect of that conduct) if the OEP considers that the conduct constitutes a serious failure to comply with environmental law (clause 38).

Commentary on the draft provisions

The House of Lords EU Environment and Energy Subcommittee recently stated that *"an effective and independent domestic enforcement mechanism will be necessary, in order to fill the vacuum left by the European Commission in ensuring the compliance of the Government and public authorities with environmental obligations"*. (House of Lords European Union Committee Brexit: environment and climate change 12th Report of Session 2016–2017 (14 February 2017) HL Paper 109, at [84].) Whether the OEP in its current form can fill that vacuum is questionable.

There are some important, and promising, functions of the OEP such as clauses 26 and 27 which provide, respectively for the OEP to monitor and advise upon environmental, a role which has not hitherto existed in this form. It is however not clear how the OEP will perform this function and in particular whether it will set up a programme for reviewing certain areas of the law or whether it will instead be responsive to issues as they are raised or become relevant.

As for enforcement the OEP's proposed structure is similar to that of the European Commission (see the analogous provisions contained in Article 258 of the Treaty on the Functioning of the European Union) in that it provides for (i) an information notice (clause 32); (ii) a decision notice (clause 33); and (iii) review by the Upper Tribunal or judicial review (clauses 35-36). In previous iterations of the Bill the OEP relied solely on judicial review as a means of challenging the acts or omissions of a local authority. The newer three-tiered system will add welcome flexibility where it was needed.

Such flexibility is all the more important when one considers that the success of the OEP will rely to great extent on its ability to act as an effective enforcement authority. Over-reliance on softer measures rather than a direct challenge to offending local authorities would inevitably be perceived as weakness and, more critically, would expose the environment to risk of harm at a time when its need for protection has become urgent. Moreover, as no specific environmental tribunal has been designated yet, it is not yet clear whether it would possess the

necessary level of expertise and therefore the confidence to determine the matters which would come before it.

Furthermore, no provision is currently made within the Bill for the Upper Tribunal to make an award of damages or to impose a fine. If the experience of the European Commission is anything to go by then such a power would equip the new watch dog with real teeth and enable the proper regulation of public bodies whose acts or omissions harm the environment. Yet the Bill makes no equivalent provision for the crucial Commission power to fine Member States for non-compliance with environmental legislation. On any view this must be seen as a down-grading of regulatory power.

Finally, and perhaps most fundamentally, there are real questions about the extent to which the OEP will be capable of acting as a truly independent body, willing and able to take local and central government to task where necessary. As it stands, both the appointment of non-executive board members and allocation of budget would be the duty of the Secretary of State. Experience suggests that non-departmental public bodies structured in this way are often subject to significant governmental oversight as a result of the appointment process and financial allocation. All of which could very well get in the way of the goal of "*robustly hold[ing] the Government to account*".

Conclusion

While the current provisions establishing the OEP contain welcome features for those interested in the protection of the environment, the doubtless laudable ambition that the OEP will be *"a new, world-leading, independent environmental watchdog"* risks being undermined by the short-comings in the current draft of the Bill identified here. If the government is serious about its stated ambition it will need to equip its watch dog with the teeth and freedom to make that possible.

AIR QUALITY AND ENVIRONMENTAL RECALL

Overview

This section considers Part 4 of the Bill which relates to air quality regulation and makes provision first for the so-called 'local air quality framework', the control of smoke and for the recall of motor vehicles that do not meet relevant environmental standards.

We assess whether the provisions in the Bill which address air quality are sufficient to tackle the scale of the problem currently posed by air pollution in the UK. We conclude that the Bill fails to meet the challenge, and instead provides a collection of disparate and piecemeal reforms, primarily focused on facilitating the making of air quality plans rather than concrete action. In its current form we consider that the Bill creates a real risk that air quality limit values and targets could slip behind those required within the EU after Brexit.

The policy background

The principal contaminants currently affecting UK air quality are carbon monoxide (CO), oxides of nitrogen (NO_x), volatile organic compounds (VOCs) and particulate matter. Of particular concern in terms of environmental health are: (i) fine particulate matter (PM2.5), i.e. particles of less than 2.5 microns diameter, emitted during fuel combustion and (ii) nitrogen dioxide (NO2), a fossil fuel combustion pollutant.

The problem of poor air quality afflicts much of the UK[6] with many areas currently in breach of EU legal limits for NO2 limits that should have been met in 2010 pursuant to Directive 2008/50/EC. Forty towns and cities exceed World Health Organisation ("WHO") guideline limits for fine particle pollution.[7] The policy case for intervention is threefold.

First, the government has recognised that air quality is currently the most significant environmental health risk in the UK. Health can be affected both by short-term, high-pollution episodes and by long-term exposure to lower levels of pollution. In January this year, the British Heart Foundation issued a stark warning that heart attack and stroke deaths related to

[6] The Guardian, Pollution map reveals unsafe air quality at almost 2,000 UK sites (27 February 2019), available online here: <https://www.theguardian.com/environment/2019/feb/27/pollution-map-reveals-unsafe-air-quality-at-almost-2000-uk-sites> accessed 12 June 2020.
[7] Friends of the Earth, Clean Air Campaign, available online here: <https://friendsoftheearth.uk/clean-air> accessed 12 June 2020.

air pollution could exceed 160,000 by 2030.[8] The Covid-19 pandemic has also thrown the implications of poor air quality into sharp focus. Although research on the links between air quality and Covid-19 is still emerging, Dr Maria Neira, director of public health at the WHO, has explained that '*we know if you are exposed to air pollution you are increasing your chances of being more severely affected*.'[9]

Secondly, air pollution has a significant impact on the natural environment, and contributes to climate change. Air quality impacts local ecosystems, and affects their ability to grow and function. This has knock-on implications for biological diversity.[10] Photochemical reactions resulting from the action of sunlight on nitrogen dioxide (NO2) and VOCs, typically emitted from road vehicles, lead to the formation of ozone.[11] Ozone is a so-called 'short-lived' climate pollutant, which can make a significant contribution to the greenhouse effect. 'Short-lived' climate pollutants, such as black carbon (another vehicle exhaust pollutant), as well as methane, and hydrofluorocarbons, collectively account for up to 45% of current global warming.[12]

Thirdly, there is a significant economic cost to poor air quality. A joint report of the Royal College of Physicians ("RCP") and the Royal College of Paediatrics and Child Health ("RCPCH") have estimated that the health problems resulting from exposure to air pollution cost the health services, business, and the people who suffer from illness and premature death, up to more than £20 billion every year.[13]

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[8] British Heart Foundation, Heart attack and stroke deaths related to air pollution could exceed 160,000 by 2030 (13 January 2020), available online here: <https://www.bhf.org.uk/what-we-do/news-from-the-bhf/news-archive/2020/january/heart-and-circulatory-deaths-related-to-air-pollution-could-exceed-160000-over-next-decade> accessed 12 June 2020.

[9] The Guardian, Is Air pollution making the coronavirus pandemic even more deadly? (Monday 4 May 2020); <https://www.theguardian.com/world/2020/may/04/is-air-pollution-making-the-coronavirus-pandemic-even-more-deadly> accessed 12 June 2020.

[10] UNECE, Air pollution, ecosystems and biodiversity, available online here: <http://www.unece.org/environmental-policy/conventions/envlrtapwelcome/cross-sectoral-linkages/air-pollution-ecosystems-and-biodiversity.html#:~:text=Ecosystems%20are%20impacted%20by%20air,ability%20to%20function%20and%20grow.&text=As%20ecosystems%20are%20impacted%2C%20so,human%20populations%20are%20also%20affected> accessed 12 June 2020.

[11] DEFRA, UK Air Information Resource, available online here: <https://uk-air.defra.gov.uk/air-pollution/causes. See also, the DEFRA and developed administration commissioned Air Quality Expert Group Report, *Air Quality and Climate Change: A UK Perspective* (2007), available online here: <https://uk-air.defra.gov.uk/assets/documents/reports/aqeg/fullreport.pdf> accessed 12 June 2020.

[12] UN Environment Programme: Climate & Clean Air Coalition, *Short-lived climate pollutants*, available online here: <https://www.ccacoalition.org/en/science-resources> accessed 12 June 2020.

[13] RCP and RCPCH Working Party Report, *Every breath we take: the lifelong impact of air pollution* (23 February 2016), available online here: <https://www.rcplondon.ac.uk/projects/outputs/every-breath-we-take-lifelong-impact-air-pollution> accessed 12 June 2020.

On 14 January 2019, DEFRA published its '*Clean Air Strategy'*, with the stated aim of '*tackling all sources of air pollution, making our air healthier to breathe, protecting nature and boosting the economy*.'[14] This follows the government's commitment to reduce pollution enshrined in its 25 year environment plan. The latent ambition is apparent from the priority given to air quality in the plan. The first of the government's ten 25-year goals is to achieve 'clean air'. The government does not have a stellar recent track record in tackling air pollution. In particular, all three of its attempts to produce a lawful UK Air Quality Plan, aimed at tackling nitrogen dioxide concentrations, were quashed following legal challenges brought by ClientEarth.[15] Regrettably, the Bill does not mark a significant turning point in the regulation of air pollution, but instead: (i) defers implementing concrete targets, and (ii) offers merely piecemeal reform.

Air quality reform in the Bill: the story so far

Part 4 is not the entirety of the Bill's air quality provisions. Some also feature in Part 1 of the Bill. In particular, clause 1 of the Bill would confer a secondary legislation making power on the Secretary of State may to set environmental long-term targets, and air quality is identified as a priority area. Furthermore, clause 2 would introduce a duty on the government to set a legally-binding target for fine particulate matter (PM2.5).

These clauses share the same fundamental flaw seen elsewhere in the Bill: the critical work is left to the future, rendering it subject to the vicissitudes of future political preferences. A proposed amendment to the Bill setting the target for PM2.5 at 10µg/m3 as an annual average, the level advised by the WHO, offered a potential solution to this problem and would have provided a stricter target than the 25 µg/m3 currently prescribed by the EU's Air Quality Directive. But that amendment was rejected and with it this potential solution was lost.[16] This

[14]Available online here: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/770715/clean-air-strategy-2019.pdf> accessed 12 June 2020.
[15] *R. (on the application of ClientEarth) v Secretary of State for Food, Environment and Rural Affairs (No.3)* [2018] EWHC 315 (Admin).
[16] Air Quality News, 'MPs vote against introducing WHO PM2.5 guideline to Environment Bill' (13 March 2020) available online here: <https://airqualitynews.com/2020/03/19/mps-vote-against-introducing-who-pm2-5-guideline-to-environment-bill/> accessed 12 June 2020.

missed opportunity in the Bill's provision on air quality has been the subject of particular lament.[17]

As considered further below, regrettably, the sum of parts 1 and 4 do not add up to the change necessary to tackle the scale of the problem posed by poor air quality in the UK.

The air quality framework: amendments to the Environment Act 1995

Clause 71, and schedule 11, to the Bill contain amendments to part 4 of the Environment Act 1995 ("the 1995 Act") whose key provisions include the following s:

a. **National air quality strategy:** section 80 of the 1995 Act obliges the Secretary of State to publish a policy statement on air quality assessment and management. Para 2 of schedule 11 to the Bill would amend section 80 to remove subsection (3), which requires that the statement (or statements) should relate to the whole of Great Britain. It would also introduce a new subsection (4A), which would require the strategy to be reviewed, and, following that review, amended if that is considered necessary. A new subsection (4B) sets out the minimum review periods, requiring a review initially within 12 months of the schedule coming into force, and then subsequent reviews to happen at least once every five years after that. This remedies the surprising omission that section 80, as made, did not itself contain a review mechanism. However, following a 12 month initial review, a review may only occur as infrequently as every 5 years. This may not be enough to ensure that the strategy is kept properly up to date or that interventions are sufficiently targeted and swift.

b. **Duty to report on air equality in England:** Para 3 would introduce a new section 80A, requiring that the Secretary of State lays an annual statement before Parliament which sets out an assessment of progress made towards meeting air quality objectives and standards in England, as well as the steps the Secretary of State has taken in support of meeting those standards and objectives. Progress made in meeting the extant objectives and standards will be subject to frequent

[17] See, for example, ClientEarth, The Environment Bill: another missed opportunity for clean air (31 January 2020), available online here: https://www.clientearth.org/were-demanding-urgent-action-on-uk-air-pollution/.

assessment, although the adequacy of the objectives and standards themselves may go unreviewed within a five year period.

c. **Functions of relevant public authorities:** para 4 would add a new section 81A, which imposes a requirement on certain relevant public authorities to co-operate with local authority air quality action planning, once the relevant public authority has been designated by the Secretary of State. It would also apply a duty to have regard to the National Air Quality Strategy when carrying out functions and services which might affect air quality to additional bodies who may be relevant to meeting air quality standards and objectives. Moreover, para 5 would amend section 82 (concerning local authority reviews). Of note, the new subsection (5) provides that local authorities in England must also identify which sources of emissions they believe are responsible for failure to achieve air quality standards or objectives; identify neighbouring authorities who may be responsible for emissions; and identify other relevant public authorities or the Environment Agency who may be responsible for emissions. This would establish a more directed and comprehensive review process.

d. **Duties of English local authorities in relation to designated areas:** a new section 83A would require local authorities to prepare an action plan to ensure air quality standards and objectives are achieved in the Air Quality Management Area it has designated under section 83. This is intended to 'tighten' the requirement to ensure action plans should secure the required standards and objectives.[18] Action plans must set out air quality measures to be taken by the local authority within the Air Quality Management Area together with associated deadlines. Action plans may be revised, and indeed *must* be revised, by relevant local authorities, if new or different measures are required. There is also a mechanism for resolving any disputes as to the content of an action plan between a county and district council by making a referral to the Secretary of State.

e. **Air quality partners:** paras 8 and 9 would introduce new sections 85A and 85B, that are aimed at increasing cooperation at the local level, and sharing

responsibility for tackling local air pollution between relevant public bodies (designated as 'air quality partners'). An 'air quality partner' is a body responsible for emissions contributing to exceedance of local air quality objectives,[19] and they are under a duty to assist a local authority, upon request, in meeting air quality standards and objectives, where there is an exceedance ("duty to co-operate"). However, the potential effectiveness of this requirement is blunted because the air quality partner can simply refuse such a request if it considers it unreasonable. A local authority in England that intends to prepare an action plan must notify each of its air quality partners that it intends to do so. Air quality partners are under a duty to propose measures for inclusion in the plan they will take to contribute to achievement or maintenance of air quality standards, and to specify a date for each particular measure by which it will be carried out. It is then obliged to carry out those measures by those dates, as far as is reasonably practicable. The Secretary of State may direct an air quality partner to make further proposals, where it has made insufficient or otherwise inappropriate proposals itself.

f. **Role of the Mayor of London in relation to action plans:** Para 10 would replace the current section 86A. It would oblige a local authority in London that intends to prepare an action plan to notify the Mayor of London. In response, the Mayor must, before the end of the relevant period, provide the authority with proposals for particular measures the Mayor will take to contribute to the achievement, and maintenance, of air quality standards and objectives in the area to which the plan relates. Local authorities are required to incorporate the Mayor of London's proposals and dates in their action plans.

g. **Role of combined authorities in relation to action plans:** in a similar fashion, a local authority in a combined authority area must notify the combined authority of its intention to produce a plan. The combined authority must respond in the same manner as the mayor of London (above), and local authorities must then incorporate combined authority proposals and dates in their action plans.

[19] As identified by that authority in accordance with the proposed amended section 82(5)(b) or (c), namely that: (b) in the case of a relevant source within the area of a neighbouring authority, identify that authority, and (c) in the case of a relevant source within an area in relation to which a relevant public authority or the Agency has functions of a public nature, identify that person in relation to that source.

Finally, paragraphs 11 and 12 amend sections 87 and 88 of the 1995 Act respectively, to broaden the range of bodies subject to these regulating powers, so as to include county councils, relevant public authorities and the Environment Agency.

Whilst these provisions would introduce a more tightly prescribed framework for the making of local air quality action plans, and facilitate increased co-operation between local authorities and other public bodies, the content of the action plans will be critical to determine how effective this framework will be in reality. Ultimately, the focus of these provisions is primarily on making plans, rather than on achieving them.

Control of smoke: amendments to the Clean Air Act 1993

Historically, the main air pollution problem in the UK has been high levels of smoke and sulphur dioxide emitted pursuant to the combustion of sulphur-containing fossil fuels such as coal, used for both domestic and industrial purposes.[20] The first Clean Air Act was enacted in 1956, following the 1952 London smog disaster, which is thought to have claimed as many 12,000 lives. The Clean Air Act 1956 was the first legislative intervention made to regulate both domestic and industrial smoke emissions.[21] The Clean Air Act 1968 supplemented it in the following decade.

Although since 1956, the main sources of air pollution have shifted from the traditional smoke emissions, to vehicle fumes,[22] the domestic burning of wood and coal in open fires and stoves nonetheless still makes up 38% of the UK's primary emissions of fine particulate matter (PM2.5). Harmful sulphur dioxide (SO") is also emitted by coal burned in open fires.[23]

The 1957 and 1968 Acts were repealed and replaced by the Clean Air Act 1993 ("the 1993 Act"), which consolidated and extended their provisions. The main pillars of the 1993 Act are

[20] DEFRA, UK Air Information Resource, available online here: <https://uk-air.defra.gov.uk/air-pollution/causes> accessed 12 June 2020.
[21] Friends of the Earth, 'London Smog and the 1956 Clean Air', <https://friendsoftheearth.uk/clean-air/london-smog-and-1956-clean-air-act#:~:text=Historians%20widely%20considered%20the%20Clean,fuel%2C%20gas%20and%20electricity)> accessed 12 June 2020.
[22] Prof Peter Brimblecombe, "The Clean Air Act after 50 years", *Weather* (November 2006), Vol. 61, No. 11.
[23] DEFRA, Clean Air Strategy, (14 January 2020), p 10, available online here: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/770715/clean-air-strategy-2019.pdf> accessed 12 June 2020.

as follows:

a. Prohibitions on emitting dark smoke from the chimneys of any building or industrial or trade premises (part 1).
b. Powers for local authorities to designate smoke control areas. Most of the UK's major towns and cities are subject to smoke control orders. In a smoke control area, only authorised fuels or a specified smokeless fuel may be burned, unless an exempt appliance in used (part 3).[24]
c. Requirements that new non-domestic furnaces (such as boilers) be provided with local authority-approved plant for arresting grit and dust (part 2).
d. Requirements for the height of chimneys serving certain furnaces to be approved by local authorities (sections 14 to 16)
e. Powers for local authorities to obtain information about air pollution, including by serving notices on the occupiers of premises (but not private dwellings) (part 5).

Notably, whilst there have been amendments to regulations made pursuant to the Clean Air Act 1993 ("the 1993 Act") in 2014,[25] there have been no discrete changes to the 1993 Act itself, let alone the wholesale overhaul of its provisions that some were seeking.[26] In its current form the Bill does not however offer a fundamental rethink, but rather, tinkers at the edges of its provisions.

Clause 72, and schedule 12, make provision for:

a. **Financial penalties for the emission of smoke in smoke control areas in England:** clause 3 would insert a new schedule 1A into the 1993 Act, that would provide for financial penalties to be imposed by local authorities for the emission of smoke in a smoke control area in England, by either a domestic or industry

[24] In England, the lists of authorised fuels and exempt appliances are published by the Secretary of State. In Wales, authorised fuels are set out in the Smoke Control Areas (Authorised Fuels) (Wales) Regulations 2019 (SI 2019/50) and exempt appliances are set out in the Smoke Control Areas (Exempted Classes of Fireplace) (Wales) Order 2019 (SI 2019/51).
[25] Clean Air (Miscellaneous Provisions) (England) Regulations 2014 SI No 3318.
[26] The Government carried out a policy review and consultation in 2013, which resulted in the regulations made in 2014. For more information, see: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/326129/clean-air-act-sum-resp.pdf> accessed 12 June 2020. There have been recent calls for such a rethink, and a vigorous campaign spearheaded by ClientEarth has pushed for a new Clean Air Act to address the air quality threats posed in the 21st Century, see for example: https://www.healthyair.org.uk/clean-air-act-21st-century/.

chimney. The new schedule prescribes the process of issuing a penalty. The local authority must be satisfied, on the balance of probabilities (rather than on the criminal standard, beyond a reasonable doubt) that on a particular occasion smoke has been emitted from a relevant chimney within a smoke control area declared by that authority. The minimum amount of a financial penalty is £175, and the maximum is £300. This is a blanket figure which applies to both domestic and industrial emitters. For the latter, this is likely to be far too small a sum to have the necessary deterrent effect. A more targeted and staggered approach would have been more effective.

b. **Offences relating to the sale and acquisition of solid fuel in England:** para 4 would introduce a new section 19B, which introduces three criminal offences:
    i. First, it would be a criminal offence for any person in England to acquire any controlled solid fuel for use in: (a) a building to which a smoke control order in England applies, (b) a fireplace to which such an order applies, or (c) a fixed boiler or industrial plant to which such an order applies. A person guilty of this offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale (currently being £1,000).
    ii. Secondly, any person who offers a controlled fuel for sale by retain in England, and fails to take reasonable steps to notify potential purchasers that it is an offence to acquire that fuel for any of those prohibited uses, is also guilty of an offence.
    iii. Thirdly, a person who sells any controlled solid fuel in England for delivery by that person, on their behalf, to: (a) a building to which a smoke control order in England applies, or (b) premises in which there is any fixed boiler or industrial plant to which such an order applies, is guilty of an offence. However, there is a relatively broad defence to this offence where a defendant reasonably believed that: (a) the building was not one to which the smoke control order in question applied, or (b) the fuel was acquired for use in, (i) a fireplace that was, at the time of the delivery, an approved fireplace, or (ii) a boiler or plant to which the smoke control order did not apply.

c. **Applying smoke control orders to vessels in England:** A vessel moored in a smoke control area in England is also brought expressly within the scope of the new schedule 1A, and subject to financial penalties. If the local authority is unable to give a notice of intent to the occupier of the vessel who is not the registered owner of the vessel, the local authority may give the notice to the registered owner of the vessel instead. Moreover, a person may object to a financial penalty issued by the local authority on the ground that the emission of smoke was solely due to the use of the vessel's engine to propel the vessel or to provide it with electric power. Many moored house canal boats have a solid fuel fire for heating, and cooking. The Canal and River Trust have observed that '*smoky boater's stoves are the source of many a complaint to the Trust during the winter months, particularly in urban areas which are already likely to be suffering from poor air quality…[it] affects boaters' health more than anyone else, so it's in our own interests to make things as good as they can be.*'[27] As such, and although inland boating contributes only '*a tiny fraction of harmful emissions compared to other forms of transport such as road, air and shipping'*,[28] the explicit inclusion of moored vessels is to be welcomed.

d. **Authorised fuels and exempted fireplaces to be listed in Wales:** paragraphs 9 to 11 make amendments to the 1993 Act in respect of the powers conferred on the Welsh Ministers. The amendments would enable Welsh Ministers to authorise fuels and exempt fireplaces as and when they are manufactured and tested, rather than waiting for common commencement dates as is currently the case for Wales.

Somewhat inexplicably, the Secretary of State, if it appears '*necessary or expedient to do so'* may by order suspend or relax the operation of the penalties for emission of smoke, or the offences relating to acquisition and sale of fuel, in relation to the whole or part of a smoke control area in England. The Secretary of State is obliged to consult the relevant local authority, unless '*on account of urgency'*, such consultation is impracticable. This equips the Secretary of State with the power to significantly undercut the potential effectiveness of these provisions. It is not clear what legitimate purpose the relaxation or suspension would serve.

[27] Canal and River Trust, The future's bright, the future's green – cleaning up boating (27 June 2018), available online here: <https://canalrivertrust.org.uk/enjoy-the-waterways/boating/boating-blogs-and-features/boating-team/the-futures-bright-the-futures-green-cleaning-up-boating> accessed 12 June 2020..
[28] Ibid.

Power to recall motor vehicles

It is widely recognised that the main threat to clean air is posed by traffic emissions. DEFRA has explained that:

> *Petrol and diesel-engined motor vehicles emit a wide variety of pollutants, principally carbon monoxide (CO), oxides of nitrogen (NO_x), volatile organic compounds (VOCs) and particulate matter (PM_{10}), which have an increasing impact on urban air quality. In addition, pollutants from these sources may not only prove a problem in the immediate vicinity of these sources, but can be transported long distances.*[29]

As part of its strategy to deal with emissions from motor vehicles, the Bill confers a new power on the Secretary of State, under clauses 73 to 74, to compel vehicle manufacturers to recall vehicles and non-road mobile machinery ("a relevant product")[30] if they are found not to comply with the environmental standards that they are legally required to meet. The government will also be able to set manufacturers a minimum recall level.

A relevant environmental standard is defined as meaning a standard that:

a. by virtue of any enactment, a relevant product must meet,
b. is relevant to the environmental impact of that product, and;
c. is specified in the regulations

"Environmental impact" is defined relatively broadly, as being any impact on the environment caused by noise, heat or vibrations or any other kind of release of energy or emissions resulting from the use of the relevant product. This means that the recall power could, potentially, apply more broadly to regulate the environmental impact of motor vehicles than solely in respect to improving air quality. For example, DEFRA has recently published the results of a government-funded research study which suggests that particles released from vehicle tyres

[29] DEFRA, UK Air Information Resource, available online here: <https://uk-air.defra.gov.uk/air-pollution/causes> accessed 12 June 2020.
[30] Defined under the proposed clause 71 as: (a) a mechanically propelled vehicle; (b) a part of a mechanically propelled vehicle; (c) an engine that is, or forms part of, machinery that is transportable (including by way of self-propulsion); (d) a part of such an engine, or any other part of such machinery that is connected with the operation of the engine.

could be a significant source of microplastics in the marine environment.[31]

The Secretary of State may issue a compulsory recall notice to a manufacturer or distributor, which requires them to organise the return of the relevant product to the recipient, or indeed, to any others on specified in the notice. Such a notice may only be issued if the Secretary of State has reasonable grounds for believing the product does not meet a relevant environmental standard.

The regulations also may confer a power on the Secretary of State to give a recipient of a compulsory recall notice a further notice (a "supplementary notice") that imposes supplementary requirements on its recipients such as, for example, to:

a. to publicise a compulsory recall notice;
b. to provide information to the Secretary of State;
c. a prohibition on supplying, or offering or agreeing to supply, a product subject to a compulsory recall notice, or;
d. to pay such compensation to a person who returns a product subject to a compulsory recall notice as may be specified.

In addition, regulations made by the Secretary may impose a duty on a manufacturer or distributor of a relevant product to notify the Secretary of State if the person has reason to consider that the product does not meet a relevant environmental standard.

The Environment Bill Delegated Powers Memorandum refers to the Volkswagen Group's emission test fixing scandal as illustrating the current limits of the government's powers to compel a recall of motor vehicles for reason of environmental non-conformity or failure under the General Product Safety Regulations 2005 SI No 1803. It summarises that the new power under the Bill:

> *would allow the Secretary of State to make provision to reflect any future emissions standards or changes in technology which may necessitate a compulsory recall of products which are subject to these, either in line with EU standards or under a separate UK regime when the UK leaves the EU. The*

[31] Available online here: <https://www.gov.uk/government/news/tyre-particles-are-contaminating-our-rivers-and-ocean-study-says> accessed 12 June 2020.

> *power to compel the recall of vehicles where there are reasonable grounds for believing they do not meet a relevant environmental standard will be underpinned by technical evidence leading to the issue of a compulsory recall notice.*[32]

However, whilst the provision of a power to recall motor vehicles for environmental failures is, in principle, to be welcomed, again, as with so much of the Bill, the devil is in the detail. Far too much is left to the discretion of the Secretary of State. The effectiveness of the power to recall will turn on the stringency of the environmental standards, and the political will required to issue recalls when those standards are breached.

The Bill has failed to take the opportunity to enshrine such environmental standards in primary legislation, with the requisite scrutiny and significance that would entail, both practically and symbolically. In addition, the Bill does not address the potential gap in environmental standards that may well arise after the UK leaves the EU. Putting standards into primary legislation would prevent them potentially being watered down in the course of trade negotiations with third countries, such as the USA (whose officials have apparently banned any talk of a climate crisis in negotiations).[33]

Moreover, it might perhaps have been prudent to have shared this power with the environmental regulators (such as the Environment Agency in England, or Natural Resources Wales), which would be able to exercise it entirely independently from the government of the day.

Conclusion

The sum of parts 1 and 4 of the Bill do not add up to the change necessary to tackle the scale of the problem posed by poor air quality in the UK. The Covid-19 pandemic has resulted in a glimpse of a less polluted atmosphere, with stark 'before and after' photographs and data imaging illustrating the unsettling differences in visible pollution. Whilst recent environmental

[32] See paras 312 to 317, available online here: <https://publications.parliament.uk/pa/bills/cbill/58-01/0009/2020.01.29%20Environment%20Bill%20Delegated%20Powers%20Memorandum.pdf> accessed 20 June 2020.
[33] The Guardian, US rules out any talk of acclimate crisis in trade negotiations (21 December 2019) available online: <https://www.theguardian.com/politics/2019/dec/21/us-bans-mention-of-climate-in-uk-trade-talks> accessed 20 June 2020.

eases, and economies reopen, previous levels of pollution are almost certain to return just as quickly as they fell .[34]

Ultimately, much will need to be achieved at a local, as well as a national level. The Mayor of London has recently announced a significant car-free initiative by closing a number of major road arteries in central London to cars and vans.[35] It is to be hoped that provides an inspirational model for other towns and cities across the UK.

Moreover, Brexit will pose particular challenges for resolving air pollution that remain largely unaddressed in the Bill. As with much of the UK's environmental standards and targets, EU law sets the parameters that must not be exceeded for different pollutants. Brexit means that there is a real risk that limit values and targets for air quality could slip behind the EU. The Environment Bill does little to assuage this concern.

[34] Air Quality News, 'Covid-19 shutdowns are clearing the air', <https://airqualitynews.com/2020/05/11/covid-19-shutdowns-are-clearing-the-air-but-pollution-will-return-as-economies-reopen/> accessed 20 June 2020.
[35] The Guardian, 'Large Areas of London to be Made Car Free', <https://www.theguardian.com/uk-news/2020/may/15/large-areas-of-london-to-be-made-car-free-as-lockdown-eased> accessed 20 June 2020.

WASTE AND RESOURCE EFFICIENCY

Overview

The Government acknowledges that the sustainable use of material resources is now imperative. Its policy paper on the waste and resource management provisions of its Environment Bill ("the Bill") notes that:

> *Material resources are at the heart of our economy and we consume them in large quantities. They allow us to meet our basic human needs as well as generate economic growth and create social value. Our use of resources has become unsustainable however, which is causing harm to the natural environment and contributing to climate change. Economically, we are also at risk of fluctuating prices as a result of resource scarcity.*[36]

Moreover, in its 25-year plan, the Government has observed that:

> *...we must tread more lightly on our planet, using resources more wisely and radically reducing the waste we generate. Waste is choking our oceans and despoiling our landscapes as well as contributing to greenhouse gas emissions and scarring habitats.*[37]

In this short article we consider whether the Bill provides the 'radical' solution which is acknowledged here and elsewhere to be so urgently needed in order to set the UK on a course towards a so-called 'circular economy' in which resources are kept in beneficial use for as long as possible before they are recovered and regenerated.

Policy background, the scale of the challenge and the case for intervention

On 18 December 2018, the Department for Environment, Food & Rural Affairs ("DEFRA") issued its policy paper, 'Our waste, our resources: a strategy for England' ("the Strategy").[38] This was the first significant government statement in this area since the 2011 Waste Review and the subsequent Waste Prevention Programme 2013 for England. It set out to build on this earlier work, as well as to introduce new approaches to waste crime, and to problems such as

[36] DEFRA, Policy paper: Waste and Resource efficiency factsheet (part 3) (13 March 2020), available online here: <https://www.gov.uk/government/publications/environment-bill-2020/10-march-2020-waste-and-resource-efficiency-factsheet-part-3> accessed 26 May 2020.

[37] DEFRA, 25-year Environment Plan (11 January 2018), available online here: <https://www.gov.uk/government/publications/25-year-environment-plan> accessed 26 May 2020 .

[38] Available online here: <https://www.gov.uk/government/publications/resources-and-waste-strategy-for-england> accessed 26 May 2020.

packaging waste and plastic pollution. The Introduction of its Evidence Annex describes the scale of the challenge and the case for government intervention thus:

> *In England, latest estimates showed 41.3m tonnes of waste were sent to landfill in 2014. A further 27.7m tonnes goes to energy recovery, incineration or backfill. This wastes valuable resources, some of which cannot be replaced. Waste also imposes social costs such as environmental impacts. For example, landfilling of biodegradable material results in the generation of harmful greenhouse gases and transport of waste materials around the country causes local disamenity and atmospheric pollution.*

Recognising the importance of this problem, the Strategy set out the following five strategic ambitions:

(i) To work towards all plastic packaging placed on the market being recyclable, reusable or compostable by 2025;
(ii) To work towards eliminating food waste to landfill by 2030;
(iii) To eliminate avoidable plastic waste over the lifetime of the 25 Year Environment Plan;
(iv) To double resource productivity by 2050; and
(v) To eliminate avoidable waste of all kinds by 2050.

Draft provisions of the Bill relating to waste and resource management

Part 3 of the Bill contains draft provisions aimed at addressing the problem, arranged under four broad sections: (i) producer responsibility, (ii) resource efficiency, (iii) managing waste and (iv) waste enforcement and regulation, considered in turn below.

(i) Producer responsibility

Clauses 49 to 50, and schedules 4 to 5, confer secondary legislation making powers on the Secretary of State (in England), the Welsh Ministers, the Scottish Ministers or, in relation to Northern Ireland, the Department of Agriculture, Environment and Rural Affairs (referred to as the 'relevant national authority'), in respect of 'producer responsibility obligations' (clause 49 and schedule 4), and 'producer responsibility for disposal costs' (clause 48 and schedule 5). Clauses 49 and 50 make broad overarching provision in summary terms, whereas the detailed permissible scope of the powers is prescribed in the respective schedules.

First, with regard to 'producer responsibility obligations', para 1 of schedule 4 provides a 'general power' that the relevant national authority may exercise to impose producer responsibility obligations on specified persons in respect of specified products or materials. The regulations may be made only for the purpose of: (i) preventing a product or material becoming waste, or reducing the amount of a product or material that becomes waste; (ii) sustaining a minimum level of, or promoting or securing an increase in, the re-use, redistribution, recovery or recycling of products or materials. For example, para 2 of schedule 4 regulations may make provision about targets to be achieved in relation to the proportion of products or materials (by weight, volume or otherwise) to be re-used, redistributed, recovered or recycled (either generally or in a specified way).

Moreover, under part 1 of schedule 4, the regulations may make provision authorising or requiring persons who are subject to a producer responsibility obligation to become members of a compliance scheme, under which producer responsibility obligations of scheme members are discharged by the scheme operator on their behalf.

Enforcement is addressed by part 2 of schedule 4. Regulations may include provision conferring functions on an enforcement authority, including the monitoring of compliance, as well as powers of entry, inspection, examination, search and seizure. Regulations may also provide for the imposition of civil and criminal sanctions.

However, the Bill's enforcement powers are not without limit. The relevant national authority *must* exercise the power to make regulations in the way it considers best calculated to secure that they: (a) do not restrict, distort or prevent competition, or (b) any such effect is no greater than is necessary for achieving the environmental or economic benefits. The proposed legislation therefore allows the imperative of resolving the problems of waste to be attenuated by the competing imperative of the very thing which gave rise to those problems in the first place, commerce.

Secondly, schedule 5 confers power on the relevant national authority to make regulations requiring the payment of sums in respect of the costs of disposing of products and materials. The regulations may be made only for the purpose of securing that those involved in manufacturing, processing, distributing or supplying products or materials meet, *or contribute to*, the disposal costs of the products or materials. There is potentially a real difference between meeting disposal costs and merely contributing to them. The eventual extent of these costs will

have a determinative impact on whether, as the Government intends, producers will be incentivised to design their products with re-use and recycling in mind.

"Disposal" of products or materials includes their re-use, redistribution, recovery or recycling. "Disposal costs" means such costs incurred in connection with the disposal of the products or materials, as may be specified in the regulations. The relevant national authority must consult persons appearing to it to represent the interests of those likely to be affected. It will be important that the weight of industry opinion does not push the Government towards setting the disposal costs at too low a level, thereby impeding the measure's potential effectiveness.

Part 2 of schedule 5 confers a similar power on the relevant national authority to make provision about enforcement as under schedule 4.

(ii) Resource efficiency

First, clause 51, and schedule 6, provide that a relevant national authority may by regulations make provision for the purposes of requiring specified persons, in specified circumstances, to provide specified information about the resource efficiency of specified products. The regulations may impose requirements to provide information in relation to a product on a person only if the person is a person connected with the manufacture, import, distribution, sale or supply of the product.

"Information about resource efficiency" is defined in para 2 to schedule 6. It is (i) information relevant to the product's impact on the natural environment, and (ii) within a number of prescribed categories.

The regulations may include provision, for example, about how information about a product is to be provided (for example, by affixing a label to the product). There are further similar provisions for the enforcement of such regulations, as set out above. Again, much will turn on the detail of the eventual regulations. However, assisting consumers to identify products that are more durable, repairable and recyclable will no doubt assist consumers who are eco-conscious. Studies suggest that effecting change in the behaviour of those without such concerns for the environment will be much harder to achieve.[39]

[39] Gordon Robert Foxall (1995),"Environment-Impacting Consumer Behavior: an Operant Analysis", in NA - Advances in Consumer Research Volume 22, eds. Frank R. Kardes and Mita Sujan, Provo, UT: Association for Consumer Research, Pages: 262-268.

Secondly, clause 52 and schedule 7, provide that the relevant national authority may by regulations make provision for the purposes of requiring specified products, in specified circumstances, to meet specified resource efficiency requirements, with provisions as to the enforcement of those requirements.

Before making such regulations, the relevant national authority must – (a) consult any persons the authority considers appropriate, and (b) have regard to:

a. the extent to which the regulations are likely to reduce the product's environmental impact;
b. the environmental, social, economic or other costs of complying with the regulations;
c. whether exemptions should be given, or other special provision made, for smaller businesses.

The requirement to have regard to the 'economic or other costs' of complying with the regulations also introduces here, as noted above, a commercial counter-balance which risks diluting the beneficial impact of the regulations if too much weight is given to the economic or other costs of compliance.

Thirdly, under clause 53 and schedule 8, the relevant national authority may by regulations establish deposit schemes for: (a) sustaining, promoting or securing an increase in the recycling or reuse of materials; (b) reducing the incidence of littering or fly-tipping whereby a recoverable deposit is paid on relevant materials. Enforcement provisions may, as above, provide for civil and criminal sanctions.

Finally, clause 54 and schedule 9, confer regulation making power on the relevant authority to make regulations about charges for single use plastic items, in a similar manner as is currently in place for plastic carrier bags. Clause 53 amends schedule 6 to the Climate Change Act 2008, which provides for the power to impose the carrier bag charge in England and Northern Ireland, so as to require sellers to pay fees in connection with the scheme.

(iii) Managing waste

Clauses 56 to 62 would, in short, amend the Environmental Protection Act 1990 to: (i) make provision for the separate collection of household waste, (ii) establish an electronic waste tracking system, (iii) make broad provision for the regulation of hazardous waste, and (iv) make provision for the regulation of the importation or exportation of waste, or the transit of waste for export, respectively.

Subject to the detail to be set out in the regulations, this is potentially a significant step forwards in terms of the modernisation of the process of the collection of waste data.

(iv) Waste enforcement and regulation

Clauses 63 and 64 make provision for powers to make charging schemes as a means of environmental regulators recovering costs incurred by them in performing functions in respect of producer responsibility obligations, pursuant to schedule 4 of the Bill. Clauses 65 to 670 and schedule 10 amend legislation regarding enforcement powers in relation to waste and other environmental matters.

A wasted opportunity or valuable resource?

Undoubtedly, the Bill contains some welcome signs of a more progressive approach to the problems of waste and resource management. First, the introduction of a system of extended producer responsibility obligations could be transformative, if the Government keeps to its objective that producers are to 'bear the full net cost of managing their products at the end of their life, including impacts on the environment and society…' This reflects the overarching 'polluter pays' principle, which in this context, aims to ensure that those who place on the market products which become waste to take greater responsibility for the costs of disposal.

Currently, producer responsibility regulation only govern packaging, electrical and electronic equipment (EEE), batteries and end of life vehicles (ELVs). The Government has identified five further categories of waste as priorities: (i) textiles, (ii) bulky waste (such as mattresses, furniture and carpets, (iii) certain materials in the construction and demolition sector, (iv) vehicle tyres and (v) fishing gear.[40] Construction, demolition and excavation (CD&E; including dredging) generated around three fifths (62%) of total UK waste in 2016,[41] and as such, whilst the sector's inclusion as one of the five priorities is welcome, the detail of the regulations is crucial. Moreover, it will be important that the process of consulting those affected by the regulations (as required by the Bill) does not result in a watering down of the latent ambition that is present in the producer responsibility provisions.

[40] DEFRA, Our waste, our resources: a strategy for England (18 December 2018), available online here: <https://www.gov.uk/government/publications/resources-and-waste-strategy-for-england> accessed 26 May 2020.
[41] DEFRA and Government Statistical Service, UK Statistics on Waste (19 March 2020), available online here: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/874265/UK_Statistics_on_Waste_ statistical_notice_March_2020_accessible_FINAL_rev_v0.5.pdf> accessed 26 May 2020.

Secondly, the provision for obligations imposed on producers to meet specified resource efficiency requirements in respect of particular products, in specified circumstances could, if applied to its full potential across a broad range of products, have a significant impact. As the Government recognises, too many products are discarded before their useful life is over.[42] Minimum requirements for resource efficiency could result in a significant shift towards a circular economy, and a more sustainable use of resources. Again, it will be important to ensure that the paying polluter does not result in modest secondary legislation.

However, whether these provisions prove capable of addressing the urgent challenges of waste and resource management hinges on the extent to which the commercial counter-balances built into them stand in the way of their effectiveness. The requirements that (i) the costs of compliance be considered in respect of resource efficiency requirements, and (ii) producer responsibility obligations avoid the restriction, distortion or prevention of competition (referred to above), could well temper the Government's stated ambition. The key issue is that, despite the short or medium-term cost to the economy, fundamental changes to both production and management of materials at the end of their life, are required. This is not addressed head-on in the Bill.

Furthermore, the provisions on plastic waste are limited, and a cause for disappointment. The Government has pledged, in its 25 Year Environment Plan, to eliminate avoidable plastic waste over the lifetime of the plan and the UK Plastics Pact, led by the charity WRAP, a coalition whose members cover the entire plastics value chain, has committed to eliminating problematic or unnecessary single-use packaging by 2025.[43] The Bill could have provided a vehicle to introduce a ban on single use plastics, rather than making provision for a charging scheme. This is too slow a place to achieve the Government's own target of the elimination of avoidable plastic waste by 2042.[44]

The reality is that here as with many of the Bill's provisions, the true scale of the Government's ambition will not be known until the various draft regulations, empowered by the Bill, are promulgated. That crucial detail is unknown, and as such, whether or not the Bill proves to be a wasted opportunity for a necessary revolution in waste and resource management regulation

[42] DEFRA, Our waste, our resources: a strategy for England (18 December 2018), p 30 available online here: <https://www.gov.uk/government/publications/resources-and-waste-strategy-for-england> accessed 26 May 2020.
[43] Available online here: <http://www.wrap.org.uk/content/the-uk-plastics-pact> accessed 26 May 2020.
[44] DEFRA, 25-year Environment Plan (11 January 2018), available online here: <https://www.gov.uk/government/publications/25-year-environment-plan> accessed 26 May 2020.

towards a circular economy is yet to be determined. Like the Bill as a whole, the efficacy of its waste and resource management provisions may be jeopardised by the extent of discretion left to the relevant national authorities, and therefore the vagaries of political preferences at a given point in time.

Conclusion

The Bill falls short of providing the radical solution to the urgent challenges of waste and resource management, but does provide for secondary legislation which, with the requisite level of ambition, could make progress towards tackling the problem, and carrying the UK towards that ever elusive circular economy.

WATER

Overview

The below considers the provisions of the Bill that concern water.

Policy background

The Government has stated its aims of the water provisions of the Bill to be to:

a. strengthen the resilience of water and wastewater services by enhancing the water industry's long-term planning regime;
b. reform the process for managing water taken from the environment, linking this more tightly to its 25 Year Environment Plan commitments (which include goals for clean and plentiful water and to reduce the risks of harm from environmental hazards), and;
c. modernise the regulation of water and sewerage companies to make it more flexible and transparent.[45]

Environmental background

It is important to read the provisions of the Bill against the background of a looming water supply crisis which faces the UK. It is a crisis which has been coming for some years, and recent warnings have become increasingly stark. In March 2020 the Environment Agency published estimates showing that England will need more than 3.4 billion litres of extra water every day between 2025 and 2050 to meet demand unless action is taken to control demand, figures published alongside a new national framework for water resources.[46] Emma Howard Boyd, chair of the Environment Agency, was quoted as saying: "If we don't take action many areas of England will face water shortages by 2050."[47] Also in March 2020, the National Audit Office published a report indicating that parts of England could run out of water within 20 years, and was highly critical of the government for abdicating responsibility and effectively placing the onus on the water industry.[48] The NAO concluded there was a critical need to move water between region, but that little progress had been made on co-operative approaches and

[45] DEFRA, Policy paper: Water Factsheet (part 5) (13 March 2020), available online here: <https://www.gov.uk/government/publications/environment-bill-2020/10-march-2020-water-factsheet-part-5> accessed 12 June 2020.
[46] The Government, 'Meeting our Future Water Needs a National Framework for Water Resources', '<https://www.gov.uk/government/publications/meeting-our-future-water-needs-a-national-framework-for-water-resources> accessed 12 June 2020.
[47] ENDS Report, 29 April 2020.
[48] NAO, 'Water Supply and Demand Management', <https://www.nao.org.uk/report/water-supply-and-demand-management/> accessed 12 June 2020.

that the economic regulation system was not conducive to such long term investment and infrastructure. It is worth setting out in full the NAO's summary:

Tackling water resource issues is one of the five priority risks the Committee on Climate Change identified in its 2017 climate change risk assessment. If more concerted action is not taken now, parts of the south and south-east of England will run out of water within the next 20 years. Reducing demand is essential to prevent water shortages as water companies are running out of low-cost options for increasing water supply. Defra has left it to water companies to promote the need to reduce household water consumption, and yet it continues to increase. Defra committed to announcing a personal water consumption target by the end of 2018 but has not yet done so, while the introduction of the business retail market has not led to the expected reductions in non-household water usage.

Water companies' long-term progress on tackling leakage and reducing water consumption has stalled over the past five years, and companies are only now starting to develop bulk water transfer solutions at the scale required. The government has been grappling with these issues for more than a decade but rapid progress is now vital for Defra to deliver on its objective of a resilient water supply. Defra has taken positive steps to give a more strategic focus to water resource planning. But it must make sure that its new national framework and Ofwat's new funding for companies to develop strategic solutions produce the collaboration and prompt action from water companies that is now needed. Defra will not be able to achieve value for money unless it provides stronger leadership across government, and a much clearer sense of direction to water companies, the water regulators and water consumers.

Draft provisions of the Bill relating to water

The proposed changes contained in the draft provisions, set out in part 5 of the Bill, would largely take effect through amendments to three statutes (all enacted in 1991): (i) the Water Industry Act 1991, (ii) the Water Resources Act 1991 and (iii) the Land Drainage Act 1991. These Acts were part of a recasting and consolidation exercise following privatisation of the water industry in 1989. Given the massive changes and challenges in the intervening three decades, it is striking that there has been no wholesale rethinking of this legislation. The Environment Bill is unfortunately very far from providing such a rethink. In summary, the draft measures provide:

a. Water resources management:

Clause 77 would introduce provisions into the Water Industry Act 1991 conferring two secondary legislation making powers on the Secretary of State (in England) and the Welsh Ministers respectively (referred to in the Bill interchangeably as the "Minister"), in relation to the water resources planning process.

i. First, the Minister would have the power to make regulations about the procedure for preparing and publishing: (a) a water resources management plan, (b) a drought plan, and (c) a joint proposal, including any revised plans or proposals. These regulations may provide for the sharing of information and, in particular, may require a water supply licensee to share such information with a water undertaker as may be reasonably requested. Such regulations could empower the Minister to make provision by enforceable directions, which must be complied with by the water undertaker to whom a direction applies.
ii. Secondly, the Minister would also have the power to give a direction to two or more water undertakers to prepare and publish 'a joint proposal', defined as a proposal that identifies measures that may be taken jointly by the undertakers for the purpose of improving the management and development of water resources. The Government has stated it wishes to promote more effective collaboration between water companies to manage supply and demand, deliver resilience against droughts and facilitate environmental improvement.[49]

b. Drainage and sewerage management plans:

Clause 78 would impose a duty on all sewerage undertakers to prepare, publish and maintain a drainage and sewerage management plan, by way of a further amendment to the Water Industry Act 1991. A 'drainage and sewerage management plan' is defined as a plan for how the sewerage undertaker will manage and develop its drainage system and sewerage system so as to be able, and continue to be able, to meet its obligations. Sewerage undertakers would also be obliged to undertake period reviews of their plans, and report their conclusions to the Minister. A regulation making power would be conferred on the Minister to prescribe the procedure for preparing and publishing a drainage and sewerage management plan.

[49] DEFRA, Policy paper: Water Factsheet (part 5) (13 March 2020), available online here: <https://www.gov.uk/government/publications/environment-bill-2020/10-march-2020-water-factsheet-part-5> accessed 12 June 2020.

c. Regulation of water and sewerage undertakers:

Clauses 79 to 81 also amend the Water Industry Act 1991 in the following three ways.

i. First, clause 79 would confer a power on the Water Services Regulation Authority ("Ofwat") to require a water or sewerage undertaker, or a water supply or sewerage licensee to provide information to it, in accordance with its duty to keep their activities under review.

ii. Secondly, clause 80 changes the process for modifying water and sewerage company licence conditions. Under the current provisions, Ofwat could modify licence conditions only where the company consents, or following a reference made to the Competition and Markets Authority ("CMA"). The CMA can report as to whether there are any matters relating to the functions of companies which adversely effect the public interest, and that could be remedied or prevented by modifications of their licence conditions. Under clause 77, Ofwat would be empowered to make modifications to licence conditions, in accordance a process that prescribes notice requirements in detail. Companies are conferred a right of appeal to the CMA against a decision by Ofwat to modify licence conditions.

iii. Thirdly, clause 81 modernises the requirement for service of documents required or authorised to be served under the Water Industry Act 1991, so that electronic means constitutes valid service. Electronic service cannot be effected on a consumer unless that person has consented in writing to receipt of documents by electronic means.

d. Abstraction: Clause 82 amends the Water Resources Act 1991 to enable the Secretary of State to revoke or vary a permanent abstraction, without liability for compensation where: (i) the change is necessary having regard to an environmental objective, or to protect the 'water environment' (being any inland or underground waters or strata, including any dependent flora or fauna), or (ii) the licence is consistently under-used (measured during a 12 year period).

e. Water quality: Clauses 83 to 85 would empower the Secretary of State in England, the Welsh Ministers and the relevant government department in Northern Ireland (respectively) to amend or modify any legislation for the purpose of: (i) making provision about the substances to be taken into account in assessing the chemical status of surface or ground water, and (ii) specifying standards in relation to those substances, or chemical status of the water. The existing powers to update those provisions (contained in section 2(2) of the European Communities Act 1972) will be revoked at the end of the transition period.

f. Solway Tweed river basin district: Clause 86 makes specific provision relating to the Solway Tweet river basin district, which straddles the border between Scotland and England.

g. Land drainage: finally, clauses 88 to 91 make amendments to the Land Drainage Act 1991. The Secretary of State (in England) and the Welsh Ministers would be empowered to make regulations for the provision of the value of other land in an internal drainage district, and moreover, for the calculation of the annual value of agricultural land and buildings. In addition, clause 89 permits an officer of the valuation office of Her Majesty's Revenue and Customs to disclose information to the Secretary of State or Welsh Ministers, as well as, for example, an internal drainage board, the Environment Agency, and Natural Resources Wales, for the purpose of exercising functions in relation to the expenses of internal drainage boards and drainage rates. The Government has explained that the purpose of these amendments to address a *"technical barrier preventing existing internal drainage boards from expanding and new ones being established, where there is local support to do so."*[50]

Devil in the detailed regulations

Save for: (i) the provisions which modernise the way in which water and sewerage undertakes are regulated by Ofwat, and (ii) the amendments to the abstraction regime in respect of permanent licenses, the primary effect of Part 5 of the Bill is to confer broad powers to make secondary legislation on the respective ministers in England, Wales (and where relevant) Northern Ireland. As such, without the content of those regulations, or of management plans, for example, there is an incomplete picture. In its current form, the ambition indicated in the Bill is modest.

In particular, the Bill itself does not set any management targets generally, nor does it specifically address water usage efficiency. Whilst the Government's 25 year environment plan sets out an ambition to reduce individual water use, and refers to setting a personal consumption target, the opportunity to make provision for reducing water usage has not been taken. As the plan notes, an individual uses 140 litres of water a day, on average.[51] For example, Water UK[52]

[50] DEFRA, Policy paper: Water Factsheet (part 5) (13 March 2020), available online here: <https://www.gov.uk/government/publications/environment-bill-2020/10-march-2020-water-factsheet-part-5> accessed 12 June 2020.
[51] UK Government, 25-year Environment Plan (January 2018), p 70, available online here: <https://www.gov.uk/government/publications/25-year-environment-plan> accessed 12 June 2020.
[52] Water UK represents major water and wastewater service providers in England, Scotland, Wales and Northern Ireland.

have lamented the failure to introduce a mandatory national labelling scheme for water appliances like dishwashers and washing machines, coupled with minimum standards.[53]

In addition, the Bill fails to increase the stringency of obligations on water companies, or other organisations, in respect to water resource management. In particular, there are no measures addressing leakage. The Environment Agency have identified that over 3,000 million litres are lost through leakage in England, which is approximately 20% of water into supply, and 'are large enough to have a noticeable effect on the total demand for water.'[54]

The Government have stated that the water quality and land drainage measures will help to 'keep pace with the latest scientific and technical knowledge', but (as with other provisions of the Bill) the devil will be in the detail.

Impact of Brexit

The legislative framework governing water is derived, to a significant extent, from EU Directives. As such, the impact of Brexit upon the regulation of water (as well as on the environment more generally) is inevitably significant.

The Bill addresses the impact of Brexit in respect of water quality, to a limited extent, by replacing the secondary legislation making powers under section 2(2) of the European Communities Act 1972. However, in order to prevent the UK from falling behind the pace of scientific and technical knowledge, the governments of England, Wales and Northern Ireland will need to take a consistently proactive approach to the updating of its water quality standards.

Moreover, the regulation of water quality is currently consistent across all four of the UK nations, due to application of EU law. Without it, and under the Bill's provisions, there may be scope for creeping and possibly significant divergences by the implementation of different standards as to water quality in England, Wales or Northern Ireland.

Conclusion

Climate change, as well as a growing population, will increasingly pile pressure on water resources.[55] Urgent action is required to increase supply, cut down on demand, and reduce waste. The Bill lamentably fails to address these issues head on. The Government's 25-year

[53] Water UK, Environment Bill – Recommendations (6 November 2019). Available online here: <https://www.water.org.uk/publication/environment-bill-recommendations-by-water-uk/> accessed 12 June 2020.
[54] Environment Agency, The State of the Environment: Water Resources (May 2018), p 11.
[55] Environment Agency, The State of the Environment: Water Resources (May 2018), p 9.

environment plan has committed it to the goal of achieving ‘clean and plentiful water.’ As noted above, one if the key aims of Part 5 of the Bill is to reform the process for managing water taken from the environment, so as to link it more tightly to its 25 Year Environment Plan commitments. Whilst the modernising provisions are welcome so far as they go, the true measure of the Government’s ambition, and its ability to meet this objective, is yet to be determined. Time is unfortunately not on the Government’s side.

BIODIVERSITY GAINS AND CONSERVATION COVENANTS

Overview

This article deals with the provisions of the Bill on biodiversity gains and conservation covenants. These are covered in Part 6 'Nature and Biodiversity' and Part 7 'Conservation Covenants' of the Bill, as currently drafted.[56] The impact of these provisions will be far reaching and will have particular importance for developers and large rural landowners. Key features are outlined below.

Objectives behind the Bill

Before considering the draft provisions of the Bill, it is helpful to consider the objectives the government is aiming to achieve.

The government acknowledges that much of our wildlife-rich habitat has been lost over the last century and many species are in long term decline.[57] A key objective of the Bill is that it will contribute to the recovery of our natural environment, improving biodiversity and protecting urban street trees, in line with the ambitions set out in the 25 Year Environment Plan published in 2018 and which will be the first environmental improvement plan provided for in Part 1 Chapter 1 of the Bill.

The government's objective is that by making biodiversity gain a condition of planning permission, they will ensure it is a priority for developers and planning authorities. Conservation covenants can then be used to secure the benefits delivered by other measures for the long term.[58]

Draft provisions of the Bill

The Bill is intended to provide a framework of measures to support nature's recovery.[59] The Bill contains provision for the following:

• A 10% biodiversity net gain requirement on new development.

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[56] The Bill: <https://publications.parliament.uk/pa/bills/cbill/58-01/0009/Enviro%20Compare.pdf > accessed 1 June 2020.
[57] Department for Environment Food & Rural Affairs, 'Policy paper 10 March 2020: Nature and conservation covenants (parts 6 and 7)' (13 March 2020): <https://www.gov.uk/government/publications/environment-bill-2020/10-march-2020-nature-and-conservation-covenants-parts-6-and-7> accessed 1 June 2020 ('Policy Paper March 2020').
[58] Policy Paper March 2020
[59] Department for Environment, Food & Rural Affairs, '25 Year Environment Plan': <https://www.gov.uk/government/publications/25-year-environment-plan last accessed> accessed 1 June 2020.

• A strengthened biodiversity duty on public authorities.

• Conservation covenants. Biodiversity net gain and the strengthened biodiversity duty on public authorities The Bill will make it mandatory for housing and development to achieve at least a 10% net gain in value for biodiversity. Developers must submit a 'biodiversity gain plan' alongside usual planning application documents and the local authority will assess whether the requirement is met. This plan must include, amongst other matters, details of how: (i) the biodiversity value has been calculated, and (ii) the way in which the net gain target will be achieved.

Calculating biometric net gain

The biodiversity value must be calculated using the Government's biodiversity metric calculator.[60] In broad terms, the biodiversity net gain is calculated by deducting the pre-development biodiversity value (calculated at the time of the submission of the planning application) from the estimated post-development biodiversity value (at the time the development is completed).[61]

Of course, a habitat's full biodiversity value may increase years after the development is 'completed'. This future value can be used where certain conditions are satisfied. These are where (i) it is secured under a planning condition, planning obligation or conservation covenant; (ii) the planning authority considers that the increase is significant in relation to the pre-development biodiversity value; and (iii) it will be maintained for at least 30 years after the development is completed.

The post-development biodiversity value can also include off-site options. These can include enhancing a habitat registered on the government's proposed "biodiversity gain register" or purchasing "biodiversity credits" from the Government.[62]

Duties on local authorities

The Bill also strengthens the biodiversity duty on public authorities. The Natural Environment and Rural Communities Act 2006 currently includes a duty on public authorities to have regard

[60] Natural England, 'The Biodiversity Metric 2.0 (JP029)' <http://publications.naturalengland.org.uk/publication/5850908674228224> accessed 1 June 2020.
[61] Further details on how the biodiversity net gain will be calculated can be found in Schedule 7A, Biodiversity Gain in England, Part 1, 'Overview and Interpretation'.
[62] In respect of the latter, clause 92 of the Bill in its current form explicitly says that "[i]n determining the amount payable under the arrangements for a credit of a given value the Secretary of State must have regard to the need to determine an amount which does not discourage the registration of land in the biodiversity gain sites register".

to the conservation of biodiversity. The Bill amends this duty so that there is an expectation on public authorities to look and act strategically – with clause 95 providing for a general duty to conserve and enhance biodiversity and clause 96 providing for biodiversity reports, in which public authorities must publish, amongst other areas, a summary of the action which the authority has taken to comply with its duties in respect of biodiversity.

Conservation covenants Another central part of the Bill is the conservation covenant. In this regard, the Bill adopts a recommendation by the Law Commission made in June 2014.[63] Conservation covenants will be voluntary but legally binding written agreements between a landowner and a designated "responsible body" to conserve the natural or heritage features of the land.

Under clause 108 of the Bill:

• A "conservation covenant agreement" will require the landowner or responsible body to do, or not to do, something on land specified in the provision.

• The landowner must hold a qualifying estate in respect of the land. A "qualifying estate" means that the landowner will hold a freehold interest in the land or a leasehold interest where the lease was granted for more than seven years.

• The agreement must have a conservation purpose, and be intended, by the parties, to be for the public good. A conservation purpose covers a broad church and includes the natural environment of land or the natural resources of land, and places of archaeological, architectural, artistic, cultural or historic interest.

There are several further points to note:

• Binding obligations: As per clause 110 an obligation under a conservation covenant is owed (a) to the landowner under the covenant, and (b) to any person who becomes a successor of the landowner under the covenant.

• Enforcement: Clause 116 of the Bill provides that in proceedings for the enforcement of an obligation under a conservation covenant, the available remedies are specific performance, an injunction, damages, and an order for payment of an amount due under the obligation.

[63] Law Commission, 'Conservation covenants – Final Report' (Law Com No 349) (24 June 2014): <https://www.lawcom.gov.uk/project/conservation-covenants/> accessed 1 June 2020.

• Defences: As per clause 117, in proceedings for breach of an obligation it is a defence to show that the breach occurred (a) as a result of a matter beyond the defendant's control; (b) in emergency circumstances; or (c) where the land was within an area, designated for a public purpose, and compliance with the obligation would have involved a breach of a statutory control.

• Discharge or modification of obligation by agreement: Clauses 118-120 outline that the parties may agree in writing to discharge the obligation or modify it.

• The Upper Tribunal and courts: Clause 121 (Schedule 16) provides for discharge or modification of an obligation on application to the Upper Tribunal. Under clause 124 the court or Upper Tribunal may, on the application of any person interested, determine the nature of conservation covenants i.e. (a) declare whether anything purporting to be a conservation covenant is a conservation covenant; (b) whether any land is land to which an obligation under a conservation covenant relates; (c) whether any person is bound by, or entitled to the benefit of, an obligation under a conservation covenant; and (d) the true construction of any instrument under which a conservation covenant is created or modified.

Concluding remarks

In some respects, the basis of the provisions lies in good practice which is already being followed by some planning authorities and developers, and which has in some cases been used to unlock development on sites which have features of national or local conservation interest. However, plainly there are many authorities and developers which have not been according sufficient priority to nature conservation, regarding it as best as an inconvenience. These provisions will put the issue squarely onto the agenda for all planning applications, of course at a time when there may be great pressure for development to aid economic recovery and to generate much-needed housing. They may be seen as presenting both threats and opportunities – perhaps much as CIL did when it was introduced. What is clear is that there will be a very steep learning curve involved. Rural landowners, particularly large ones, have the potential to do very well financially, including not only farmers, but major owners such as the Crown Estate, statutory undertakers, MoD and the Church Commissioners.

Of course, the detail of the provisions may be different when the Bill eventually becomes law. However, the objective of the Bill is that it will introduce "a range of ambitious measures to

address biodiversity loss" to reverse biodiversity decline.[64] Much of the success of these measures will be reliant on landowners, developers and public authorities understanding and utilising these provisions to good effect. In this regard, the government is expected to consult on and provide guidance. Such guidance should clarify the ways in which the use of on-site habitat creation may be preferred to off-site options (the mitigation hierarchy)[65] and how provisions will work during the 'transition period'.

[64] Policy Paper March 2020.
[65] Department for Environment Food & Rural Affairs, 'Net gain, Summary of responses and government response' (July 2019), at 9. Available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/819823/net-gain-consult-sum-resp.pdf> accessed 1 June 2020.

BACK IN DA HOUSE: THE ENVIRONMENT BILL RETURNS

The Urban Dictionary tells us (which was news to me) that the expression "in da house" is an exclamation used as a compliment, especially if the person being complimented is considered very knowledgeable and has helped a person out in some way with little difficulty doing so. I am not sure whether that relates in any meaningful way to the Committee Stage proceedings on the Environment Bill, which resumed in November, but anyway the Bill is "back in da House". Rudely interrupted by lockdown on 19th March, the Bill is now back with the Public Bill Committee, where it will stay for November, 1st December being the agreed "out date".

I have been reading Parliamentary debates and Committee proceedings on environmental legislation for 30 years now, beginning with the Environmental Protection Act 1990. The "line by line" consideration of the Bill in Committee, I am afraid to say, does not grow more exciting with the years. Rather like the age of policemen, as you get older, MPs seem to get ever more prolix. On a number of occasions the Chair of the Committee has had to chide members for making speeches rather than focusing on amendments, and has bemoaned slow progress.

The outcome of the process has a definite theme. The opposition tables amendments designed to increase the accountability of government: the Government opposes them and they are withdrawn or voted down. Alternatively, the Government tables amendments designed to increase the (already broad) discretion accorded to Government: the opposition bemoans then and they are passed. There is a lot of suggesting that "may" should be replaced by "must", and a lot of resisting such changes.

There is also a very large elephant in the Committee Room, which does occasionally get referred to – this is the Government's Planning White Paper, published after the initial Committee proceeding. The ambition to reform the planning system in the way proposed seems unlikely, frankly, to sit easily with environmental aspirations.

There are a few issues where it may be worth highlighting statements made by the Parliamentary Under Secretary, Rebecca Pow MP.

Environmental principles and proportionality

The Government resisted an amendment to leave out the qualification of "proportionality" in respect of the provisions on the policy statement on environmental principles in what is currently clause 16, on the basis that the words could be all things to all people. Rejecting the amendment Rebecca Pow MP said:

"Proportionate application is a key aspect of use of the principles, and it ensures that Government policy is reasoned and based on sensible decision making. It is vital that this policy statement provides current and future Ministers with clarity on how the principles should be applied proportionately, so that they are used in a balanced and sensible way. Setting out how these principles need to be applied in a proportionate manner does not weaken their effect, nor does ensuring that action on the basis of the policy statement is only taken where there is an environmental benefit. It simply means that in the policy statement, we will be clear that Ministers need to think through environmental, social and economic considerations in the round, and ensure that the environment is properly factored into policy made across Government from the very start of the process.

When the policy statement is then used, Ministers of the Crown will take action when it is sensible to do so. This approach is consistent with the objective in relation to the policy statement of embedding sustainable development, aimed at ensuring environmental, social, and economic factors are all considered when making policy. Not balancing those factors could have consequences that halt progress. For example, a disproportionate application of the "polluter pays" principle could result in anyone being asked to pay for any negligible harm on the environment, when in reality, many actions taken by humans cause some environmental harm, such as going for a walk in the country. It is essential to ensure that the principles are applied in an appropriate and balanced way, and proportionality is absolutely key to this."

Environmental principles and the armed forces

The Government rejected another amendment to apply the environmental principles provisions to the armed forces and national security matters, removing the exemption in the Bill. Rebecca Pow MP stated:

"While we recognise the intention behind these amendments, it is fundamental to the protection of our country that the exemptions for armed forces, defence and national security are maintained. The exemptions that would be removed by the amendments relate to highly sensitive matters that are vital for the protection of our realm, so it is appropriate for them to be omitted from the duty to have due regard to the environmental policy statement. A critical part of the role of Defence and Home Office Ministers is to make decisions about the use of UK forces to prevent harm, save lives, protect UK interests or deal with a threat. We have several colleagues in the Room who

have strong armed forces links, and I think they will agree with that summary. It would not be appropriate for Ministers to have to go through the process of considering the set of environmental principles before implementing any vital and urgent policies related to the issues I have just mentioned."

Environmental principles and fiscal decisions

Similarly, the Government was having no truck with a provision to ensure environmental principles provisions covered fiscal decisions:

"I thank hon. Members for tabling the amendment. While we recognise the intention behind it, it is important to maintain the exemption to ensure sound economic and fiscal decision making. It is important to be clear that this exemption only refers to central spending decisions, because at fiscal events and spending reviews such decisions must be taken with consideration to a wide range of public priorities. These include public spending on individual areas such as health, defence, education and the environment, as well as sustainable economic growth and development, financial stability and sustainable levels of debt.

There is no exemption for individual policy interventions simply because they require spending. Ministers should still have due regard to the policy statement when developing and implementing all policies to which the statement is applicable. This means that while the policy statement will not need to be used when the Treasury is allocating budgets to Departments, it will be used when Departments develop policies that draw upon that budget. This is the best place for the use of the policy statement to effectively deliver environmental protection."

Guidance to OEP

Could the Office for Environmental Protection, created by the Bill, prove an inconveniently unruly horse? Perhaps not if the Government creates sufficiently stout reins. For example the Government amendment creating new clause 24 will allow the Government to issue guidance to the OEP on its enforcement policy. Notwithstanding opposition protests, the clause was approved. As put by Rebecca Pow MP:

"The amendment and new clause will provide a power for the Secretary of State to issue guidance to the OEP on the matters listed in clause 22(6) concerning its enforcement policy. The OEP will be required to have regard to this guidance in preparing its enforcement policy and in carrying out its enforcement functions. This is

an important new provision, which will allow the Secretary of State to seek to address any ambiguities or issues relating to the OEP's enforcement functions where necessary. We expect the OEP to develop an effective and proportionate enforcement policy in any event, but Secretary of State guidance can act as a helpful resource for the OEP in the process. For example, the Secretary of State may issue guidance to the OEP relating to how it should respect the integrity of other statutory regimes, including those implemented by regulators such as the Environment Agency. That could also be invaluable to resolve and clarify any confusion that may arise regarding the wider environmental regulatory landscape.

As the Minister ultimately responsible to Parliament for the OEP's use of public money, it is appropriate that the Secretary of State should be able to act if the OEP were not exercising its functions effectively or needed guidance from the Secretary of State to be able to do so, for instance, if it were failing to act strategically and, therefore, not taking appropriate action in relation to major systematic issues. The new clause will not provide the Secretary of State with any power to issue directions to the OEP—that is important—or to intervene in specific decisions. Rather, the OEP is simply required to have regard to the guidance in preparing its enforcement policy and exercising its enforcement functions. Furthermore, the Secretary of State must exercise the power in line with the provision in paragraph 17 of Schedule 1, which requires them to "have regard to the need to protect" the OEP's independence. That is important as well."

Seriousness and the boiled frog, and venue

There was debate over the restriction on OEP's enforcement functions caused by the qualification of the word "serious" on the OEP taking action for breaches of environmental law. Labour put it quite memorably in the following analogy:

"Frankly, as with the old fable of the frog that does not get out of the saucepan before it boils because at no stage does it decide it is too hot for it to stay, the OEP would have no ability to pull the frog out of the saucepan at any stage. It would simply have to stand by while the frog boiled, and then refer the boiled frog to the minister and say, "Is that serious enough and should we perhaps have done something about it beforehand?"

Another controversial issue is the court venue for actions by the OEP to enforce environmental law. Originally the Upper Tier Tribunal was to be the venue, a decision applauded by many, and which might over time have led possibly to a more intrusive standard of review. Perhaps

the Government realised this. The stand-in for Rebecca Pow MP, while she was briefly ill, stated:

> *"Having reflected further on how that process will fit within the wider landscape of environmental mitigation, we have identified a risk that hearing environmental reviews in the upper tribunal could introduce unnecessary complexity and, potentially, inconsistency. This change is therefore intended to create greater coherence, clarity and consistency and is in the interests of good administration. First, the change will ensure that all the OEP's legal proceedings are heard in a single forum, the High Court, regardless of whether they are brought as an environmental review following normal enforcement procedure or as an urgent judicial review. Secondly, the change will ensure that all alleged breaches of environmental law are heard in the same forum, regardless of who has brought claims. For example, wider environmental judicial reviews brought by nongovernmental organisations are heard in the High Court and environmental reviews brought by the OEP will now come to the same forum. That should help to promote a consistent approach towards the interpretation and application of environmental law"*

Producer responsibility

The Committee moved on to the provisions on waste and there was a lengthy discussion of producer responsibility. Again, the Bill gives the Government vast leeway as to what action it takes. However, Rebecca Pow MP did provide some interesting insights in that regard:

> *"The Bill creates producer responsibility obligations in respect of specified products or materials. That is one of a number of provisions that will enable us to take action significantly to improve the environmental performance of products across their entire life cycle—from the raw material used, to end-of-life management. Other powers in the Bill include our ability in schedule 5 to require producers to pay disposal costs for their products; our powers in schedule 6 to introduce deposit return schemes; and the powers in schedule 7 to set resource efficiency standards in relation to the design and lifetime of products.*
>
> *The Government need the flexibility to decide what measures will best deliver the outcomes that we want. Imposing producer responsibility obligations in all cases may not be appropriate. The power is drafted in a way that gives us the flexibility to choose the appropriate measure or combination of measures for any product, and to decide*

which producers are obligated, the obligations on them, and the steps that they need to take to demonstrate that they have met their obligations."

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Gethin has a broad planning and environmental law practice. Gethin is ranked as one of the *'Highest Rated Planning Juniors Under 35'* by Planning Magazine (2020). His recent instructions include acting as junior counsel to Richard Wald QC, on behalf of Natural Resources Wales, in a successful 4 week inquiry concerning proposed byelaws to protect salmon and sea trout stocks in Wales. He was also instructed by the Government Legal Department in the judicial review challenge to the Heathrow third runway. He regularly advises on a diverse range of planning and environmental issues. For example, he has advised in relation to the Environmental Information Regulations, on the prospects of appealing a refusal of planning permission to develop a site within the Green Belt, and in relation to issues arising from the removal of permitted development rights by planning conditions. Gethin has been instructed in relation to judicial review claims as sole and junior counsel. Gethin also has experience of enforcement matters. To view full CV click here.

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