

Environment, Food and Rural Affairs Committee Environmental Audit Committee

Scrutiny of the draft Environment (Principles and Governance) Bill

1. CIWEM is the leading independent Chartered professional body for water and environmental professionals, promoting excellence within the sector. The Institution provides independent commentary on a wide range of issues related to water and environmental management, environmental resilience and sustainable development.
2. We welcome the opportunity to respond to the Committees on their inquiry on the Environment (Principles and Governance) Bill. This response has been compiled with the assistance of our members, who are expert practitioners in the field.

Summary

3. As the UK moves towards EU exit, the Environment (Principles and Governance) Bill represents a once in a generation opportunity to ensure that over coming decades, society and our environment will be protected by a robust legal and regulatory framework, enabling delivery of a healthier environment for future generations in line with Government's stated ambitions.
4. We are pleased that the Bill provides some clarity on the establishment on a new oversight body, the Office for Environmental Protection (OEP), to replace the functions of European Union institutions, and on embedding environmental principles into UK law.
5. We question whether the OEP as proposed has the meaningful independence required to effectively scrutinise the actions of Government and public authorities and to take enforcement action over breaches of environmental law. We consider that an arm's length body is too close to government for this remit to be discharged objectively and without political influence. The Bill should be amended to constitute the OEP differently, as a Parliamentary Body.
6. We welcome the power of the OEP to take enforcement action against both the Government and public authorities over failures to implement environmental law. This is an improvement on earlier proposals which were consulted upon in summer 2018.
7. There are significant loopholes in the draft wording which allow the Government to disregard or downplay the environmental principles which have protected and enhanced our natural environment for decades. We are concerned that this could lead to a weakening of environmental standards post-Brexit.

8. The Government's pledges to be the first generation to leave the environment in a better state are on one hand strengthened by placing the 25-year environment plan into statute, but then on the other must be called into serious question by its weak proposals for a regulator, lacking in independence. Claims OEP will be world leading are, at this point, some way short of the mark.
9. Government stated that leaving the EU would not leave environmental protections in the UK weaker but that if anything, they would be stronger. The Bill as drafted represents a failure to adequately replace the functions and authority of the European Commission and the Court of Justice of the European Union (CJEU). Therefore, unless the Bill is strengthened these statements will not be borne out.

Response to inquiry questions

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

10. We do not consider that the Office for Environmental Protection (OEP), as constituted by the Bill, would have adequate independence to scrutinise the Government properly and fully.

11. The UK is moving from a situation whereby compliance by member states with environmental law is scrutinised and enforced by the European Commission and the Court of Justice of the European Union (CJEU), which are independent of the governments of member states. This is effectively the baseline level of independence against which the Government's proposals should be judged.
12. Article 3(1) of Annex 4 of the Withdrawal Agreement¹ makes specific note of this arrangement in the first part of its paragraph concerning effective enforcement of the EU's principles and laws:
 13. *"Noting that within the Union the effective application of Union law reflecting the common standards referred to in Article 2(1) is ensured by the Commission and the Court of Justice of the European Union acting under the Treaties, the United Kingdom shall ensure effective enforcement of Article 2 and of its laws, regulations and practices reflecting those common standards".*
14. To meet the requirements of the Withdrawal Agreement (accepting at the time of submission of this evidence that the Agreement has not been approved by Parliament), it is clear that a body with appropriately similar means and powers to undertake scrutiny and enforcement to that which has been provided by the combination of the Commission and the CJEU is required, once the UK has left the EU.

¹ [Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council on 25 November 2018](#)

15. Such functions and authority together have provided vital support and justice for UK society over the years, in forcing the Government to take action on persistent pollution contraventions relating to issues including water and air quality. The Commission and CJEU's independence from UK government, but their authority over it, have been vital factors in forcing it to act.
16. Government has justified its approach in the Bill in its response to its summer 2018 consultation². It argues *"The draft Bill includes objectives for the OEP to perform its duties objectively, impartially, proportionately and transparently (Clause 12(1)). This will ensure that the body is independent of government (and other bodies) and capable of holding it to account."*
17. We would argue that, in practice, the independence of the body rests on more than this one clause. For example, as proposed in the Bill, the Secretary of State will appoint the OEP's Chair and non-executives and control its budget. The funding of the body, its senior representatives, and therefore its ability to act effectively, will be at the whim of current and future governments, with Parliament having no direct oversight.
18. The National Audit Office³ state that: *"ALBs typically meet at least one of the following three Cabinet Office tests: (i) they perform a technical function; (ii) their activities require political impartiality; or (iii) they need to act independently to establish facts."* All are potentially relevant to the OEP. However, it also notes that ALBs are central government bodies that carry out discrete functions on behalf of departments, but which are controlled or owned by them.
19. Given the Secretary of State's control over non-executive members and budgets (Schedule, clause 9), OEP will effectively be controlled and owned by Defra. We do not consider that this is appropriate (given that there could well be instances where Defra itself may need to be subject to scrutiny and enforcement by the OEP) as it could compromise independent and objective investigation.
20. An alternative to an ALB would be a Parliamentary Body. Cabinet Office⁴ states that Parliamentary Bodies: *"often deliver functions or services that are viewed as of particular importance to Parliament, or requiring even greater distance from ministerial control. They are often set up with similar structures and powers as other public bodies, though their governance processes are usually more focussed on political independence and accountability to Parliament."* And that *"In some instances parliamentary bodies have been set up to assist in scrutinising the government"*. Examples are given as the National Audit Office or the Independent Parliamentary Standards Authority.

² Defra. Environmental Principles and Governance after the United Kingdom leaves the European Union: Summary of responses and government response. December 2018

³ National Audit Office. Departments' oversight of arm's-length bodies: a comparative study. July 2016.

⁴ Cabinet Office. Classification of Public Bodies: Guidance for Departments. April 2016

21. There is clear evidence of the fate of supposedly 'independent' ALBs which are outspoken and challenge Government, such as the Sustainable Development Commission and the Royal Commission on Environmental Pollution. Both undertook respected and forward-thinking work on sustainability and the environment, which saved government money⁵. Yet these were closed in 2011. Other NDPBs, such as the Environment Agency, have gone from being able to speak independently of government when established, to being fully aligned members of the 'Defra family' now.
22. For the sake of current and future generations, the OEP must be protected from such political interference and straightjacketing.
23. As proposed, OEP will be too close to Government and therefore its ability to act truly independently will be considerably constrained. It is difficult to see how this is not in immediate conflict with the Withdrawal Agreement because in this guise it would not be able to guarantee the required effective enforcement of Article 2 of the Agreement.
24. We therefore strongly consider that the most appropriate form for OEP should be a Parliamentary Body (an Entity Set Up by and Accountable to Parliament)⁶.
25. Failing any ability to alter the provisions in the Bill this significantly, there may be an alternative model: The Institute for Government⁷ has in the past proposed an alternative class of body for whom independence and parliamentary accountability are paramount, and where the function relates to regulation, standards and independence as a watchdog: Independent Public Interest Body. This recommendation was supported by the Public Administration Select Committee in 2014⁸.
26. We consider that such a class of body could also be appropriate for OEP, if a Parliamentary Body is refused, although the recommendations on such taxonomy of bodies was, we understand, not taken forward by Government.
27. The Bill's Impact Statement cites establishment of such an independent body as constitutionally inappropriate and without precedent. We do not agree with the former and government has not given a clear justification for this assertion.
28. On the issue of precedent, Government has not been shy in trumpeting the OEP as "*world leading*"⁹. We would suggest that to be world leading, there would need to be an element

⁵ Sustainable Development Commission. [Becoming the Greenest Government Ever: Government progress against the sustainable operations on the government estate targets 2009](#). July 2010

⁶ Cabinet Office. [Classification of Public Bodies: Guidance for Departments](#). April 2016

⁷ Institute for Government, 2010. [Read Before Burning: Arm's length government for a new administration](#).

⁸ Public Administration Select Committee. [Who's accountable? Relationships between Government and arm's length bodies](#). November 2014.

⁹ Rt Hon Michael Gove MP. [Environment Secretary sets out plans to enhance environmental standards](#). November 2017.

of the novel about OEP and thus absence of precedent should not be an obstacle if a particular constitution for the body is necessary.

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

29. Broadly, we consider that the draft Bill affords appropriate powers to the OEP. However, there may be some opportunities where these could be improved.

30. We welcome the provision that the OEP will have powers to take all public authorities (including central government) to court over their implementation of environmental law; a positive change since the Defra consultation in 2018.

31. We consider that the powers given to the OEP broadly represent an appropriate process of escalation. We recognise the importance of allowing public authorities to respond to notices issued by OEP to state whether they agree (or not) with the decision. We would suggest however that Clause 23(4) should be strengthened to require that the authority must provide an evidenced justification for its position in the event that it disagrees and proposes not to take the steps set out in the notice.

32. It is then right that any decision by a public authority not to carry out steps set out in a notice should ultimately be liable to challenge through the courts, via judicial review. The OEP should be adequately resourced and empowered to bring judicial review proceedings effectively and swiftly.

33. The Withdrawal Agreement requires that administrative and judicial proceedings are available to enable effective and timely action for both public bodies and the public in response to violations, and that "*any sanctions are effective, proportionate and dissuasive and have a real and deterrent effect*"¹⁰.

34. We have previously called for the OEP to have the power to issue fines. We do consider that fines would facilitate an effective and important deterrent effect, and that fines of a significant scale should be possible at an appropriate point in proceedings. However, there is likely to be a legal position on precisely where in the process the use of fines would be most effective and appropriate, and we are not qualified to provide an opinion on whether this should be before, or after, recourse to the courts.

35. Any fines levied should be used, under the scrutiny of the OEP, to rectify the failings in question and should be proportionate in scale to doing so.

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

36. We would suggest that the biggest overlap with existing government bodies is with the Committee on Climate Change (CCC), however this could be made more beneficial by adjusting the OEP's remit.

¹⁰ [Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union, November 2018.](#)

37. We agree that the CCC should remain the point of scrutiny and advice for domestic climate change policy. This is established in law and is working effectively, at least in relation to climate change mitigation. However, it is a glaring omission that the OEP explicitly does not have enforcement powers over climate change policy, which even the CCC have argued should be the case¹¹.
38. Currently the European Commission has the power to enforce corrective action by member states to comply with EU targets, and as such 55% of greenhouse gas reductions expected by 2030 are derived from EU law and subject to CJEU enforcement¹². Adding this remit to the OEP would be a significant step to making it genuinely world leading. Climate change mitigation policies often have multiple benefits for the environment, so it makes sense to give the OEP powers to enforce the advice of the CCC, offering a complete overview of environmental law (of which the Climate Change Act is a very significant piece).
39. Moreover, whilst the Climate Change Act is robust on climate change mitigation (typically decarbonisation, via the carbon budgets process), it is considerably lighter in relation to adaptation with the outcome that Government's approach to adaptation, characterised by the National Adaptation Programme, is unambitious and poorly developed. There would be a beneficial opportunity to enable the OEP to take a supporting role in driving improved action across Government on adaptation, particularly as there are public authorities (particularly local authorities) with major roles to play.
40. We would also emphasise that, in the context of climate change mitigation and adaptation, the exclusion of town and country planning and flooding from the OEP's remit is unhelpful.
41. Without the OEP's powers extending to climate change, or more powers being granted to the CCC, it is unclear how climate change mitigation and adaptation will be adequately enforced after Brexit¹³, leaving a gap in a very important part of environment policy and legislation.

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

- 42. We are concerned that as drafted, the Bill is not sufficiently robust on how the principles must be dealt with. We do not believe that that the requirement of Annex 4, Article 2 of the Withdrawal Agreement "*respect the following principles in their respective environmental legislation*" is properly reflected by the approach set out in the Bill.**

¹¹ [Committee on Climate Change. Letter to Rt Hon Michael Gove MP, 30th May 2018](#)

¹² [Greener UK. Why the Proposed New Environmental Body Should Enforce Climate Law. September 2018.](#)

¹³ [Greener UK. Why the proposed new environmental body should enforce climate law. September 2018](#)

43. The duty on Ministers to *"have regard to"* the policy statement allows for considerable discretion and potentially undermines this requirement. EU law states that in many instances, directives *"must"* be interpreted in line with certain principles, e.g. the CJEU has ruled¹⁴ that the Habitats Directive must be interpreted in line with the precautionary principle.
44. The Bill, in setting out a requirement for the policy statement to set context for the applicability of the principles, also appears to provide for considerable opportunity and discretion for the Secretary of State to affect the interpretation of the law. We would expect that the two should be read side by side to understand and establish an enforceable regulation. Without the ability to assess a draft policy statement at this point it is hard to get a complete picture of how effective and how enforceable the principles will be.
45. Article 191 of the Treaty of the Functioning of the European Union states that *"Union policy...shall be based on"* (the principles). The term *"shall be based on"* is considerably stronger than *"have regard to"*. As with our concerns regarding the constitution of the OEP, we consider that this wording is inadequate to meet the requirements of the Withdrawal Agreement.
46. Whilst there are welcome provisions that the policy statement must be consulted on and laid before parliament, the fact that the Secretary of State may at any time revise the policy statement adds in the potential for it to be amended according to the priorities of the government at a given point in time (which may not necessarily be best for the environment).
47. The Bill presently provides for considerable discretion on the part of Ministers. Clause 4 (2) provides for broad interpretation regarding whether or not environmental benefits and / or costs are significant. It will be essential that the policy statement provides some greater clarity on how this requirement may be interpreted, and that it safeguards against Ministers underplaying environmental benefits and overplaying costs, in order to minimise regard for the principles.
48. We strongly suggest that there should be an appropriate requirement for providing evidence to support such decisions. The policy statement should also set out the process by which such decisions may be challenged (again, we strongly suggest this should be an important role for the OEP, which should be able to challenge such a decision via its enforcement powers).
49. The CJEU has taken decisions on the application of the principles in relation to environmental law in the past. In future, this role will need to be provided by the OEP with recourse to the courts.

¹⁴ [Court of Justice of the European Union. Judgment of the Court \(Grand Chamber\) in Case C127/02. 7 September 2004.](#)

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

50. **As the UK leaves the European Union, the underpinning narrative from Government has been that if anything, the UK may wish to increase environmental standards, not reduce them. The Bill as drafted provides no guarantee that this will be the case.**
51. The Secretary of State told the Environmental Audit Committee in July¹⁵ of *"ambition that the UK has, in some areas, to enhance or have a higher level of standards on the environment"*; that *"being different can sometimes mean being better"*; that *"I do believe that our environmental standards shouldn't be undermined"* and *"we want to use every means available to provide that guarantee and provide that reassurance"*.
52. Moreover, the Prime Minister informed the House of Commons on Monday 21st January 2019 *"not only will we not erode protections for workers' rights and the environment, but we will ensure this country leads the way."*¹⁶
53. Such guarantee and reassurance is manifestly absent from the Bill at the present time. The Bill is silent on non-regression, except for saying the Government will consider the provisions of the Withdrawal Agreement ahead of publishing the final Bill.
54. In relation to non-regression, Article 2 (1) of the Withdrawal Agreement requires that *"the Union and the United Kingdom shall ensure that the level of environmental protection provided by law, regulations and practices is not reduced below the level provided by the common standards applicable within the Union and the United Kingdom at the end of the transition period"*.
55. We welcome the provision that the environmental principles which have protected and enhanced our environment for decades will be embedded into legislation. However, the statement that Ministers will only have to 'have regard to' the policy statement on their implementation, and have the option to not apply the principles in circumstances as decided by the government, is an unacceptable loophole.
56. This loophole is, we consider, a regression to their status under EU law and could lead to a weakening from EU environmental standards. In order to maintain a similar status as under EU law, it would be more appropriate for Ministers to be compelled to 'act in accordance' with the policy statement.

¹⁵ Environmental Audit Committee session on Environmental Principles and Governance consultation, 11th July 2018

¹⁶ [Commons Hansard, 21st January 2019](#)

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

- 57. There is a risk of a significant governance gap after the UK leaves the EU and before the OEP is established in the event that the UK leaves with no deal, as there would be no transition period where the rules and the institutions of the EU would still apply.**
58. To avoid a governance gap in a no deal scenario, the Environment Bill establishing the OEP would have to be in place before March 29th (Exit day). However, considering the full Bill is not due to be published until the Spring this is essentially impossible.
59. Whilst the Bill provides for retrospective action against failings which occurred after the UK's date of exit, but before the OEP is fully established, there will be no active scrutiny between times, and potentially a backlog as soon as it is set up. This would translate to significant potential for failings to slip through the net, allied to the fact that failings will typically involve environmental damage or insufficient progress. Delays to acting upon them will exacerbate these impacts. Thus, the governance gap would be very concerning in a no-deal scenario.
60. To conclude, our concerns relate primarily to the fact that the provisions in the draft clauses of the Bill do not effectively or adequately replicate the functions of EU institutions that have been instrumental in protecting and enhancing our environment in recent decades.
61. As proposed, the OEP is an 'independent' body in name only, fully funded and constituted by Government and at the mercy of its short-term priorities at the cost of long-term environmental protection.
62. The environmental principles do appear on the face of the Bill; however, Ministers are only compelled to bear them in mind and can disregard them entirely wherever money is involved or, it would appear, any circumstance in which they become awkward.
63. We hope that these comments are helpful. If you would like us to expand on or clarify any of the points made, please don't hesitate to get in touch with us.