

Environment Bill Report stage briefing: Parts 1 & 2

September 2021

This briefing is on behalf of the environmental coalitions [Greener UK](#) and [Wildlife and Countryside Link](#), and focuses on the sections of Part 1 and Part 2 of the bill that we believe would benefit most from amendment.

Priority amendments we support

Amendments 5, 6, 7, 9: halting and reversing decline in species and habitats by 2030 (Lord Randall of Uxbridge, Lord Goldsmith, Baroness Jones of Whitchurch, Baroness Young of Old Scone)

We strongly support **government amendment 6** to tighten the language of the Clause 3 species abundance target. This is equal in intent to the cross party **amendment 5 which we also support**. **Amendment 6** would be a welcome and significant improvement as it would introduce a clear statement of ambition to halt species declines by 2030 into the bill. This will shore up the UK's position as a role model for other countries to follow in the negotiations for the new set of international targets to be agreed under the Convention on Biological Diversity next year and is a powerful demonstration of global leadership.

Additionally, we welcome **amendment 7** which would go a step further and place a clear target to halt and to begin to reverse declines in biodiversity by 2030 on the face of the bill. This would give legal weight to the full extent of government ambition to put biodiversity on a path to recovery by 2030, as set out in the [Leaders' Pledge for Nature](#) announced last year and in the [G7's Nature Compact](#) from June.

Amendment 9 is also helpful as it would require targets to be set to improve the extent and condition of important wildlife habitats by 2030 and be a means of complementing the species abundance target and helping to contribute to the overall recovery of the state of nature by 2030. Species recovery is grounded in improvements in the availability of good quality habitats on which they rely, and a complete target suite for biodiversity requires that both elements are addressed.

The UK is one of the most nature depleted countries in the world, languishing at the bottom of the league for G7 countries, based on the [Biodiversity Intactness Index](#). Given that nature continues to decline at an alarming pace, it is imperative that ambitious and sustained action is taken to restore habitats and species before it is too late. A comprehensive and progressive set of 2030 targets is needed to kickstart the action needed to drive the recovery of nature forward at pace.

Amendment 11: binding interim targets (Baroness Brown of Cambridge)

Clause 5 places a welcome duty on the Secretary of State to ensure that targets are met. However, there is nothing to compel governments, including future ones, to start taking action now to meet targets, or to take remedial action where targets are missed. Ensuring that action is taken early will be critical to meeting the long term targets. **We therefore support cross party amendment 11** which would place a duty on the Secretary of State to meet interim targets. This matters, given the number of existing voluntary targets that have been [missed](#) or [abandoned](#).

The welcome insertion of a legally binding species abundance target for 2030 is a clear indication that the government does not object in principle to legally binding short term targets, and indeed accepts the utility of a closer deadline in driving progress. When he moved the government's amendment during Committee, Lord Goldsmith [said](#) that the government hoped that it will be the net zero equivalent for nature, "...spurring action of the scale required to address the biodiversity crisis". It appears inconsistent, therefore, not to follow the successful model of the 2008 Climate Change Act, in which five year targets (carbon budgets) are legislated for. The government has provided no compelling justification for this critical difference.

During Committee Lord Goldsmith [argued](#) that the government needed flexibility to adapt interim targets, while keeping long term fixed targets, to allow it to reflect on what is and what is not working. The bill, however, already gives the Secretary of State considerable discretion in setting interim targets, provided they make an appropriate contribution towards meeting the long term targets. This leeway enables the government to define interim targets based on actions needed to set the direction of travel towards the long term targets, and does not constrain it to define interim targets with a fixed outcome.

The government has also expressed a concern that binding interim targets would lead to short term thinking, which it is keen to avoid. We agree that a long term approach is needed, but this is not an either/or decision: successful implementation of long term targets will depend on sustained and targeted progress in the short term.

Binding interim targets are supported by many in the business community as they can provide near term [certainty for businesses](#), creating the sort of stable environment which encourages investment in their workforce, and in green products and services. They would focus businesses on planning the trajectory towards the long term targets and help drive innovation in their business models. They would also mitigate the risk of backloading actions to meet targets. Evidence provided in the [Dasgupta report](#) shows that delaying action by even ten years is likely to ratchet up costs considerably.

We also strongly support cross party amendment 14 tabled by Baroness Brown of Cambridge. This would provide a crucial link between targets and Environmental Improvement Plans (EIPs). It would mirror the [wording](#) of the 2008 Climate Change Act and require the government to set out the proposals and policies (not merely steps) needed to meet long term and interim targets and deliver environmental improvement within EIPs.

While Clause 8 sets out requirements for the content of EIPs, we consider that these need to be strengthened to ensure that all EIPs include time bound, specific measures which are more explicitly linked to the delivery of the targets to be developed through the bill.

The current EIP (the [25 Year Plan for the Environment](#)) is essentially a narrative document, containing long descriptive passages, with hundreds of possible actions, many of which are difficult to measure. Without a more explicit link between targets and EIPs as proposed in **amendment 14**, there is a risk that EIPs will remain largely abstract narratives, with meaningful actions backloaded towards the end of each 15 year EIP period.

In Committee, Lord Goldsmith [stated](#) that the government expects EIPs would include measures needed to meet long term and interim targets as well as relevant policies and proposals. It should therefore be straightforward to make this explicit in the bill, to strengthen the legislative framework for targets and ensure it is implemented in the future in the way that the government intends now.

Amendment 20: environmental principles (Baroness Parminter)

Clause 17 requires the Secretary of State to prepare a policy statement on environmental principles. Ministers must have “due regard” to this statement when making policy, but the requirement is subject to wide ranging exemptions set out in Clause 19(3). These absolve large parts of HM Treasury, the Ministry of Defence (MoD) and, indeed, those “spending...resources within government” from considering the principles at all when making policy.

As academic experts have [emphasised](#), the overarching and systemic operation of the principles is part of their value. Carveouts undermine that and are an inherently problematic step backwards.

Lord Goldsmith’s responses throughout Committee suggested that a requirement to have due regard to the policy statement in these areas would be tantamount to a requirement to achieve a specific environmental outcome in all cases. This fundamentally misrepresents the [aim](#) of the policy statement, which is to offer a clear foundation for policy development that puts relevant environmental considerations at the heart of policy making, and prevent unintended consequences. It does not seek to centre irrelevant environmental considerations at the expense of developing legitimate policy aims.

We **strongly support cross party amendment 20** which would remove the exceptions relating to the armed forces, defence, tax and spending as limitations on the application of the duty on the policy statement on environmental principles.

Exceptions for armed forces, defence and national security

Clause 19(3)(a) refers to policies relating to the armed forces, defence or national security. While this may be reasonable were it to be confined to decisions relating to urgent military matters, as currently drafted it appears to offer a blanket exclusion for the MoD, the Defence Infrastructure Organisation and the Armed Forces. The MoD has said that this is a “targeted exemption”; however, it is not drafted as such and is very widely cast.

Given the highly sensitive environments in which several military training areas are located and the associated policy processes (for example, byelaw reviews, planning applications, contract and procurement decisions and applications for live firing and use of heavy artillery), this clause needs to be tightened considerably.

International environmental law and national requirements such as Environmental Impact Assessment and the Wildlife and Countryside Act 1981 already apply to the MoD. It controls many areas designated for their conservation or landscape value and carries out activities to support nature on its land in line with its statutory duties, rendering this blanket exclusion even more perverse. Consideration of the principles in related policy would support the MoD in fulfilling these requirements. Failure to consider them could lead to incoherencies in policy development and would be detrimental to good governance.

These exclusions also appear to contradict the MoD’s own enthusiasm for the principles – see, for example, this [Introduction to Environmental Management in the MoD Acquisition Process](#) (an official document, from 2018, aiming to help MoD employees ‘control, minimise, and mitigate environmental impacts arising from the MoD’s procurement decisions’), which seems to be an explicit endorsement of the prevention principle and explains quite clearly how it will benefit the military.

“Environmental problems are often dealt with retrospectively, after the damage has been done and at great cost. By introducing environmental considerations as part of the culture and overall management strategy it will help achieve effective environmental management without the sense that there has been an extra burden.

Environmental management does not have to unduly restrict the military by making regulatory compliance an overriding burden; it should be better viewed as an opportunity to save money, freeing it to be reallocated to operational activities. For instance, protecting the quality of land in training areas will ensure the availability of future training opportunities, and have financial benefits such as reducing energy costs and clean-up, disposal or litigation costs, and improve public relations.”

As the Environmental Audit Committee recommended (paragraph 33) in its [pre-legislative scrutiny report](#),

“Any exclusions to the application of the principles ought to be very narrowly defined. The Bill should specify that the Ministry of Defence as a landowner is not excluded, nor should general taxation or spending be omitted since many environmental measures depend on changes to the tax system.”

In Committee, Lord Goldsmith noted that this bill does not represent a “change in status for land that is protected in law as a consequence of its designation as an SSSI or anything else.” – as many MoD sites are – and suggested that the MoD exemption is intended to retain agility where there is “an urgent need to achieve operational objectives.” However, as currently drafted the bill risks encouraging the needs of short term, urgent operational objectives to shape the way in which overall, long term MoD policy is developed and to influence the ways in which these pre-existing environmental duties are discharged. It would also limit how the MoD can contribute to the UK’s response to the environmental crises we face, rather than providing the targeted exemption the minister described.

Exceptions for tax, spending and or the allocation of resources within government

Similarly, Clause 19(3)(b) appears to offer a blanket exclusion for HM Treasury or any matter which might entail government spending or resource allocation.

In response to [media coverage](#) of concerns about the wide exclusions on the face of the bill, Defra offered [some clarification](#) on spending, including that “It is not an exemption for any policy that requires spending”. While welcome, the problem remains that these wide exemptions remain in the legislation, meaning policy makers are less likely to apply the policy statement in relation to the policy on financial matters without explicit instruction otherwise. Furthermore, so far as the allocation of resources between departments is undertaken without regard to environmental principles, the principles are liable to be applied too late in the process to have real impact.

Excluding “Spending or the allocation of resources within government” will severely limit departments’ ability to develop the best policies for the environment. As the development of individual policies will be subject to the “due regard” duty, policy makers will need to consider environmental principles in creating policy and implementing funded policies. However, they will not be able to put a case to Treasury, as part of a departmental submission ahead of a spending review, for the policies that have the biggest benefit or most adhere to the principles – and nor will the Treasury be required to factor environmental impacts holistically into overall allocation of funds.

Taxation is a key lever for government to drive environmental improvement. Yet currently the tax system often does not embody environmental principles, which causes perversities and makes governments' environmental aims more difficult to achieve.

However, many fiscal policies enacted partially or entirely for environmental ends would still fall under the definition of taxation, while other, non-environmental fiscal measures, not fitting the definition, would in theory be subject to the requirement to have due regard to the policy statement. This lack of clarity is confusing to say the least.

During Committee, Lord Goldsmith stated that "macroeconomic issues are too remote from the environmental principles for them to be directly applicable". We challenge this assertion. The bi-directional relationship between economic policy and environmental outcomes is strong, if not always initially apparent.

In [its damning report](#) on environmental tax measures the Public Accounts Committee found that, worryingly, HMT has a limited understanding of the tax system's environmental impacts and how it could be used to achieve the government's environmental goals. It also highlighted the importance of leadership and coordination on environmental matters, which has so far been lacking, and recommended that HM Treasury assess the environmental impact of every tax change considered. The tax system interacts with environmental policy areas which are the responsibility of other government departments. Given HM Treasury's cross government remit, environmental principles must feature in its policy making, including on taxation.

At the same time, the National Audit Office has identified five large tax reliefs that work against the government's environmental goals while together costing the state £16.8 billion in lost revenue in 2019-20. Yet taxes with a positive environmental impact account for only seven per cent of UK tax revenue, and taxes with an explicit environmental purpose only 0.5 per cent. Seven per cent is fairly average for OECD countries but falls well short of potential demonstrated by countries like South Korea or Croatia, where 11 per cent of revenue is generated from environmental taxes.

It is baffling, therefore, that the government has excluded tax policy from this part of the Environment Bill.

The exemption for taxes in this bill will do nothing to encourage a more sustainable tax system and does not sit comfortably with a government promising to lead on both the climate and nature emergencies.

Lord Bird's **amendment 19** aims to secure the best possible outcomes for future generations and its intent is to be welcomed, but its aim would be better achieved by ensuring full and proper application of the principles as currently included, without exclusions or qualifications, as would be achieved by Baroness Parminter's **amendment 20**. The interests of future generations would be most concretely supported by integrating the environment into wider decision making, applying precaution in decision making, preventing harms and ensuring that polluters pay.

Amendments 24 and 30: OEP independence (Lord Krebs and Baroness Ritchie of Downpatrick)

The independence of the Office for Environmental Protection (OEP) was the standout issue in Committee debates, with exceptionally strong cross party support for the bill to be strengthened. A number of common themes emerged in the debate.

- The legislation must be able to stand the test of time. It is not enough to rely on the goodwill and sincerity of the current set of Defra and DAERA ministers for its future interpretation and the robustness of the OEP should not rest on personalities.
- The OEP must be genuinely independent of Defra and DAERA, in practice and perception. As Lord Cameron of Dillington [said](#), under present arrangements the OEP would be “a mere tool of the very body it should be overseeing”. Independence is also critical in ensuring public confidence in the OEP.
- Accountability of public bodies is important, but as Baroness Jones of Moulsecoomb [argued](#) Parliament is the proper place for the OEP to be accountable to, with the Northern Ireland Assembly overseeing accountability in Northern Ireland.
- Experience of ministerial appointments to other bodies highlights the importance of an independent approach. The OEP has weaker arrangements on appointments than other bodies, including the comparable fiscal oversight body, the Office for Budget Responsibility (OBR).
- Granting ministers the power to ‘guide’ how the OEP holds them to account through its enforcement function is constitutionally improper.

Appointments

The government is proposing for the OEP to have weaker arrangements on appointments than other comparable domestic oversight bodies. Paragraph 2 of Schedule 1 provides for the Secretary of State to appoint the Chair and the other non-executive members, with the Northern Ireland Member appointed by DAERA. This position differs starkly from the appointment process for several other oversight bodies. For example:

- At the National Audit Office (NAO) the Comptroller and Auditor General is appointed with the consent of the House of Commons on the joint recommendation of the Prime Minister and the Chair of the Committee of Public Accounts (which is by convention a member of the Official Opposition). The non-executive members of the NAO are appointed by the Public Accounts Commission.
- At the Budget Responsibility Council at the OBR, the Chair and members are appointed by the Chancellor of the Exchequer but must have the consent of the Treasury Select Committee.

These cases each have a statutory basis for their specific appointment processes and the direct involvement of Parliament is a recognition of the appropriateness of an additional degree of independence from government control over the person appointed.

Public oversight of the leadership of public bodies spending public money through ministerial responsibility is important. However, this can still be achieved in arrangements where ministerial responsibility is shared with parliamentary accountability. The involvement of Parliament in appointments of that require greater independence than conventional non-departmental public bodies provides a public opportunity for scrutiny and airing of potential conflicts, issues and capabilities. It is also a check on ministerial power over the individuals that will be providing oversight of government activity.

Alternative measures to create distance between ministers and public appointees exist already in the cases referred to above. It is essential that the OEP, with its explicit enforcement and oversight role over government, is treated similarly.

Instead, the government has [opted](#) for a standard public body appointment process for the OEP in which ministers hire and fire the Chair and other board members. Ministers argue that pre-appointment hearings would be sufficient to provide adequate scrutiny.

While such hearings can be a helpful mechanism, they come at the tail end of the appointment process. In several [cases](#) the advice of select committees following pre-appointment hearings has been overridden and the government's preferred candidates confirmed regardless.

As the [Institute for Government](#) and other witnesses submitted during the pre-legislative scrutiny of the draft bill, Parliament should play a greater role in the appointments process. This was [accepted](#) by the Environmental Audit Committee when it recommended:

85. We recommend that Schedule 1 should be amended to reflect Paragraph 1 of Schedule 1 to the Budget Responsibility and National Audit Act 2011 for the appointment of the Office for Environmental Protection's Members and Chief Executive and paragraph 6(3) of Schedule 1 of the same Act to set out a process to protect Office for Environmental Protection members against dismissal by the Secretary of State. This appointments process would utilise the statutory body of parliamentarians as the appointing Committee.

The government's view (set out in its May 2018 [written evidence](#) to the Public Administration and Constitutional Affairs Committee's inquiry into pre-appointment hearings) is that the ultimate decision on public appointments should be made by ministers as they are accountable and responsible for the decisions and actions of their department and its arm's length bodies. The Cabinet Office's insistence that all public bodies should be treated the same ignores the reality that variations already exist in public body appointment processes.

We therefore **strongly support amendment 24** which would require the appointment and termination of the Chair and other non-executive members of the OEP to be made with the consent of the relevant environment select committees. This mirrors the approach taken on appointments to the OBR. Parliament conducted very similar debates on the OBR's constitution during its scrutiny of the Budget Responsibility and National Audit Bill in 2010-11. [Minister Greening was clear](#): the veto for the Treasury Committee was designed "to ensure that there is no doubt that the individuals leading the OBR are independent and have the support and approval of the Committee".

Complete discretion

The government has sought to control how the OEP will hold it to account through its enforcement function. Powerful arguments were raised in Committee on the broad scope of the Clause 25 guidance power, how often it will be exercised and its impact on the independence of the OEP. There was a strong sense that the power suggests a lack of trust in the OEP chair and board, as well as a wish to control the way it operates.

In a letter to the Commons on 28 August 2021, Minister Pow suggested that "The guidance will only be used in specific circumstances. For example, if the OEP were not taking action in relation to serious, systemic issues of national importance, or if some confusion arose around a potential overlap between the OEP and other statutory regimes. The government could use the guidance power to suggest ways in which the OEP could more effectively use its powers and resources to benefit people and the environment."

These situations do not constitute a rationale for the guidance power as set out within the bill. If the OEP was to fundamentally fail in its role, and neither the ability of the public to raise complaints to the OEP, or access Judicial Review via other routes, nor the will of the government to prevent systemic failure in the implementation of environmental policy, were able to remedy this, it is questionable how additional guidance may help.

Conversely, if the OEP was confused regarding its role, or required suggestions for operating more effectively, it is not clear why the government would be unable to clarify or offer advice without a statutory guidance power set out in legislation, for example through the tailored review process that all non departmental public bodies undergo.

We strongly support cross party amendment 24 which would remove the guidance power and instead give the OEP complete discretion to carry out its legislative functions.

The Comptroller and Auditor General has [complete discretion](#) in the carrying out of the functions of that office. The OBR has [complete discretion](#) in the performance of its duty to examine and report on the sustainability of the public finances. The government must explain why it does not believe that the OEP should be afforded similar discretion, which will undoubtedly be necessary given the entrenched and vested views the OEP is likely to encounter as it seeks to deliver its [mission](#) to uphold environmental laws.

Funding

The government [has agreed](#) that to ensure its [financial independence](#), the OEP will be provided with a five year indicative budget which is formally ring fenced by HM Treasury within any given Spending Review period. This is comparable with how some other bodies are given long term financial certainty, such as the OBR, for which HM Treasury has made a [similar commitment](#).

However, in 2020 the government appeared to waver on the commitment for the long term budget to be for five years, demonstrating the hazards of leaving such matters to political rather than legislative commitments. Following an intervention from the Environmental Audit Committee and Caroline Lucas MP, [the commitment was re-stated](#).

There is nothing to stop a future government deciding not to respect this commitment, especially if the OEP has started to make life difficult for ministers or in any new period of austerity or funding cuts. This political commitment should, therefore, be enshrined in the legislation, to provide certainty in relation to ongoing funding levels.

We support amendment 24 which would require the Secretary of State to lay before Parliament, and publish, a statement setting out the multi-annual budget which they intend to provide to the OEP. The amendment would also require the Secretary of State to lay before Parliament, and publish, a statement responding to any request from the OEP for additional funding due to a change in the body's responsibilities or functions. These welcome and measured safeguards would ensure that the commitment of current ministers is respected in the future, protecting the long term funding of the OEP.

Government amendment 23

The government has chosen to ignore the significant cross party calls for the OEP's independence to be strengthened. Instead, it has offered **government amendment 23** which it claims will "bring in a further safeguard for the independence of the new Office for Environmental Protection by requiring greater parliamentary scrutiny of any guidance issued to the OEP". Amendment 23 requires the government to lay guidance before Parliament for 21 days, and to respond to any recommendations made by Parliament or parliamentary committees during that time. It does not, however, guarantee the opportunity for Parliament to devote time to effective scrutiny nor debate the guidance – and the government is not required to alter the guidance in response to parliamentary concerns.

This amendment is a trivial response to the significant concerns that have been raised. While it would add a layer of process and an opportunity for Parliament to raise concerns, the government's approach to date on the OEP inspires little confidence that significant concerns on the guidance would be heeded, given that ministers have repeatedly ignored the advice of Parliament and its select committees on critical aspects of the OEP's constitution, including its enforcement function. Far from adding an effective safeguard, the veneer of scrutiny it purports to provide would further undermine the independence of the OEP by increasing the force of the guidance, making it harder for the OEP to disregard.

Northern Ireland

Schedule 3 makes provision for the functions of the OEP in Northern Ireland. **We strongly support the inclusion of Northern Ireland within the remit of the OEP.** Extensive regulatory dysfunction and unacceptable levels of disregard for environmental law has resulted in substantial degradation of the environment in Northern Ireland and significant economic and social costs.

The independence of the OEP in Northern Ireland is, therefore, of critical importance. The lack of an independent frontline environment regulator and historically weak environmental governance means that the OEP must have a cast iron constitution and culture of independence from the outset.

In this context, we are concerned by the appropriateness of a broad power for DAERA to issue guidance to the OEP, which it must have regard to when preparing its enforcement policy or exercising its enforcement functions in Northern Ireland. This will affect the OEP's ability to perform its role independently and does not take sufficient account of the particular circumstances of Northern Ireland, including the power sharing nature of the Northern Ireland Executive and the political and administrative context.

For the reasons stated above, we do not consider **government amendment 32** (which follows the approach in government amendment 23) an appropriate response to the significant concerns that have been raised about the OEP's independence in Northern Ireland. We **strongly support Baroness Ritchie's amendment 30**, which would provide similar safeguards to those proposed in Lord Krebs' amendment 24. Critically, it would remove the guidance power, equip the OEP with complete discretion to undertake its functions in Northern Ireland, including on enforcement, and enable the Northern Ireland Assembly to oversee the appointment of the Northern Ireland member on the OEP's board.

Amendment 27: environmental review remedies (Lord Anderson of Ipswich)

The availability of meaningful and effective remedies to correct unlawfulness is a crucial aspect of any successful enforcement mechanism. However, the constraints in Clause 38(8) would significantly restrict the Court's ability to grant remedies following an environmental review, thus undermining the entire enforcement process.

This is a deeply concerning aspect of the bill which must be corrected if the OEP is to have any chance of living up to its potential and to be the world leading body the government [has promised](#).

Where the Court determines that a public authority has failed to comply with environmental law it can, in certain circumstances, grant any remedy that would be available in judicial review proceedings. Such remedies might include an order that quashes the unlawful decision or an order that the public authority must re-take the decision in accordance with the law.

However, the Court's remedy-granting power, and the discretion usually afforded to judges, is subject to two very significant caveats. Critically, the Court can only grant a remedy where it is satisfied that to do so 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.

This would place, in every case, the interests of any third party above those of the environment and those seeking to defend it. In environmental cases, there will often be a third party – such as a developer or a fossil fuel extractor – who may suffer a degree of hardship because of a finding of public authority unlawfulness, depending on the remedy applied.

It is not the case that, as suggested in [Lord Goldsmith's response](#) in Committee, this provision is only cause for concern in the context of individual local planning cases. In strategically brought cases dealing with systemic breaches of environmental law which garner wide public interest, there is scope for third parties to claim that a remedy could cause them substantial hardship or prejudice and, if that claim is made out, to prevent the Court from granting the remedy.

Instead, the interests of any such third parties should be balanced with other interests: those of the environment and of other third parties, including members of the public, who may not have a financial stake in the matter but are likely to have other relevant interests. This clause removes the Court's normal discretion. Instead, this provision creates an unprecedented and unjustified restriction on the Court's usual discretion to grant the remedy it deems fair, just and appropriate, considering all the circumstances of the case.

In Committee, Lord Goldsmith [noted](#) that the provision is "an extension" of an existing position. In certain cases, as Lord Goldsmith said, "the court has a discretion to refuse relief". However, his comments omit to mention that in the legislation he referred to the Court's discretion is preserved. When the relevant circumstances are made out, the High Court "may" refuse to grant the relief sought. Clause 38(8) is more than a mere extension of the existing rules. Its content and framing are entirely different. **The reality is that in no other context is the Court's ability to grant remedies restricted in this inflexible and disproportionate way.**

The clause has been roundly criticised by environmental law academics and practitioners. For instance, [legal advice](#) prepared for ClientEarth by a leading environment silk and junior barrister concludes that the provision "in our opinion unnecessarily imposes a dogmatic mandatory fetter on judicial discretion which has no parallel in existing law. This undermines the efficacy of the environmental review process and undermines the OEP's ability to achieve its stated objectives." The Bingham Centre for the Rule of Law published [a report](#) which considers the current approach's incompatibility with the satisfaction of rule of law requirements for effective remedy of unlawfulness, remarking that "Unlawful action by a public authority, by its very nature, is detrimental to good administration".

The government's main rationale is timing. According to the bill's explanatory notes, this provision "recognises the fact that the environmental review will take place after the expiry of judicial review time limits and that prejudice may result from quashing the decision at this later date". However, this blanket condition is not an appropriate response.

The OEP will be an expert body and the Court will have its usual (aside from the clause 38(8) restrictions) general discretion to grant or refuse to grant relief. Given this, there is no reason to think that third party interests would not be appropriately considered.

The Court should therefore retain its usual ability to grant a remedy wherever it deems it appropriate. This discretion is certainly capable of being exercised to ensure fairness in any lengthy enforcement cases in which the OEP becomes involved.

Although the parties to judicial review proceedings cannot agree to extend time limits, the Court can do so. The Civil Procedure Rules set out that “the court may...extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired)”. In this way, there is not an absolute bar on the extension of time limits as the minister’s response suggests. As set out in case law, in considering whether to grant an extension of time, “[t]he courts’ approach...has to strike a fair balance between the interests of the objector, the interests of the developer and the public interest.” (*R (Daniel Gerber) v Wiltshire Council* [2016] EWCA Civ 84, [46].) The same approach is very much adopted in the Court’s exercise of its discretion as to the granting of remedies and should be replicated in environmental review.

We strongly support cross party amendment 27, tabled by Lord Anderson of Ipswich, which would preserve the Court’s discretion in granting remedies while indicating factors to be considered when determining what outcome would be in the interests of justice. This would guide the court by requiring it to have regard to the nature and consequences of the authority’s failure to comply with environmental law, as well as the likelihood that the grant of a remedy would cause substantial hardship or prejudice to any third party or be detrimental to good administration. In this way, the approach is more balanced than the current wording of the bill: it does not promote one set of interests above the other but instead creates a route for the Court to consider the different factors and interests that are live in each matter, enabling it to grant a remedy that is, ultimately, issued in the interests of justice.

Alongside the new environmental review mechanism, the OEP can also launch judicial review proceedings. Where it decides to apply for judicial review, the OEP does not need to first complete its investigation process. However, this is limited to when a threshold known as the “urgency condition” is met (clause 39(1)). The urgency condition requires that it is necessary for the OEP to make a judicial review application in order to prevent or mitigate serious damage to the natural environment or to human health (clause 39(2)).

We support amendment 28, tabled by Lord Anderson of Ipswich, which would remove the urgency condition, meaning that the OEP could choose to apply for a judicial review of alleged public authority non-compliance with environmental law when it deems it appropriate to do so. This approach would not preclude the OEP from relying on judicial review in more exceptional cases as [Lord Goldsmith’s response](#) in Lords Committee envisages.

Finally, it is widely recognised that the OEP will need to be intelligent and targeted in exercising its enforcement functions. However, the bill constrains the OEP’s ability to act in this way when it comes to the scope of issues that can be considered in a single set of environmental review proceedings. The OEP can only apply for an environmental review in relation to the specific conduct described in a decision notice that it has given to a public authority. This prevents the OEP from taking a strategic approach to enforcement by wrapping up connected or similar issues into one environmental review.

We strongly support cross party amendment 26, tabled by Lord Anderson of Ipswich, which would remedy this and remove the risk of inefficiencies created by the current approach. It would afford the OEP greater flexibility in applying for environmental review proceedings and allow it to apply for an environmental review in relation to multiple instances of alleged misconduct where those instances are similar or related, enabling a more strategic approach. This would mean the OEP could be more agile, avoiding the need to return to the very beginning of its investigation process in relation to each new instance of alleged misconduct.

The amendment would enhance the effectiveness of environmental review and enable the OEP to identify the serious cases in relation to which use of its enforcement powers is most appropriate and valuable. This would ensure a strategic and cost effective approach in relation to instances where multiple public authorities are taking a similar potentially unlawful approach or where there are serious issues of systemic unlawfulness. Considering such instances of related or similar potential unlawfulness together could reveal broader and deeper issues which require attention. It is precisely this sort of matter with which the OEP should concern itself.

Commentary on other amendments

Amendment 1 – biodiversity and climate emergency (Lord Teverson)

Parliament [declared](#) a biodiversity and climate emergency in 2019, and ministers have repeatedly accepted its existence. Opening the second reading debate on the Environment Bill in February 2020 the Secretary of State [explained](#) that the bill was being introduced to address the biodiversity and climate emergency, stating:

“We face two great global challenges: climate change and biodiversity loss. A million species face extinction, and climate change is piling the pressure on nature, doubling the number of species under threat in the past 15 years. If global temperatures rise by even 1.5°, we will lose even more of our precious life on Earth. As an island nation, we are acutely aware of the devastating effects of plastic pollution on marine life. We need to act now to turn things around. This Government were elected on the strongest-ever manifesto for the environment, and this Bill is critical to implementing that commitment.”

As the Secretary of State recognised, there is a need to act now. The provisions of the Environment Bill must be implemented swiftly to address an emergency that worsens by the year. This amendment provides a welcome reminder that the bill has been introduced to respond to an emergency, and an explicit government acknowledgement of that would help ensure the timely application of the bill’s provisions.

Amendment 2: soil health (Baroness Bennett of Manor Castle)

Amendment 3: light pollution (Lord Randall of Uxbridge)

Our priorities for improving the target setting framework are set out above and are focused on ensuring that the framework is future proofed, effective and fit for purpose.

Amendments 2 and 3 would require targets to be set on the important matters of soil quality and light pollution.

We urge the government to address the clear desire for stronger action on these through the target development process that this bill will establish. This must be done holistically and transparently with early and effective stakeholder engagement.

The government should publish a timetable and plan for how it intends to progress targets not included in the first tranche expected to be published for consultation in early 2022.

The power in Clause 1(1) gives the government the ability to set targets on any matter relating to the natural environment or people's enjoyment of the natural environment. This power must be used actively to focus government action on environmental improvement in areas where the need is greatest.

Amendment 4: WHO guidelines and PM2.5 (Baroness Hayman of Ullock)

We support **amendment 4** tabled by Baroness Hayman of Ullock which sets parameters on the face of the bill to ensure that the PM_{2.5} target will be at least as strict as the 2005 WHO guidelines, with an attainment deadline of 2030 at the latest. For more details see [this briefing](#) from the Healthy Air Campaign.

Amendment 8: plastic reduction target; amendment 36: plastics strategy for England (Baroness Jones of Whitchurch)

These amendments recognise the urgent need to address plastic pollution. Of the two, we believe **amendment 36** would allow for a more robust and effective approach. We believe that the government should concentrate on improving the target setting framework rather than adding more target requirements to the face of the bill.

Amendment 36 would require the government to prepare and publish a plastics strategy explaining how it intends to reduce or eliminate plastic pollution while avoiding the sorts of regrettable substitutions that occur when plastic is simply substituted for other materials on a like for like basis. Already, concern over plastic has seen some businesses simply switch to alternatives made from paper, wood, metal or compostable material – which can all also be used with environmental recklessness.

The [EFRA Committee](#), [Greenpeace](#) and [Green Alliance](#) have illustrated the dangers of what happens when producers just switch material rather than concentrating on overall reduction. As the Green Alliance report shows, switching the UK's current consumption of plastic packaging (1.6 million tonnes) to other materials on a like for like basis could almost triple associated carbon emissions (from 1.7 billion tonnes CO₂ equivalent to 4.8 billion tonnes CO₂ equivalent). The strategy would ensure that objectives in relation to climate change goals are considered.

Given the transboundary nature of plastic pollution, the government should also set out in the strategy how it intends to take a global leadership role on this issue. In light of Lord Goldsmith's [announcement](#) in November 2020 confirming the UK's support for a mandate to commence negotiations for a global treaty to tackle plastic pollution at UNEA 5.2, we believe the UK is well placed to advance this opportunity.

The proposal outlined in **amendment 36** will enable the government to take a robust approach to the particularly pernicious problem of plastic pollution. As the strategy would need to be developed by 2023 and reviewed every five years, we believe it would be effective at encouraging swift action as well as avoiding and addressing perverse outcomes, as it would be able to incorporate emerging evidence.

Amendment 18: soil management strategy for England (Earl of Caithness)

Soil health provoked considerable discussion at Lords Committee, with cross party agreement that soil restoration measures are urgently needed to secure the future of farming, to store carbon and to provide the healthy soil structure that underpins biodiversity.

Lord Goldsmith **agreed** that it was “impossible to exaggerate the importance of soil” and pointed to the Environmental Land Management (ELM) scheme and its payments for soil restoration as a key lever for improving soil health.

The ELM measures are welcome but are only a partial solution. A soil management strategy would provide the push to the pull factor created by ELM.

Encouraging farmers to opt for soil restoration would be helpfully complemented by the strategy proposals, particularly national targets for achieving the sustainable management of soil, and the regular publication of data showing progress towards those targets. A combination of financial incentive on the ground and national level coordination would give soil restoration the focus it requires.

Amendment 21: environmental risk forecasting report (Lord Bird)

This amendment seeks to create a new mechanism to regularly assess risks to our environment. Its intent is laudable, but we question the narrow focus on risk.

Our natural world needs a full scale recovery from its precipitous decline. Such a recovery requires work not only to manage risk, but also to identify and act on positive opportunities to enhance the health of nature. The targets framework established by the bill could drive this multi-faceted approach to nature’s recovery.

Amendment 21 advances some principles which would helpfully inform the implementation of the targets framework. These include consideration of the environmental views of young people, a commitment to regularly publishing data on the state of nature and a requirement on all government departments to produce plans on how they intend to contribute to nature’s recovery.

For more information, please contact:

Ruth Chambers, senior parliamentary affairs associate, Greener UK
e: rchambers@green-alliance.org.uk
t: 020 7630 4524

GREENER UK

