

Written evidence from Greener UK and Wildlife and Countryside Link
The Environment, Food and Rural Affairs Committee inquiry into the Environment Bill

Greener UK is a coalition of 13 major environmental organisations campaigning for stronger protections and higher standards through the Brexit process. Wildlife and Countryside Link brings together 54 organisations to use their strong joint voice for the protection of nature. Together, our members have the support of over eight million people.

Summary of key concerns on the bill

- If the government is serious about its repeated verbal commitments to maintaining, and indeed enhancing, environmental standards, it must include a straightforward and substantive commitment to non-regression of environmental law in this flagship bill
- While a framework to set legally binding targets is welcome, it must be significantly strengthened in order to be effective
- The clauses on environmental principles need wholesale reform if they are to achieve equivalence let alone approach world leading legislation
- The independence and powers of the Office for Environmental Protection, including the proposed Environmental Review, must be strengthened
- The waste and resource efficiency measures are too focused on ‘end of life’ solutions to waste and recycling, with much more emphasis needed on the production side and to encourage the reduction of waste in the first place
- The bill includes several measures which could seriously undermine the water environment. Clause 79 should be amended in process and purpose
- The biodiversity and nature clauses should be strengthened. Local Nature Recovery Strategies will be ineffective unless there are stronger duties to use them in planning and spending decisions
- Biodiversity net gain in development requires stronger safeguards to ensure that it is part of a national plan to restore nature, that it does not enable more inappropriate development and that newly created habitats are protected for the future

Question 1 – non-regression from EU environmental standards

1.1 We understand that the [government believes](#) the measures in the Environment Bill, including the framework to set legally binding targets, and the oversight provided by the Office for Environmental Protection (OEP), to be “already superior to a non-regression commitment”. This misses the point that the purpose of a non-regression provision is to provide a guarantee that current and future governments cannot weaken environmental protection measures.

1.2 While the Environment Bill is an important and much needed piece of legislation, specific provisions guaranteeing current standards will not be weakened are a prerequisite to delivering the government’s ambition to leave the environment in a better state.

1.3 Non-regression is a key part of modern environmental law, as contained in a recent update to French Law and the [draft IUCN Global Pact for the Environment](#). Therefore, the government should include a non-regression provision in our domestic law, Brexit or not.¹ This should cover all aspects of environmental law, as well as implementation, making sure that new regulations, guidance, decisions and other actions by public bodies are all subject to non-regression and not limited by the narrow definition of environmental matters contained in the bill. The introduction of new primary legislation and/or policies across government, including new non-environmental law

¹ [Greener UK briefing on non-regression in the Environment Bill](#), October 2018.

that impinges on environmental standards, should also be subject to a clear, substantive non-regression check to provide transparency and improve integration of environmental considerations.

1.4 The loss of the non-regression provision from the [Withdrawal Agreement](#) heightens the need for domestic legal certainty that environmental standards will not be weakened. Environmental law is at risk of sustained deregulatory pressure, including from those seeking to strike trade deals, for example with the US. While the Withdrawal Agreement Bill could and should be used to provide safeguards, this does not remove the need to properly safeguard and improve environmental law in the Environment Bill.

1.5 If the government is serious about its repeated verbal commitments to maintaining, and indeed enhancing, environmental standards, then it will wish to see this legacy enshrined in law through a straightforward commitment to non-regression of environmental standards in this flagship Environment Bill.

Question 2 – environmental principles

2.1 The clauses on environmental principles are largely unchanged from the [draft Environment \(Principles and Governance\) Bill](#), despite very clear evidence that emerged during pre-legislative scrutiny, including from leading academics on the need for these clauses to be strengthened.²

2.2 The bill constitutes a significant and unacceptable weakening of the legal effect of the principles. In the second reading debate on the bill, the [Secretary of State said](#) that “The Bill will enshrine environmental principles in UK law for the first time”. We would like to highlight that the principles are already enshrined in UK law (EU treaties and their inclusion in many environmental directives and regulations make them part of UK law).

2.3 Clause 16 requires the Secretary of State to prepare a policy statement on environmental principles. Only Ministers, not public authorities, must have ‘due regard’ to this statement when making policy but the requirement does not apply to decision making in individual cases and is subject to wide ranging exemptions in Clause 18(2) and (3), which relegates these important legal principles to little more than creatures of policy. Clause 17 provides for some parliamentary scrutiny of the statement but there is no formal role for parliament in approving it, which must be corrected.

2.4 Currently, under EU law the environmental principles are binding on all public authorities including in individual administrative decisions. This legal obligation will be lost through the bill and we invite the Committee to recommend to Defra that the bill includes a duty on all public authorities to apply the principles, and not merely to have due regard to the policy statement.

2.5 We note that the three Aarhus rights (public access to environmental information, public participation in environmental decision-making and access to justice in relation to environmental matters) were removed from the list of principles that was set out in the draft bill (Clause 2(g) to (i)).

2.6 While we agree that these rights should not be included in a list of environmental principles, we think that the government should reference these important rights in the bill and use it as an opportunity to improve their implementation and ensure they are fully respected, protected and fulfilled.

2.7 Without fundamental redrafting, this part of the bill represents a significant backward step.

² Lee, Maria and Scotford, Eloise A.K., [Environmental Principles After Brexit: The Draft Environment \(Principles and Governance\) Bill](#) (25 January, 2019).

Question 3 – the powers, resources and independence of the Office for Environmental Protection

Independence and resources

3.1 We welcome the government’s recognition that “the OEP should have sufficient independence from government”. However, the additional measures that the government has introduced are not yet sufficient to ensure the independence of the body in the long term.

3.2 The process of appointing the Chair and other non-executive members of the OEP’s board has not changed since the publication of the draft bill. In recent oral evidence, the Secretary of State told the Committee that the model of the Office for Budget Responsibility in which the appointment of the Chair is made with the consent of the Treasury Select Committee “has much to recommend it”. It is disappointing therefore that the government appears to be relying on pre-appointment hearings to provide independence, which they do not. We encourage the Committee to reiterate its previous recommendation on a greater role for parliament in the appointments process.

3.3 The government has agreed that in order 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 welcome and should be reflected in the legislation. However, the government has not given the OEP the ability to have its own Estimate separate from Defra, which remains of concern. The government claims that this would remove the flexibility for Defra to provide in-year financial support to the OEP in response to changing circumstances. We do not believe this to be correct as supplementary estimates can be prepared and submitted to deal with in-year budgetary changes, as is the case for bodies such as the National Audit Office.

3.4 We welcome the new duty³ on the Secretary of State, in exercising functions in respect of the OEP, to have regard to the need to protect the OEP’s independence. This duty should be strengthened and Clause 20 (or Paragraph 16 of Schedule 1) should have added to it an obligation on the OEP to report to parliament on any attempt, particularly by or on behalf of, any of the public bodies it oversees, to compromise its ability to act in the ways contemplated by Clause 20(2). Clause 20(2) – which requires the OEP to act objectively and impartially – should have added to it ‘independently’.

Powers

3.5 Many of the OEP’s functions rely on the identification of a potential ‘failure to comply with environmental law’ by a public authority. However, the definition of this term is concerning. This is already a clear phrase with an obvious meaning – it does not require elucidation in legislation.

Investigations (Clause 28)

3.6 We welcome the ability of the OEP to conduct investigations on its own initiative without having to rely on receipt of a complaint, which is provided for in Clause 28(2). It must also be empowered to conduct broader inquiries into systemic issues and make recommendations based on these. This could be established in Clause 24 and could help prevent breaches of law before they occur. Clause 28(9) should require the publication of the reports the OEP prepares following an investigation.

Environmental Review (Clause 33)

3.7 We welcome the government’s attempt to improve the enforcement provisions in the bill. Environmental reviews could, if designed better, represent an improved mechanism for the comprehensive review of compliance with environmental law. However, the proposed process is unsatisfactory for a number of reasons.

³ Paragraph 16 of Schedule 1.

3.8 There is a need to move away from traditional judicial reviews, which have proved unsatisfactory in dealing with environmental complaints. While the environmental review model appears to be an attempt to do just that, the way it is currently curtailed by reference back to judicial review principles, means the substance of the review process is, in essence, judicial review in disguise:

- The Upper Tribunal should not be restricted to applying ‘judicial review principles’ in environmental reviews. Clause 33(5) should be removed.
- The bill must explicitly state that environmental reviews should consider technical facts and issues, covering the substance behind the decision, with expert adjudicators who are able to thoroughly review the substantive matters at hand.
- Environmental reviews should be available in urgent situations, rather than having to start judicial review proceedings in the High Court as set out in Clause 34.
- The environmental review process should be directly accessible by civil society more widely. As has been recognised by the Supreme Court, in order for the judiciary to ensure that the government carries out its functions in accordance with the law, people must in principle have unimpeded access to it.
- The constraints imposed on the Upper Tribunal in Clause 33(8) appear to severely limit the ability of the Tribunal to grant meaningful sanctions and remedies. Instead, the Upper Tribunal must be empowered to grant meaningful, dissuasive and effective sanctions and remedies including, where appropriate, fines – just as the Court of Justice of the European Union is currently able to do.
- The purpose and force of the statement of non-compliance is not clear and should be bolstered to allow the court to use it to deliver mandatory compliance orders as bespoke remedies.

Question 4 – powers and provisions relating to air quality, biodiversity, water resource management and waste management

4.1 The duty to achieve long-term targets for the significant improvement of the natural environment (and/or people’s enjoyment of it) is a welcome inclusion in the bill. If robust, this framework could help reverse decades of environmental decline, but in its current form, it is not nearly ambitious enough to tackle the environmental crisis we are facing. This part of the bill needs significant amendment:

- While there is a duty on the Secretary of State to achieve the long-term target, the interim targets are much less powerful, with no duty to achieve them. There is a risk that this could lead to delayed action towards achieving the targets, with action backloaded towards the end of the 15-year period, making it much harder to achieve them. The bill should ensure that interim targets are legally binding.
- While the bill sets priority areas for targets to be set, the parameters under which these should be set are very unclear. Likewise, a retrospective, ‘significant improvement test’ is applied to all targets once set, without any real clarity about what this means. To ensure the targets drive the transformative change needed to tackle the environmental crisis, the bill should set clear and ambitious parameters for the priority areas with a clear outcome. One

way that the outcome could be set would be to ensure each target meets the significant improvement test individually and cumulatively, and that the test is applied when setting, and not just reviewing, the targets. There should be more detailed requirements on the Secretary of State to set targets and the bill should include a requirement to seek and consider independent, expert advice when setting the targets.

- Clauses 3(3) and 10(5) allow the Secretary of State to revise or revoke any interim or long-term target. This wide-ranging power must be tightened.

4.2 Environmental Improvement Plans (EIPs) put the existing 25 Year Environment Plan on a statutory basis and create an obligation for future plans, alongside annual reporting requirements for the Secretary of State and the OEP. However, the content of the EIPs is not specific, nor is the link between the EIPs and the targets as an EIP does not have to include specific actions or policies that are capable of achieving targets. There is also no requirement to seek advice on setting the plan.

4.3 The bill should require that, at the time of each five-yearly review of targets, the Secretary of State reports on:

- whether they expect targets to be met (not just on whether meeting the targets will achieve the 'significant improvement' test), and if not
- what specific, time-bound extra steps will be taken that are demonstrably able to meet the target(s).

4.4 This would strengthen the (much weaker) intention of Clause 11(2), which states that when reviewing an EIP the Secretary of State must consider progress towards targets.

Parts 3 - 6

4.5 Parts 3 – 6 of the bill contain specific provisions for the priority areas identified in Clause 1. However, join up between the provisions is lacking (including link-up between overarching targets and how later provisions, such as biodiversity gain, will contribute to these), as is detail on the secondary legislation required (for example, new duties for statutory bodies and local authorities).

Biodiversity gain

4.6 Biodiversity gain is the flagship policy of the Nature and Biodiversity section of the bill. The bill must be amended so 'gain habitats' are secured in perpetuity (with necessary changes to proposals on conservation covenants to achieve this as these are currently deficient); to include Nationally Significant Infrastructure Projects within the scope of biodiversity gain (and to limit development exceptions as a general rule), and to ensure a minimum of at least 20% gain. Existing international and national protected wildlife sites should be clearly excluded from the policy. The effectiveness of net gain depends on ensuring that no existing protections or requirements are weakened and that biodiversity gain is additional to these. There should be a clear statement in the bill that nothing in these provisions will loosen existing requirements and that the mitigation hierarchy applies. Further regulations and guidance should be developed through public consultation and stakeholder engagement.

Local Nature Recovery Strategies

4.7 The duty to use the Local Nature Recovery Strategies (LNRS) is very weak. To provide the strategic impetus for action and set the spatial framework to deliver a national Nature Recovery Network, it is essential that there is a requirement in the bill that ensures LNRS properly influence policy and decision-making in key areas such as planning, spending, Environmental Land Management and biodiversity net gain.

4.8 While the Explanatory Notes recognise the need for local plans to target net biodiversity gain, there is no mechanism in the bill to ensure biodiversity increases are spatially targeted through LNRs and ultimately provide a Nature Recovery Network.

4.9 The provisions in the biodiversity duty remain too open-ended to guide everyday action. The bill should require the government to consult on and publish guidance for public authorities on how the duty should be fulfilled. Moreover, the duty will now be satisfied by planning actions to enhance biodiversity; it ceases to apply separately to individual decisions. A duty to consider the need to enhance biodiversity in the exercise of functions by public authorities should be added.

4.10 While the requirement for public authorities to report on actions pursuant to the duty is welcome, the bill should also require a reviewing and advising public authority to be designated to audit the reports produced, as well as sanctions for lack of progress.

4.11 The extent to which the duty applies to the marine environment is unclear and must be clarified. More generally, the extent to which the bill's varying provisions apply to the marine environment is also unclear and must be clarified for each Chapter's provisions.

4.12 For example, the meaning of "natural environment" and "water" on the face of the Bill should explicitly include mention of the marine environment (amendments to Clauses 39 and 89).

Waste and resource efficiency

4.13 In the area of resources and waste, the government's proposed measures currently focus far too much on end-of-life solutions to waste generation and do not consider other lifecycle impacts or the UK's considerable international material footprint. These measures will fall short of the need to dramatically drive down use and impact of virgin resources in line with the IPCC's recommendations.

4.14 Government must provide clarity on its plans to deliver waste reduction targets, including for single use plastic items, but also for other materials.

4.15 With this focus on reduction in mind, Producer Responsibility Obligations must be designed as a system to incentivise a lifecycle approach that considers impacts from extraction and production through supply chains. When applied to packaging in particular, this should entail a wholesale reduction in single-use products, and towards reusable alternatives and in general the policy should incentivise lower impact, longer lasting products. Potential costs incurred by producers should therefore not be limited to disposal.

4.16 Government must publicly commit to the introduction of an 'all-in' deposit return scheme for drinks bottles, something the government's own consultation document stated would lead to the best environmental outcomes. Deposit return systems should be designed to incentivise reuse as well as recycling of packaging items.

Water

4.17 The bill includes several measures which could seriously undermine the water environment.

4.18 England is already far behind its target of achieving Good Ecological Status in all waters by 2027. The government should not be using the bill to give itself powers to amend difficult targets or the way they are measured.

4.19 Clause 79 is a wide-ranging power to amend the regulations that implement the EU Water Framework Directive. These include vital rules about the way water quality is measured and the different chemicals and pollutants that must be considered.

4.20 This power should not be a licence to weaken important targets via secondary legislation.

4.21 Clause 79 should be amended in process and purpose to ensure that targets and standards cannot be weakened without thorough public consultation and scientific advice.

4.22 Furthermore, some positive opportunities to improve the water environment are missed.

4.23 The bill must tackle water consumption. In the same way as the bill requires that a target must be set for reducing particulate matter, the bill should include a sister clause to specify that a target be set for a rapid and sustainable reduction in water consumption. Anything less will be a significant missed opportunity as the next legislative vehicle to deliver this may be several years away. The bill should include a power to:

- Establish ‘no abstraction zones’ around priority freshwater habitats where there is evidence of damage by abstraction, and
- Introduce a mandatory water efficiency labelling scheme, linked to minimum standards for fittings and incorporated into building regulations

4.24 Small waterbodies and wetland habitats form an essential but overlooked part of our water environment. The bill should require a strategic programme to further their conservation to be set out at a catchment scale, under the framework of a national Nature Recovery Network.

Question 5 – common frameworks

5.1 The bill’s provisions relating to environmental principles and governance primarily relate to England only. Parallel provisions are provided for Northern Ireland – if agreed by a future Executive.

5.2 The role of the OEP extends to reserved functions of UK Ministers in Scotland, Wales and Northern Ireland.⁴ However, in relation to the application of the principles, three different approaches are taken:

- In Northern Ireland, UK ministers exercising reserved functions must, if the provisions are commenced, have due regard to the Northern Ireland Ministers’ policy statement.⁵
- In Scotland, UK ministers exercising reserved functions have no new duty.⁶
- In Wales, UK ministers exercising reserved functions are excluded from the duty.⁷

5.3 For devolved matters in Scotland and Wales, the bill is silent as such matters are for the respective governments. This approach is consistent with the devolution settlements but does raise matters that require clarification.

⁴ Clause 127(1)(b) and Clause 40(1), taken together.

⁵ Schedule 2, paragraph 8(2).

⁶ Chapter 1 extends to England and Wales only, see Clause 127(1)(a).

⁷ Clause 18(3)(c)

5.4 The Committee should ask the government to:

- Provide clarification, with examples, of the reserved functions of UK ministers that would be subject to oversight by the OEP; and
- Indicate why the reserved functions of UK ministers in Northern Ireland may be subject to the environmental principles but that this is not the case for the reserved functions of UK ministers in Scotland and Wales.

5.5 The bill is silent on co-operation between jurisdictions. Devolved institutions and functions are excluded from the duty to co-operate with the OEP.⁸ In general, this is consistent with the devolution settlements. However, the Committee should ask the governments what plans they have to enable the OEP and its devolved counterparts to co-operate where appropriate.

5.6 The bill is also silent on the issue of ‘common frameworks’. The UK’s governments have been developing a range of common frameworks, in accordance with the approach agreed by the JMC.⁹ These have yet to engage with external stakeholders, but the latest update was provided by Scottish Government on 24 October 2019.¹⁰

5.7 These common frameworks are of a technical nature, specific to various topics. This is positive but incomplete. There is no clear statement, jointly agreed, of overall environmental aspiration or collective commitment to environmental ambition. Such a statement would provide international credibility to the governments’ individual commitments and ensure there was no opportunity to engage in a ‘race to the bottom’.¹¹

5.8 The Committee should encourage the governments to develop and agree a joint policy statement of high-level environmental objectives.

Question 6 – resourcing

6.1 No, sufficient consideration has not been given to the resource implications of the bill for national and local government and other public bodies.

6.2 After [years of cuts](#), local authorities and statutory bodies such as Natural England will need to receive significant funding increases over the coming years if they are to play their important roles in tackling the climate crisis and reversing ongoing, alarming declines in nature.

6.3 For instance, the success of a biodiversity gain system depends on increased resourcing (both skills and capacity) within statutory agencies and local authorities (including access to independent ecologists). Without better resourcing the system could result in incorrect or inconsistent application of biodiversity gain with worse biodiversity outcomes.

6.4 In addition to the comments relating to Net Gain, a significant investment is needed to build the data and evidence base to create LNRS.

⁸ Clause 22.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/814326/Frameworks_Products_Update_.pdf

¹⁰ https://www.parliament.scot/S5_Environment/Meeting%20Papers/ECCLRC_20191029_Public_Papers.pdf

¹¹ It would be similar to 2009’s agreed high-level objectives for the marine environment (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/182486/ourseas-2009update.pdf).

6.5 The recent [PAS survey](#) of resources (following the increase to planning application fees) highlighted that capacity (skills and experience) is as important as resources. Ecology is identified as one of the top ten worries for the future as is enforcement, which is the number one concern. Effective delivery of biodiversity gain will be dependent on the ability of planning authorities and others to monitor the quality of outcomes and to take effective enforcement action where needed.

6.6 Resources to ensure effective monitoring will be needed across all areas covered by the bill. For instance, monitoring of performance of water environment (water quality, status of species and habitats, etc) requires capacity in terms of, *inter alia*, skilled staff and budgets. We find no evidence that this has been adequately considered.

6.7 Environmental monitoring ambitions should be set in law and not left to the discretion of ministers, with clear monitoring objectives established.

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