

Environmental governance in a time of transition

19 October 2020

Introduction

The government has pledged to “...create a world-leading system for environmental governance” and to put “the protection and improvement of the environment . . . at the heart of this new system”.¹ A new public body – the Office for Environmental Protection – will “...be our independent watchdog with the teeth to hold government and other public bodies to account on fulfilling their obligations on the environment – including on climate change”.² A policy statement will embed environmental principles in ministerial policy making.³

Since it was first identified in 2017, government ministers have made repeated commitments to address the environmental governance gap that would arise when the UK left the EU.^{4,5} For example, Defra Minister Lord Gardiner of Kimble told Parliament in January 2020 that “...there will be no governance gap and the OEP will be ready to act from 1 January 2021”.⁶

The government’s plans for England are being taken forward through the Environment Bill, which was first published in October 2019 and republished after the general election in January 2020. The government has recognised that “...without the Environment Bill, the UK would not have in place a robust system of environment governance”.⁷

It is therefore of great concern that the passage of the Environment Bill has been severely delayed, with current estimates suggesting it is unlikely to receive Royal Assent before Spring 2021.⁸ This means that the Office for Environmental Protection will not be ready to scrutinise the government and other public authorities’ compliance with environmental law at the end of the transition period on 31 December 2020. Nor will the proposed policy statement on environmental principles, first committed to in 2018, be agreed, let alone embedded in Whitehall policy making.⁹

On 22 September 2020, the Environment Secretary told the EFRA Committee that the government is planning to put in place interim arrangements but no further details have been provided:

“...the delay to the Bill means the legislation will not enable [the Office for Environmental Protection] to be formally established by the beginning of the year, we will be establishing it in embryonic form, with a secretariat to support that first chair who is appointed”.¹⁰

This briefing explains what the government must do to ensure that its interim plans are fit for purpose.

As a first step, **the government should urgently publish a written ministerial statement on the interim arrangements** which addresses the points below.

Ten areas where action is needed

Urgency

The interim arrangements should only be in place for a short time period, and no longer than is necessary to enable the Environment Bill to receive Royal Assent and be implemented. The commencement of the relevant provisions within Part 1 of the bill should be expedited to ensure that timescales do not become elongated. A clear timeline should be set so that the interim arrangements cease to exist no later than three months after the bill has achieved Royal Assent. The commencement of Part 2 of the bill on environmental governance in Northern Ireland should also be expedited by the Northern Ireland department given the lack of clarity on what interim environmental governance measures will be put in place there.¹¹

Transparency

Apart from the Secretary of State's oral evidence to the EFRA Committee in which he explained there would be an "embryonic" Office for Environmental Protection and a secretariat to support the first Chair, no further details have been made available. This lack of transparency should be rectified immediately, including through the publication of a written ministerial statement, a dedicated session with the relevant parliamentary scrutiny committee(s) and the existing regular stakeholder engagement on the set up of the Office for Environmental Protection.

Independence

It is essential that the interim environmental governance arrangements operate independently of government to provide assurance and confidence to the public and to ensure that a culture of independence permeates the new governance system from the outset. This should include the secretariat being based outside the government estate, with IT systems and processes, including a complaints handling interface and website, hosted outside GOV.UK.

Operational readiness

The interim arrangements must be ready from 1 January 2021. Urgent user testing of the complaints management interface should be undertaken, to enable the identification and resolution of any technical issues before the system goes live. Stakeholders should be consulted on whether any proposed policies and communication resources are publicly accessible and strike an appropriate note in terms of independence.

Resourcing

Ministers have previously indicated to Parliament that the Office for Environmental Protection staffing capacity will be 60 to 120 FTEs. The budget for the interim secretariat should be published and must be sufficient to enable it to manage the estimated number of complaints and other essential tasks. The budget for the first year of operation for the Office for Environmental Protection should also be published – this should reflect the Target Operating Model on which the above estimate of staff required to fill essential functions is based and cover essential establishment costs including for IT, human resources and procurement systems.¹²

Complaint handling

Members of the public must be able to submit complaints on potential breaches of environmental law via a complaints management system that is operational from 1 January 2021. The Secretary of State told the EFRA Committee in September that the interim secretariat will "...be able to help the chair process any complaints that might come in" but there is no clarity on what is meant by "process".

What, for example, will happen to the large number of existing complaints concerning potential breaches of environmental law being handled by the EU institutions under current procedures? How does the government intend to work with the European Commission to ensure that these are not lost and arrangements are in place for them to be handed over to the Office for Environmental Protection, or devolved environmental governance bodies, if required?¹³

Information relating to the work of the interim secretariat must be published, for example any reports or decisions pertaining to complaints, the complaint handling process itself, public contact points, staffing details and any ad hoc advice provided.

Serious breaches of environmental law

The government should explain how serious breaches of environmental law, including where there is a risk of serious or irreversible damage to the environment or a risk of acute, significant or widespread damage to human health, will be enforced in the time period between the end of the transition period and the Office for Environmental Protection becoming a legal entity with an operational enforcement function. Furthermore, how will any potential systemic or chronic environmental law failures by a public authority be dealt with? Will there be an escalation process for such breaches and what are the arrangements for dealing with complaints about potential breaches of law relating to the Defra Secretary of State?

Territorial application

Interim arrangements are also being developed in Scotland and Wales.^{14,15} Clarity is needed on how the government's interim arrangements for England will interact with those being developed elsewhere in the UK. Co-operation will be especially important on complaints that are common to all, or more than one, part of the UK, or those that cross borders or affect both reserved and devolved matters. As a matter of considerable urgency, clarity is needed on whether Northern Ireland will be part of the interim arrangements being developed by the UK government. Clarity is also needed on how the Office for Environmental Protection will co-operate with EU bodies in relation to transboundary issues, including those relating to the Northern Ireland/Republic of Ireland border.

Clear governance

The written ministerial statement should confirm the process and timing of the appointment of the Chair. A Chair designate must be appointed by the end of the transition period and the recruitment of the other non executive directors should commence immediately. Will the interim secretariat report to the Chair designate, how will the staff of the secretariat be appointed and on what terms? Ensuring that the interim secretariat is not wholly staffed by Defra civil servants (or officials from public authorities who might be the subject of investigation or complaints) would bring considerable benefits for skills, expertise and organisational culture.

Without a board of independent non executive directors in place, who will provide oversight of the secretariat's work? The Infrastructure and Projects Authority could, for example, be asked to undertake an urgent critical friend review to test both the operational readiness of the new arrangements and the arrangements for a timely transition to the permanent governance system. Any such review should include engagement with stakeholders. Stakeholders should also be involved in key governance arrangements, such as any strategy group, to provide external oversight and perspective.

Environmental principles

Principles to protect our environment and our health, such as acting with precaution and avoiding harm, must be guiding lights to government ministers as they make policy. To be effective, their legal basis should be strengthened through a duty to apply the principles.

The delay in progressing the policy statement on environmental principles is of serious concern. How will the government ensure that environmental principles underpin government policy making in the interregnum until the policy statement has been approved? The consultation should be fast tracked, with a cross Whitehall engagement programme completed within three months of the bill achieving Royal Assent. The UK and devolved governments should publish a joint high level statement setting out how they intend to uphold environmental principles. This should be laid in each parliament before the end of the transition period.

In the interim, government should remind all relevant bodies that general principles of EU law are nonetheless binding on UK authorities. Public authorities must therefore continue to apply these principles in their activities as before – notwithstanding the regrettable delay to the policy statement.

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Endnotes

- ¹ Environment Bill 2020 [policy statement](#).
- ² Defra [press release](#), 15 October 2019.
- ³ Environmental governance [factsheet](#), March 2020.
- ⁴ Greener UK [briefing](#) for parliamentarians and policy makers, August 2017.
- ⁵ [Opinion piece](#) by Michael Gove, 12 November 2017.
- ⁶ [Lords Hansard](#), 20 January 2020.
- ⁷ [Annexes](#) to the Environment Bill Impact Assessment, March 2020
- ⁸ [The mystery of the vanished Environment Bill](#), 5 October 2020.
- ⁹ [Information paper](#) on the policy statement on environmental principles, December 2018.
- ¹⁰ Oral evidence, the work of Defra, [HC21](#), 22 September 2020.
- ¹¹ [Answer to a written question](#) from Rachel Woods MLA, 6 October 2020.
- ¹² [Lords oral question](#), 20 January 2020.
- ¹³ Letter from Paul Speight, Head of Unit, the European Commission, June 2020.
- ¹⁴ [Interim Environmental Protection Assessor, Wales](#).
- ¹⁵ Environmental Standards Scotland [recruitment process](#).

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