

## Environment Bill: Lords Consideration of Commons Amendments

25 October 2021

### Summary

The Environment Bill returns to the House of Lords on Tuesday 26 October, for consideration of [Commons Reasons and Amendments](#) and amendments to the motions from Peers.

Several of the amendments relate to the environmental governance framework in Part 1 of the bill. The issues they raise are not new as they were identified by the two environment select committees during their pre-legislative scrutiny of the draft bill in 2019. They have also been repeatedly raised at every stage of the bill's long parliamentary passage, with a cross party consensus that the bill should be strengthened.

Other proposed improvements, for example those aiming to strengthen the bill's provisions on air and water quality as put forward by Baroness Hayman of Ullock and the Duke of Wellington (see amendments 3B and 45B), depend on independent, robust oversight and a whole government approach to the environment, which the amendments below would deliver.

### The Office for Environmental Protection

#### 1. Independence of the Office for Environmental Protection (Amendments 31C and 75C; Motions F1 and N1)

The independence of the Office for Environmental Protection (OEP) has been a standout issue in parliamentary debates, with exceptionally strong cross party support for the bill to be strengthened. The OEP's constitution must be able to stand the test of time as EFRA Chair Neil Parish [highlighted](#) during Commons Consideration of Lords Amendments. It is not enough to rely on the goodwill and sincerity of the current set of Defra ministers for future interpretation and the robustness of the OEP should not rest on personalities.

**We encourage Peers to support amendments 31C and 75C** proposed by Lord Krebs and Baroness Ritchie of Downpatrick. These would safeguard the OEP's independence in the long term by amending the power of the Secretary of State and DAERA to 'guide' how the OEP will hold ministers to account on any environmental wrongdoings to make it more targeted. They also provide the OEP with complete discretion to undertake its activities in England and Northern Ireland, putting it on a par with other bodies who are afforded this discretion (the National Audit Office and the Office for Budget Responsibility).

The amendments would introduce two important changes to the scope of the power.

Firstly, they would restrict the power to the preparation of the OEP's enforcement policy (a strategic issue) but would remove the exercising of the OEP's enforcement functions from the scope of the power (an operational issue). The OEP must be allowed the freedom to act objectively and impartially, as the bill requires it to do so in Clause 22(2).

Secondly, they would amend the scope of the power to make it more targeted by focusing it on Clause 22(6)(c) on how the OEP intends to exercise its enforcement functions in a way that respects the integrity of other statutory regimes, including statutory provision for appeals. This would ensure that the OEP's discretion to prioritise cases and to decide what constitutes serious environmental harm, again both important operational matters, are free from political interference.

This strikes a reasonable balance between the accountability that the government has said is necessary and allowing the OEP the freedom to pursue its statutory functions without undue or inappropriate ministerial involvement.

This more targeted power, combined with the use of processes that guide the relationship between public bodies and government, such as the preparation of the Framework Document and the Tailored Review process, would be ample to enable any government views to be articulated in the future.

**Given it was intended to be a “world leading body to give the environment a voice and hold the powerful to account”, affording the OEP discretion to exercise its functions should be incontestable.**

The amendments also replicate existing arrangements for appointing the board members of comparable oversight bodies – the Office for Budget Responsibility and the OEP's sister body Environmental Standards Scotland – where the respective parliament plays a greater role, ensuring that ministers cannot hire and fire board members at will.

## **2. Environmental review remedies (Amendment 33B; Motion G1)**

The availability of meaningful and effective remedies to correct unlawfulness is a crucial aspect of any successful enforcement mechanism. However, the constraints proposed by the government 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 being the world leading body the government has promised.**

Where the Court determines that a public authority has failed to comply with environmental law it must be able to remedy that breach. However, the bill contains 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.

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.

**We encourage Peers to support Lord Anderson of Ipswich's amendment 33B.** This adopts a more balanced approach and 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. We note the amendment is modelled on Clause 1(8) of the government's [Judicial Review and Courts Bill](#), which sets out six factors to which the court must have regard before granting the exceptional remedies provided for by that bill.

As Lord Anderson [put forward](#) during the Report stage debate, "...the Government cannot credibly claim to have independent and effective safeguards while protecting themselves from being held to account by the very body established for the purpose".

**If the government does not accept this amendment, it will undermine the new environmental governance system and the OEP's intended mode of operation.** OEP Chair Designate and experienced regulator Dame Glenys Stacey has [described](#) to MPs the "...standard regulatory approach of a cup of tea together, but a stick is in the cupboard, and everyone knows that stick is there, and it will come out if needs be." Without this amendment, Dame Glenys will find her cupboard bare when she searches for that stick, reducing the effectiveness of the new environmental enforcement system.

For further information see this [legal advice](#) prepared for ClientEarth and the Bingham Centre for the Rule of Law's [report](#).

## Environmental targets and principles

### 1. Binding interim targets (Amendment 12B; Motion D1)

We welcome the bill's framework to set legally binding targets and the addition of a new target to halt species decline by 2030. Clause 6 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 encourage Peers to support Baroness Brown of Cambridge's amendment 12B** which would place a duty on the Secretary of State to meet interim targets.

The government has 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.

As Baroness Brown of Cambridge [explained](#) during Lords Report stage:

"In my experience as a scientist, it is easier to predict the impact of actions to support such systems over a five-year timescale than it is to predict outcomes in 15 or 20 years, as the noble Lord, Lord Cameron, reminded us on Monday. The Minister said it discourages large-scale change for a focus on quick wins. I might agree with this if we were talking about a five-year target alone, but evidence shows the effectiveness of the combination of statutory interim targets and a legislated long-term goal. I sincerely hope the Government will reconsider their position on statutory interim targets, because the evidence is clear. They would help ensure that the excellent intent of this important Bill is delivered."

During Report stage, Lord Thomas of Cwmgiedd [reminded us](#) that “[Long term targets] do not easily fit into the short-term electoral cycle; they are not something a politician or decision-maker can say is for a future generation, years and years away. Interim targets are the here and now.”

Binding interim targets are supported by many in the business community as they 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.

Indicators alone do not bring the same certainty of political intent or build confidence for investment in the way that binding targets can. Instead, as the 25 Year Environment Plan [progress report](#) showed last week, they often simply chart the progress of ongoing decline.

We recognise that natural variability in some areas of environmental improvement would make it hard to plot a linear path to achievement of a long term target. However, that should not mean that we do not plot any path at all.

## **2. Environmental principles (Amendment 28B: Motion E1)**

The Environment Bill will introduce a new system for ensuring that government departments integrate environmental considerations into their policy making. Ministers will be subject to a new duty to have due regard to a policy statement on environment principles, which was published for [consultation](#) earlier this year.

However, the bill, as drafted, contains a loophole for all government policy relating to defence, the Armed Forces and national security, as well as spending, resource allocation and taxation.

**We encourage Peers to support Baroness Parminter’s amendment 28B** which would remove the exceptions in relation to defence policy. The aim of the environmental principles policy statement is to place environmental considerations at the heart of government policy making, but this will only be achieved if approached consistently by all departments. For further details see this [briefing note](#) on why the defence loophole must be closed.

Baroness Parminter’s **amendment 28B** proposes that the exception for defence policy is narrowed to “safeguarding national security”. We note that this already has a legal precedent in the [Equality Act 2010](#) and urge the government to accept this reasonable amendment which would ensure the protection of national security and the environment.

## **Lords Amendment 85 (Motion P)**

Schedule 9 seeks to reduce the consumption of single use plastic by allowing charges to be imposed. The government had sought to limit the charges to single use plastic items, which risked merely shifting the environmental burden, as alternative materials may be used with equal environmental recklessness. The problem lies with the single use throwaway culture, not with plastic per se.

Parliamentarians and NGOs called for this clause to be amended to future proof government action on reduction and reuse, as did [many businesses](#).

**We therefore welcome the government's decision to accept the principle of Lords Amendment 85** [via LA85 (a) to (c)] to enable charges to be made for all single use materials. This will ensure that the government can successfully tackle our throwaway culture at the same time as tackling plastic pollution. It is also welcome that the power will be extended to Welsh Ministers through **government amendments 85D and 85E**. We would welcome clarity on the position in relation to Northern Ireland and Scotland. For more detail see this [briefing note](#).

## **Amendment 45B (Motion J1)**

We welcome the Duke of Wellington's proposed **amendment 45B**. The government's amendments at Report stage strengthened the bill through new reporting and monitoring duties placed on water companies and a duty on the government to make a plan to tackle sewage pollution. However, more monitoring and reporting, while welcome, is not enough. Without placing a legal duty on water companies not to pollute there is no guarantee of immediate action to tackle sewage pollution. There is significant public interest in strengthening this part of the bill and we encourage Peers to support **amendment 45B**.

### **For more information, please contact:**

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