

Environment Bill: Commons Consideration of Lords Message

5 November 2021

Summary

The Environment Bill returns to the House of Commons on **Monday 8 November** for Consideration of Lords Message.

There are three remaining issues to be considered: the independence of the Office for Environmental Protection, environmental enforcement and a duty on water companies to reduce the impacts of sewage pollution.

Government amendments are offered on environmental enforcement and sewage pollution but not on the independence of the Office for Environmental Protection. This is especially disappointing given that concerns on this important matter have been raised throughout the bill's passage.

Commentary on amendments

1. Independence of the Office for Environmental Protection (Amendments 31C and 75C)

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 recent events have shown so viscerally, it is not enough to rely on the goodwill and sincerity of current postholders to protect public interest matters such as public body independence for the long term.

The bill has several gaps which the government has steadfastly refused to address, instead preferring to give itself a high degree of flexibility on how it is able to steer and resource the new watchdog in the future. This is a far cry from the supranational oversight that the OEP is intended to replicate domestically. It is also weaker in several regards than existing domestic oversight bodies and the new watchdog that the Scottish government has established, Environmental Standards Scotland.

Guidance power

The government argues that, as the Secretary of State is ultimately responsible to Parliament for the OEP, they must retain an ability to ensure that the OEP functions as intended. The route for this is the guidance power in Clause 24 in relation to the OEP's enforcement policy and activity.

The government argues that the guidance powers that exist for other arm's length bodies provide precedent for this. For example, the government can provide guidance to bodies such as the Climate Change Committee. But the government has no such guidance power in relation to the small number of bodies which, like the OEP, can pursue breaches of the law in the courts. The Equality and Human Rights Commission and the Information Commissioner have no such fetters on their discretion and freedom to undertake enforcement action.

Serious concerns about the guidance power have been raised by independent legal experts. For example, the Bingham Centre for the Rule of Law concluded in its [rule of law analysis of the bill](#) that:

“At the strategic level, [the OEP] is not free to make up its own mind about what is a serious breach of environmental law, whether damage to the environment or human health is serious, or how to prioritise cases. Instead it must consider the views of the Secretary of State. Then at the practical level of individual cases, it is not free to make up its own mind about when to enforce environmental law, it must first consider the views of the Secretary of State. It cannot be said that this is a robust and independent process for environmental protection and holding the state to account. This runs the real risk of breaching the Rule of Law requirement to have effective and non-selective sanctions for breaches of the law.”

The Bingham Report also identified a serious conflict of interest:

“There is an additional aspect of [the guidance power] which goes beyond a lack of independence and opens up the real risk of bias and conflict of interest. What if the complaint made to the OEP concerns the actions of the Secretary of State himself or herself? There is a long standing principle of administrative law that a person should not be a judge in their own cause. If the OEP is investigating the actions of the Secretary of State, can the Secretary of State issue guidance to the OEP on how that complaint should be investigated? Under the terms of this Bill, that would be a lawful course of action. Complaints about Ministers “marking their own homework” have become common. This provision would give legislative force to this kind of abuse of process.

The ability of the Secretary of State to issue guidance on enforcement policy and enforcement functions opens up the real possibility of the Secretary of State issuing guidance on how the Secretary of State is to be investigated. This risk of bias is at odds with sound administrative practice and undermines the Rule of Law.”

Intensive scrutiny of the guidance power by Peers has identified several concerns about its wide scope which allows the government to steer the OEP’s approach to enforcement in very specific ways. This includes how it will decide what the word “serious” means in relation to breaches of the law and environmental damage. Far from being a semantic or trivial diagnostic exercise, the meaning of “serious” is one of the most important aspects of the new enforcement system, as it is the legal gateway to all OEP action on enforcement, including carrying out investigations into complaints and taking cases to the court.

We therefore strongly 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 such 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 a 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.

Appointments

The amendments would 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. Without these, ministers will have unilateral power over the OEP's board appointments. While the first round of board recruitment resulted in a set of excellent appointments, the growing trend of ministerial meddling in public body appointments is of great concern and the amendments would provide an important degree of insulation from this.

We note that the environmental select committees called for stronger parliamentary oversight of appointments in their pre-legislative scrutiny of the draft bill. For example, the EFRA Committee recommended that:

“The Government must revise the appointments process to ensure greater independence and transparency. We recommend that the process should be modelled on the equivalent process for the appointment of the Chair of the Budget Responsibility Council at the Office for Budgetary Responsibility. The Chair and all non-executive members of the board should be appointed by the Secretary of State only with the consent of the Environment, Food and Rural Affairs Select Committee. The Chair should be subject to a pre-appointment hearing prior to the Committee consenting to her appointment. Similarly, a non-executive member should not be dismissed from the Board of the OEP without the consent of the Environment, Food and Rural Affairs Select Committee.”

2. Environmental enforcement (Amendment 33B)

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

We strongly support Lord Anderson of Ipswich's amendment 33B, which adopts a more balanced approach and would preserve the Court's discretion in granting remedies. The amendment sets out several factors the court should follow when deciding the way forward. We note it 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 new remedies provided for by that bill. As Lord Anderson [put forward](#) during the Lords 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".

Following sustained parliamentary and stakeholder pressure, and concerns that this part of the bill [undermined the rule of law](#), the government has reconsidered its position and is now proposing an amendment to Clause 37(8) on the Court's ability to grant remedies where environmental laws have been breached.

It suggests introducing a new Condition B which contains two additional two tests in limbs (a) and (b) that the court must apply before it can decide to grant a remedy. This new Condition B provides that the court must be satisfied that:

- (a) granting the remedy is necessary in order to prevent or mitigate serious damage to the natural environment or to human health, and
- (b) there is an exceptional public interest reason to grant it.

We welcome the government's acknowledgment that in some circumstances granting a remedy to address behaviour or damage will be necessary even if it may cause substantial hardship to the rights of a third party and that this will apply to both England and Northern Ireland. However, we have concerns about the wording of Condition B: the public interest test in limb (b) should be tempered or removed to avoid creating legal uncertainty and what appears to be a ridiculously high bar to overcome.

The OEP is already required to prioritise investigating conduct that may cause or has caused 'serious' damage to the natural environment or to human health. Limb (a) of Condition B would provide a final check on the OEP's definition of serious damage, ensuring enforcement action is a last resort given that the new system is intended to resolve potential breaches of environmental law at the earliest possible stage. By fulfilling limb (a) the OEP will also be demonstrating public interest given the clear overlap between the needs of public health, the economy and environmental protection.

Given the introduction of this new test in limb (a), the introduction of a further barrier to overcome through limb (b) and the concept of an 'exceptional public interest reason' to grant a remedy is seriously concerning. Following reforms in 2015, the Administrative Court in England and Wales cannot usually grant a remedy to the claimant where the outcome for them would not have been substantially different if the conduct complained of had not occurred. However, the court retains a discretion to grant a remedy in these cases if appropriate "for reasons of exceptional public interest".

That scenario is manifestly different to the scenario under consideration here, namely where an authority's conduct may cause or has caused serious damage to the environment or human health and granting a remedy could prevent or mitigate such serious damage.

The 'exceptional public interest' test is still relatively new, and there is little authority on its application, leading to uncertainty around what the test means and how it should be applied. More importantly, introducing a test with such a high bar will further restrict the court's ability to address systemic behaviour by public authorities that is causing serious environmental harm and affecting human health. Arguably, the prevention or mitigation of serious damage to the environment or human health is by its very nature of great public interest. **We therefore recommend that either limb (b) of Condition B is removed or the 'and' at the end of (a) is changed to 'or'.**

3. Storm Overflows

The section of the bill that will insert a new chapter on Storm Overflows into the Water Industry Act 1991 has been progressively improved as the bill has passed between the Houses. The chapter now includes:

- **141A Duty on sewerage undertakers to take all reasonable steps to ensure untreated sewage is not discharged from storm overflows** – requiring improvements in the sewerage systems, progressive reductions in the harm caused by untreated sewage discharges, and the Secretary of State, Director (Ofwat) and the Environment Agency to exercise their respective functions to secure compliance with this duty.
- **141B Storm overflow discharge reduction plan** – requiring the Secretary of State to prepare and publish a plan on reducing the frequency, duration, volume and adverse environmental and public health impacts of discharges, by 1 Sept 2022.
- **141C Progress reports on storm overflow discharge reduction plan** – requiring reporting against the above.
- **141D and 142E Annual reports on discharges from storm overflows** – requiring sewerage undertakers and the Environment Agency to each publish reports annually.
- **141F Interpretation** – which disappointingly excludes consideration of discharges due to various failures or blockages.

The government's latest addition, an amendment in lieu of Lords amendment 45B, adds **Clause 141EC Reduction of adverse impact of storm overflows**. This requires sewerage undertakers to secure a progressive reduction in the adverse impact of discharges from the undertaker's storm overflows, including impacts on the environment and on public health, under a duty enforceable by the Secretary of State or a delegated authority.

This clause captures the 'progressive reductions in harm' sought by the Lords amendment, and helpfully defines these as encompassing both environmental and public health, as opposed to one or the other. However, it falls slightly short of Peers' aspirations in that it **does not place a duty upon the Secretary of State** as set out in Lords amendment 45B and instead notes only that the duties are enforceable. While this is a missed opportunity, overall, this section of the bill represents a significant framework that will provide a structure for positive action to tackle the environmental and other harms caused by Storm Overflows.

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