

RTPI – EAST OF ENGLAND PLANNING CONFERENCE 5 NOVEMBER 2021

The Environment Bill

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HISTORY & PROGRESS

- Draft Environment (Principles and Governance) Bill published Dec 2018 [*precursor to a wider Environment Bill in 2019 took forward s16 of the Withdrawal Act 2018*].
- Environment Bill [Mk1] published Oct 2019 [*pre election*]
- Environment Bill [Mk2] introduced on 30 Jan 2020 [*post election amends*]

HISTORY & PROGRESS

Commons

- 2nd Reading Feb 2020
- Committee Stage Mar 2020
- Report Stage Jan 2021
- 3rd Reading May 2021

Lords

- 1st Reading May 2021
- 2nd Reading June 2021
- Committee Stage June 2021
- Report Stage Sept 2021
- 3rd Reading Oct 2021

HISTORY & PROGRESS

Final Stage

- Lords proposed series of Amendments – Oct 2021
- Commons Disagreed and Agreed Oct 2021
- Due for final consideration **8 Nov 2021**

WHAT IS IN IT?

- Long title:

“A Bill to make provision about targets, plans and policies for improving the natural environment; for statements and reports about environmental protection; for the Office for Environmental Protection; about waste and resource efficiency; about air quality; for the recall of products that fail to meet environmental standards; about water; about nature and biodiversity; for conservation covenants; about the regulation of chemicals; and for connected purposes.

WHAT IS IN IT?

- Two thematic halves.
 - (1) legal framework for environmental governance; and
 - (2) specific environment measures, including measures on waste and resource efficiency, air quality and environmental recall, water, nature and biodiversity, and conservation covenants.

WHAT IS IN IT?

- PART 1 - ENVIRONMENTAL GOVERNANCE
- PART 2 - ENVIRONMENTAL GOVERNANCE: NORTHERN IRELAND
- PART 3 - WASTE AND RESOURCE EFFICIENCY
- PART 4 - AIR QUALITY AND ENVIRONMENTAL RECALL
(*mv*)
- PART 5 – WATER
- PART 6 - NATURE AND BIODIVERSITY
- PART 7 - CONSERVATION COVENANTS
- PART 8 - MISCELLANEOUS AND GENERAL PROVISIONS
- 21 X SCHEDULES

WHAT DO PLANNERS NEED TO NOTE?

- THE OEP – Part 1 Chp 2 (cl 23 – 44)
- TARGETS and EIPs– Part 1 Chp 1 (cl 1 -22)
- AIR QUALITY – Part 4 (Cl 73-75)
- NATURE AND BIODIVERSITY - PART 6 (cl 99 – 119)
- CONSERVATION COVENANTS - PART 7 – (Cl120 – 142)

Office of Environmental Protection

- Withdrawal Act 2018 s.16 (now repealed) Bill to establish inter alia *“a public authority with functions for taking, in circumstances provided for by or under the Bill, proportionate enforcement action (including legal proceedings if necessary) where the authority considers that a Minister of the Crown is not complying with environmental law (as it is defined in the Bill)*

?



Office of Environmental Protection

- HMG's stated ambition for OEP is to create “ *a new, world-leading, independent environmental watchdog*” to replace the European Commission
- OEP intended to be an arms length non-departmental public body

Heads of OEP & Location

- 22 Dec 20 Dame Glenys Stacey appointed as OEP Chair Designate (started role on 1 Feb 21)
- 28 Jan 21 Natalie Prosser appointed Interim Chief Executive Officer (CEO)
- Office in Worcester

OEP Main Provisions Part 1

Established by Cl. 21, with aim to “*contribute to (a) environmental protection and (b) the improvement of the environment*” [Cl. 22(1)].

Specific duties include to:

- act objectively and impartially [Cl. 22(2)]
- prepare a strategy re exercise of functions [Cl. 22(3)] including enforcement policy [Cl. 22(6)] to be laid before Parliament and published ; [***but see Cl 24***]
- monitor/report to SoS on env. improvement plans/targets [Cl. 27] and env. law [Cl. 28]
- advise on changes to env. law [Cl. 29]
- enforce v. public authority re breaches of env. law [Cl. 30-40]

OEP Main Provisions Part 2

OEP:

- must handle complaints made by any person re a public authority breached of env. law [Cl. 31]
- may investigate a complaint [Cl. 32]
- may serve a public authority with an information notice where it has reasonable grounds for suspecting a serious breach [Cl. 34]
- may issue a public authority with a decision notice if satisfied on the BoP of a serious breach [Cl. 35]
- may apply to court for an environmental review [Cl. 37]; JR principles apply [Cl. 37(5)] and the court must make a statement of non-compliance if it finds that env. law has been breached. JR remedies apply minus damages [Cl. 37(8)]

Comment on OEP Provisions

- Some added functions e.g. monitoring/advisory roles [Cls. 28 & 29] but not clear whether this will be ad hoc or systematic/comprehensive
- Enforcement structure is similar to the EuComm with flexible multi-tiered structure (investigation, information, decision, Env Review, statement of non-compliance)
- But no provisions re damages/fines or therefore ‘real teeth’
- Most critically OEP independence is a concern. SoS responsible for appointment of non-exec Board members and budget and many of the powers are discretionary only.
- NB CI 24 **Guidance on the OEP’s enforcement policy and functions**

Comment on OEP provisions

CI 24 SoS to issue Policy and Function Guidance – (controversy).

- HL sought to amend and remove
- SoS may issue guidance to the OEP on the OEP's enforcement policy and to which OEP must have regard in—
 - (a) preparing its enforcement policy, and
 - (b) exercising its enforcement functions.
- SoS may revise the guidance 'at any time'.
- Gov now added in requirement for Guidance to be laid and scrutinised by Parl



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ENVIRONMENTAL TARGETS -

The intention-

- Queen's Speech 2019: *"...To protect and improve the environment for future generations, a bill will enshrine in law environmental principles and legally binding targets, including for air quality"*

ENVIRONMENTAL TARGETS – Key Provisions

- Pt 1 sets out a framework for legally binding targets including:
 - Cl. 1: SoS may set long-term (i.e. >15 yrs [Cl. 1(6)]) environmental targets re the natural environment / people's enjoyment of it. Priority areas are AQ, H₂O, biodiversity, resource efficiency / waste reduction. Targets must specify an objectively measurable standard and a deadline
 - Cl. 2: SoS must set a particulate matter (PM2.5 AQ) target

ENVIRONMENTAL TARGETS – Key Provisions cont.

- Cl. 3: SoS to seek advice from independent and expert persons before regulating under Cls. 1-2
- Existing targets (ETs) may be revoked/lowered if SoS is satisfied that (a) meeting ET would have no significant benefit or not meeting it or meeting a lower target or (b) changed circs mean ET is disproportionate re social/economic/other costs, with reasons to Parl.
- Cl. 4: SoS must ensure targets are set and met
- Cl. 5: on/before reporting date SoS must inform Parl. re whether targets met/reason for failure to do so and steps to be taken to achieve them
- Cl. 6: SoS must review targets and consider whether “significant improvement” test (objectively measured) met.

Comment on Key Target Provisions

- Earlier (pre-Oct '19) versions of the Bill had no target provisions at all.
- The current draft Bill has no set targets which are left to later stages. Stringency is key- unambitious targets would thwart the promise *“to lead the way... by enshrine[ing] in law...legally binding targets”*
- Cl. 3 requires SoS to seek independent expert advice but not to follow it and Cl. 3(3) gives great latitude to SoS to consider ETs disproportionate in soc/econ terms.
- Current draft leaves target ambition almost entirely up to the SoS of the day and creates a real risk of regressive weakening of env. standards.

Air Quality and Environmental Recall
Provisions of Part 4



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AIR QUALITY Part 4

- Part 4 of the Environment Bill 2019-21 contains provisions on AQ [and vehicle recall].
- Schedule 11 contains amendments to Part 4 of the Environment Act 1995 (air quality).
- Schedule 12 includes amendments to the Clean Air Act 1993 - for local authorities to impose financial penalties in smoke control areas.

AQ TARGETS see Clauses 1 and 2

- CI 1 provides for a new power for the Secretary of State to set long-term environmental targets by regulation.
- CI 2 requires the Secretary of State to make regulations setting a legally-binding target to reduce fine particulate matter (PM2.5) in ambient air.

Clause 1

Environmental targets

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1 Environmental targets

- (1) The Secretary of State may by regulations set long-term targets in respect of any matter which relates to—
 - (a) the natural environment, or
 - (b) people’s enjoyment of the natural environment.10
- (2) The Secretary of State must exercise the power in subsection (1) so as to set a long-term target in respect of at least one matter within each priority area.
- (3) The priority areas are—
 - (a) air quality;
 - (b) water;
 - (c) biodiversity;
 - (d) resource efficiency and waste reduction.
- (4) A target set under this section must specify—
 - (a) a standard to be achieved, which must be capable of being objectively measured, and
 - (b) a date by which it is to be achieved.5
- (5) Regulations under this section may make provision about how the matter in respect of which a target is set is to be measured.10
- (6) A target is a “long-term” target if the specified date is no less than 15 years after the date on which the target is initially set.

Clause 2

2 Environmental targets: particulate matter

- (1) The Secretary of State must by regulations set a target (“the PM_{2.5} air quality target”) in respect of the annual mean level of PM_{2.5} in ambient air.
- (2) The PM_{2.5} air quality target may, but need not, be a long-term target.
- (3) In this section “PM_{2.5}” means particulate matter with an aerodynamic diameter not exceeding 2.5 micrometres. 25
- (4) Regulations setting the PM_{2.5} air quality target may make provision defining “ambient air”.
- (5) The duty in subsection (1) is in addition to (and does not discharge) the duty in section 1(2) to set a long-term target in relation to air quality. 30
- (6) Section 1(4) to (9) applies to the PM_{2.5} air quality target and to regulations under this section as it applies to targets set under section 1 and to regulations under that section.
- (7) In this Part “the PM_{2.5} air quality target” means the target set under subsection (1). 35

AIR QUALITY PART 4 & SCH 11 AND 12

Part 4 and Schs 11 and 12 include:

- New duty on the S of S to review the Air Quality Strategy at least every 5 years and to report annually to Parliament on progress (Sch 11).
- Stronger requirements for local authorities under the Local Air Quality Management framework (Cl 71 and Sch 11).
- New powers for local authorities to impose civil penalty notices for the emission of smoke in smoke control areas in England (Cl 72 and Sch 12).
- The S of S has the power to make regulations for the recall of relevant products (for example, vehicles) (cl 73 and 74).

Schedule 11 – Local Air Quality Management Framework

3 After that section insert –

“80A Duty to report on air quality in England

As soon as reasonably practicable after the end of each financial year, beginning with the financial year in which this section comes into force, the Secretary of State must lay a statement before Parliament that sets out – 15

- (a) the Secretary of State’s assessment of the progress made in meeting air quality objectives, and air quality standards, in relation to England, and 20
- (b) the steps the Secretary of State has taken in that year in support of the meeting of those objectives and standards.”

“81A Functions of relevant public authorities etc 25

(1) The following persons must have regard to the strategy when exercising any function of a public nature that could affect the quality of air –

- (a) relevant public authorities;
- (b) local authorities in England; 30
- (c) county councils for areas in England for which there are district councils.

(2) In this Part, “relevant public authority” means a person designated in accordance with subsection (3) as a relevant public authority in relation to an area in England. 35

(3) The Secretary of State may by regulations designate a person as a relevant public authority in relation to an area in England if the person’s functions include functions of a public nature in relation to that area.



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Part 6 NATURE AND BIODIVERSITY

- Govt has described as *'framework of measures to support nature's recovery in line with the ambition set out in the 25 Year Environment Plan'*
 - a 10% biodiversity net gain requirement on new development
 - a strengthened biodiversity duty on public authorities
 - Local Nature Recovery Strategies (LNRSs)
 - Species Conservation Strategies and Protected Sites Strategies
 - targeted measures to protect existing trees
 - **conservation covenants (see later)**
- Local authorities key role to play in the delivery of measures

Biodiversity Gain and Planning

CI 92 – 94 and Sch 14

- Para 1 Sch 14 inserts new section 90A into TCPA 1990 and following government
- Amendments agreed to Sch 14 proposed changes to PA 2008 (ss 103 104 and 105 and Sch 2A)

Biodiversity Gain and Planning

- **S.90A TCPA inserts new Sch 7A** – makes requirement that all planning permissions in England be deemed to be subject to a condition to ensure the biodiversity value attributable to the development exceeds the predevelopment value by at least 10% - the biodiversity gain objective (BGO) aka BNG. The biodiversity value of a development will be measured using a DEFRA metric.

Biodiversity Gain and Planning

- Condition is:
 - *development may not be begun unless (a) a biodiversity gain plan has been submitted to the planning authority and (b) the planning authority has approved the plan*
- (ref paras 14 and 15)*
- Exceptions = via regs or urgent Crown and Dev Order.

Biodiversity Gain and Planning

CI 93 93 Biodiversity gain site register

- SoS by regs
- ‘biodiversity gain site’ is land where—
 - a) a person is required under a conservation covenant (see later) or s.106 or to carry out works for the purpose of habitat enhancement,
 - (b) that or another person is required to maintain the enhancement for at least 30 years after the completion of those works, and
 - (c) (ref Sch 7A) enhancement is made available to be allocated in accordance with the terms of the covenant or obligation to one or more developments for PP granted

Biodiversity Gain and Planning

- Ss 103 -105 and Sch 2A PA 08
- DCO's apps where NPS available and requires BNG then the DCO cannot be approved unless it provides the requisite BNG (10%, as per TCPA 1990). An NPS which does not provide BNG must include it on review.
- DCO's apps where no NPS available or where NPS does not require BNG (yet) Govt may issue a '*biodiversity gain statement*' or '*separate biodiversity gain statement*'.

Biodiversity Gain and Planning

- BGS must be consulted upon and then laid before Parliament when finalised.
- NB as with TCPA 1990 '*excluded development*' may be addressed regulations which allows certain development not to provide BNG.



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CONSERVATION COVENANTS

Background

- DEFRA - Consultation based on LC Report - 2018
- Govt Response - July 2019
 - Agreed “*useful tool for delivering lasting conservation outcomes*”
 - Differed from LC’s proposals
 - No separate Statute

Conservation Covenants

“We conclude from the responses that there is both the demand and potential for conservation covenants to make a key contribution to lasting conservation. We intend to introduce legislation for conservation covenants for England as part of the Environment Bill; based on the Law Commission Bill, but with amendments to allow organisations in addition to conservation charities and public bodies to apply to become responsible bodies and to allow the Secretary of State to set additional requirements for annual reports in secondary legislation”

DEFRA 2019

CONSERVAION COVENANTSs

Part 7

Pt 7 Cl 110 – 132

Creation of conservation covenant

- Cl108 Conservation covenant Agreements (CCAs)
- Cl109 Conservation Covenants
- Cl 110 Responsible Bodies

Conservation Covenants

- CI 111 CC is “*so much of a conservation covenant agreement as is given statutory effect by this section*”.
- CI 110 CCA –
 - **“signed as a deed by the parties”** – Amendment agreed
 - Agreement B/W landowner and a responsible body contains provision which
 - (i) is of a qualifying kind,
 - (ii) has a conservation purpose, and
 - (iii) is intended by the parties to be for the public good

Conservation Covenants

CI 110(2) **qualifying provision in CCA** is one which

- requires landowner to do, or not to do, something on land in England specified in the provision in relation to which the landowner holds a qualifying estate specified in the agreement for the purposes of the provision, or
- to allow the responsible body to do something on such land, or
- requiring the responsible body to do something on such land.

Conservation Covenants

- **CI 112 Responsible Bodies**
 - Secretary of State or ‘designated body’
 - local authority (as defined excl parish councils) may apply to be designated as RB ‘suitable’
 - non-local authority (incl charity) may be designated
 - if some of its main purposes or functions relate to conservation (in the case of public bodies or charities) &
 - is suitable to be a responsible body or “at least some of the body’s main activities relate to conservation” and it must also meet the suitability test.

Conservation Covenants

- CI 112 (9) definition of “*conservation*”
 - (a) the natural environment or natural resources of land,
 - (b) places of archaeological, architectural, artistic, cultural or historic interest, or
 - (c) the setting of land with a natural environment or natural resources or which is a place of arch

Conservation Covenants

- *Effect of conservation covenant*
 - Cl113 Local land charge
 - Cl113 Duration of obligation under conservation covenant : *indefinite (freehold) or remainder (leasehold) or shorter if CCA provides*
 - Cl115 Benefit and burden of obligation of landowner – *owed to RB*
 - Cl116 Benefit of obligation of responsible body – *owed to landowner and successor*

Conservation Covenants

- *Breach and enforcement*
 - CI 117 Breach of obligation – NB *where negative obligation breach includes permitting or suffering another; positive CC breached ‘if it is not performed’*
 - CI 118 Enforcement of obligation – *contractual remedies*
 - CI 119 Defences to breach of obligation – *matter beyond control; emergency avoiding loss of life or injury; land within designated area and breach*

Conservation Covenants

- *Discharge and modification*
- CI 120 Discharge of obligation of landowner by agreement
 - CI121 Discharge of obligation of responsible body by agreement
 - CI122 Modification of obligation by agreement
 - CI123 Discharge or modification of obligation by Upper Tribunal

Conservation Covenants

- CI 123 and Sch 17 — Discharge or modification of obligations under conservation covenants by Upper Tribunal
- *Application can also be made by Def to enforcement; No application under s 84(1) Law of Property Act 1925;*
- *Test for discharge is “if it is reasonable to do so in all the circumstances of the case” and based upon taking into account “changes any material change of circumstance since the making of the original agreement”; whether serves conservation purpose; serves public good*
- *UT also has powers to grant compensation*

Any Questions?

Thank you for listening!

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