The Environment Bill: Implications and Impact[1]

Ruth Keating

Barrister, 39 Essex Chambers

Introduction

This paper considers the most relevant implications and impact of the Environment Bill 2019–2021 ("the Bill") for planning. The Environment Bill was first proposed in July 2018. When it was first proposed, I am sure it was not expected that a paper would be presented on the Bill rather than the Act more than three years later. The Bill has endured a long and protracted passage through Parliament. It has been included in three parliamentary sessions and two Queen's speeches.[2] It has continued as a Bill even past a date of significance, 31 January 2020, and it has been delayed by a pandemic. It now seems it is on the final stretch, set to receive Royal Assent later this year.

It seems likely that the majority of the features that are present in the Bill will appear in much the same form in the final Act. However, given the increasing focus on the environment and climate change daily in the news, there is still time for some changes to be made and the Bill will likely attract attention as it moves through the final stages of the parliamentary process. Amendments have already been tabled, indicating the areas where further clarification or ambition is being sought.[3]

The Bill is a wide-ranging piece of legislation; it has grown in length and breadth and currently contains 145 clauses and 21 Schedules. Given the breadth of the Bill, this paper cannot cover in detail all of the draft provisions. For that reason, this paper focuses on the key areas that will impact planners and flags some of the other key, broader environmental developments in the Bill. Many of the provisions below focus on England; this is not to forget or overlook the instances where Northern Ireland, Wales and Scotland are doing things differently.

The Bill, and ultimately the Act, will update and in some cases, change much of the environmental law we have grown familiar with. The objective of the Bill is to introduce ground-breaking legislation, to achieve the aim of being "the first generation to leave the environment in a better state than that in which we inherited it".[4] It is aimed at many things; to fill the gaps which have been left in the landscape of environmental law as a result of Brexit and to develop the domestic legislative scheme. As a result, in some cases there is a risk that planners might sleepwalk into some quite fundamental changes.

This paper highlights the following areas of reform in the Bill:

- Background to the Bill.
- The new Office for Environmental Protection.
- Environmental principles.
- Environmental target provisions.
- Conservation covenants.
- Biodiversity gain.
- Air quality.
- Conclusion.

[1] The paper deals with the position as at 10 August 2021. By the time this paper is presented and read there will no doubt be further developments.

[2] The previous version of the Bill, the Environment Bill 2019, fell at the dissolution of Parliament before the December 2019 General Election. It was then reintroduced in substantially the same form in the current Parliament.

[3] "Running list of all amendments on report tabled up to and including 22 July 2021" available at *https://bills.parliament.uk/publications/42271/documents/584* [accessed 8 October 2021].

[4] Defra, "Our commitment to delivering a Green Brexit" 14 August 2019 available at *https://deframedia.blog.gov.uk/2019/08/14/our-commitment-to-delivering-a-green-brexit/* [accessed 8 October 2021].

Background to the Bill

There is an inextricable link between EU law, Brexit and the Bill. This is reflected by the Explanatory Notes to the Bill which state at para.17:

> "Most of the UK's environmental law and policy derives from the EU, and EU structures and processes provide for oversight and enforcement. The Bill sets out the measures needed to ensure that there is no environmental governance gap on withdrawal from the EU. The Bill will require the setting of long-term, legally binding and joined-up targets tailored to England, embed consideration of environmental principles in future policy making and establish the independent Office for Environmental Protection."

The impact of EU law on domestic European law has been profound.

Since 1973, the provisions of the EU Treaties and a considerable amount of EU legislation—through Directives, Regulations and decisions—have shaped UK environmental law. Not least these influences have included now well-established features of the domestic landscape including the Waste Framework Directive 1975,[5] the Birds Directive 1979,[6] the Environmental Impact Assessment Directive 1985,[7] the Habitats Directive 1992[8] and not least, the Strategic Environmental Assessment Directive 2001.[9] All of these developments, along with many others, have irrevocably shaped the environmental landscape.

An area of difficulty is where there will be divergence in the future and the ways in which the Bill might, in its current form, point in the direction of divergence. Previously, the need to follow the jurisprudence of the CJEU was a constant presence. The implications of Brexit, broadly speaking, are that the UK can now depart from pre-exit EU environmental law and evidently is not required to transpose or adhere to any post-Brexit changes to EU environmental law.

The Bill, of course, adopts features which were developed as part of EU law; notably, by way of example, the precautionary principle, the preventative principle and the polluter pays principle. However, they will of course no longer follow the same direct path of EU law. They may follow alongside an accompanying train track, occasionally waving over in agreement at the EU, and vice versa. However, of course, there is also the possibility for paths to diverge.

The assumption thus far has been that by retaining the existing body of EU law, not much has changed. However, that position was to prevent a tumultuous transition post Brexit, or the "cliff edge".[10] Some environmental law may develop in parallel with EU law, but we of course cannot assume that it will. This is substantiated, in part, by the removal of the "non-regression" principle from the final Withdrawal Agreement and Protocol which was in an earlier draft.

The UK is therefore at a turning point and one which will continue for some time. Both post-Brexit and in respect of the Bill: (i) it loses its established connection with the EU and it can therefore take a different approach than that taken by the EU and the CJEU; and (ii) Law which was previously based in EU principles can be developed, repealed or amended.

[5] Directive 75/442 on waste [1975] OJ L194/47.
[6] Directive 79/409 on the conservation of wild birds [1979] OJ L103/1.
[7] Directive 85/337 on the assessment of the effects of certain public and private projects on the environment [1985] OJ L175/40.
[8] Directive 92/43 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7.
[9] Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L197/30.
[10] EU Withdrawal Bill, Fact Sheet (Department for Exiting the European Union) available at *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/714373/2.pdf* [accessed 8 October 2021].

The OEP

Overview of the OEP

As Sarah Cary says in her paper:

> "[o]ver the past few years the UK has sought to transpose the requirements simply in to UK law, but there is an extraordinary amount of current activity to more fundamentally review the UK's approach to environmental policy including in planning framework."

Much of this change is driven by Brexit and also the need to provide robust environmental protection in the face of a climate emergency. This latter theme is also explored in Professor Valerie Fogleman's paper this year. There is much symmetry in the papers at this year's conference: the UK is standing on the edge of some substantial change, or at least the need for substantial change, in terms of planning and the environment.

In terms of governance, the functions previously provided by EU institutions—the European Commission and the CJEU—need to be replaced. Initially the Government's response was that oversight from Parliament, existing bodies and judicial review could provide a sufficient solution.[11] However, this later developed when then Environment Secretary Michael Gove set out plans to consult on a "world-leading body to give the environment a voice and hold the powerful to account".[12] He said it would "be independent of government, able to speak its mind freely".

A core aspect of the Bill is the establishment of the Office for Environmental Protection ("OEP").[13]Part 1 Ch.2, provides that the OEP is an independent statutory body. While the provisions have not come into force yet, the Interim OEP was established on 1 July 2021.

The OEP's enforcement powers address breaches of environmental law duties by public bodies and are aimed at filling the gap left by the supervisory powers of the European Commission following Brexit.[14] The OEP's constitution is not set out in the Bill, however it will be an arm's length body and its explanatory notes provide that the OEP is to be a non-Departmental public body.[15] Its principal objective is to "contribute to—(a) environmental protection, and (b) the improvement of the natural environment" (cl.23(1)) and in doing so it must act objectively and impartially (cl.23(2)). Dame Glenys Stacey's appointment as chair was announced in December 2020 and Natalie Prosser as the Interim CEO-designate.

In terms of process, the OEP must also prepare a strategy which sets out how it intends to exercise its functions (cl.23(3)) and that strategy must contain its enforcement policy (cl.23(6)). This strategy must be laid before Parliament and published; however, it may be revised at any time.

Concerns have been raised regarding the OEP's powers and remedies, along with its appointment and funding arrangements. The current position is that both the appointment of nonexecutive board members and allocation of budget would be the duty of the Secretary of State. A difficulty in principle arises in that there is the risk that non-departmental public bodies structured in this way are often subject to significant governmental oversight through the appointment process and financial allocation. Consequently, this can, or can be perceived to, impact on impartiality.

[11] Department for Exiting the European Union, "The Repeal Bill, Factsheet 8: Environmental protections" p.2 available at *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/714379/180511_EUWB_Environmental_Protections_factsheet_10_May_18.pdf* [accessed 8 October 2021].

[12] Defra and M. Gove, "Environment Secretary sets out plans to enhance environmental standards" 13 November 2017 available at *https://www.gov.uk/government/speeches/environment-secretary-sets-out-plans-to-enhance-environmental-standards* [accessed 8 October 2021].

[13] Clause 22.

[14] House of Lords European Union Committee Brexit: environment and climate change 12th Report of Session 2016–2017 (14 February 2017) HL Paper 109 at [84].

[15] It is noted that the Welsh Government is not including itself with the remit of the OEP and some concerns were raised in Wales regarding the likely independence of the OEP available at *https://www.bbc.com/news/uk-wales-55036371* [accessed 8 October 2021].

In terms of enforcement, cl.31 provides for the OEP's enforcement functions where there is a failure of public authorities to comply with environmental law. Further to that:

- Clause 32 provides that a person may make a complaint to the OEP under this section if the person believes that a public authority has failed to comply with environmental law.
- Related to this the OEP has the power to carry out an investigation into a complaint it receives (cl.33).
- Pursuant to cl.35, the OEP may give an information notice to a public authority if the OEP has reasonable grounds for suspecting that the authority has failed to comply with environmental law, and it considers that the failure, if it occurred, would be serious. The authority must supply any information relating to the alleged failure which is specified in the notice.
- Clause 36 continues that the OEP may also issue a decision notice to a public authority if the OEP is satisfied, on the balance of probabilities, of the above, i.e. that there has been a failure to comply with environmental law and it considers that the failure is serious. The notice will include the steps which the OEP thinks the public authority should take and the recipient authority must then respond in writing to that notice.
- The OEP may apply for judicial review, or a statutory review, in relation to conduct of a public authority (whether or not it has given an information notice or a decision notice to the authority in respect of that conduct) where the conduct: (i) reaches the "seriousness threshold", i.e. where the OEP considers that the conduct constitutes a serious failure to comply with environmental law;[16] or (ii) where the matter is urgent, i.e. making an application is necessary to prevent, or mitigate, serious damage to the natural environment or to human health.[17]
- Under cl.38, where the OEP has given a decision notice it may apply to the court for an "environmental review" where the seriousness threshold is met. If the court ultimately makes a statement of non-compliance, it may grant any remedy that could be granted by the court on a judicial review other than damages, but only if satisfied that granting the remedy 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.

It is worth noting that in previous iterations of the Bill, the OEP relied solely on judicial review as a means of challenging the acts or omissions of a public authority and so the newer three-tiered system provides further flexibility as needed to reflect seriousness. Over-reliance on these softer measures, however, could open the OEP up to the criticism that enforcement was weak at a critical time for the environment and further, the OEP will have to progress quickly through the various stages as necessary; so that flexibility does not give rise to delay.

Evidence

Several points arise from the above clauses, not least the standard of review which will be applied in future cases. There is a question mark over what, in practice, it will mean to have "failed to comply with environmental law". There are clear restrictions in judicial review. The focus is naturally on administrative compliance in the *Wednesbury* sense, rather than an assessment of substantive compliance with environmental outcomes.

[16] Clause 38 and Clause 39 of the current draft Bill.
[17] Clause 39 of the current draft Bill.

The CJEU considers whether there has been a failure by a Member State to fulfil its treaty obligations. The language is broader than the language used for judicial review. The test applied is also more extensive than that in the current Bill. The CJEU assesses whether the Commission has demonstrated that the national authorities made a "manifest error of assessment". For example, in the case of *Commission v UK*[18] the court held at [91]:

> "In that last respect, it is also clear from [85] and [87] of *Commission v Portugal* that, in order to demonstrate that the national authorities exceeded the limits of their discretion by failing to require that an impact assessment be carried out before giving consent for a specific project, the Commission cannot limit itself to general assertions by, for example, merely pointing out that the information provided shows that the project in question is located in a highly sensitive area, without presenting specific evidence to demonstrate that the national authorities concerned made a manifest error of assessment when they gave consent to a project. The Commission must furnish at least some evidence of the effects that the project is likely to have on the environment."

This is arguably a less deferential and more evidenced based approach than would be adopted in judicial review proceedings. There is therefore doubt as to whether the same standard of review will be retained by the current Bill. Previously, in infringement cases the CJEU has engaged in complex evidential questions. An example of this is the case of *Commission v Poland (BialowiezaForest)*[19] which concerned a site designated both under the Habitats Directive and Wild Birds Directive. The Commission commenced proceedings and alleged that the Polish Government had failed to ascertain that the measures would not adversely affect the integrity of the site. Taking examples from the judgment:

- At [185] of the judgment the court held as follows:

  > "… so far as concerns the impact of the active forest management operations at issue on saproxylic beetles, whilst the Republic of Poland contends that 'dead pines that are standing and exposed to the sun', which constitute the habitat of the goldstreifiger beetle, will not be removed, it does not, however, adduce any evidence in support of that assertion, which is, moreover, contradicted by the 2016 appendix and Decision No 51 which expressly provide for the removal of dead or dying trees without including the restriction relied on by the Republic of Poland."

- At [241] the court continued:

  > "Indeed, the Puszcza Białowieska Natura 2000 site is the most important area in Poland for presence of the white-backed woodpecker and the three-toed woodpecker. Dying and dead trees, in particular spruce trees a century old or more, are the most important feeding and breeding places for those two species of woodpecker. The removal of thousands of trees colonised by the spruce bark beetle will result in the deliberate destruction of the habitats of those species of woodpecker and a large-scale disturbance of their populations. In that regard, the Polish authorities have not adduced any evidence showing that the two species of woodpecker at issue benefit from intensification of tree felling where their habitats are located, whereas its intensification is, on the contrary, liable to accelerate the decline in numbers of those two species. Moreover, there is no data indicating whether, after the spread of the spruce bark beetle has ended, the population of those woodpecker species will recover to a greater or lesser degree.

[18] *Commission v United Kingdom* (C-508/03) EU:C:2006:287; [2007] Env. L.R. 1; [2006] J.P.L. 1673.
[19] *Commission v Poland (BiałowieżaForest)* (C-441/17).

> Finally, account should be taken of the fact that spruce trees regenerate themselves in areas affected by the spruce bark beetle, without the need for human intervention."

- At]257] the court held:

> "Contrary to the Republic of Poland's contentions, doubt cannot be cast on that conclusion by the 2015 impact assessment, since it merely indicates, in point 4.2.3, that 'it will be necessary to ensure that … forest management operations are suspended during the nesting period', without stating, however, that the requisite measures to establish a general system of protection for all species of wild birds have been taken."

- [264] also held:

> "In addition, it is to be noted that the Republic of Poland has merely submitted that neither the presence nor the way of life of the four bird species typical of natural forests, that is to say, the pygmy owl, the boreal owl, the white-backed woodpecker and the three-toed woodpecker, is threatened by the active forest management operations at issue. It has relied, in particular, for that purpose, on data relating to 2014 and 2015 in order to show that there was no reduction in numbers of the white-backed woodpecker. However, such data predate the application of those operations. Also, the fact that it is possible to find on other Natura 2000 sites in Poland numbers of the white-backed woodpecker and the three-toed woodpecker greater than those stated in the SDF in force for the the Puszcza Białowieska Natura 2000 site cannot invalidate the finding that those operations are such as to threaten the stability of the populations of those two species on that site."

Given the focus on judicial review is not as intensive as the CJEU's approach, it seems unlikely that this judgment could be replicated in judicial review. The above case is one example of the CJEU engaging in evidential questions in greater depth than is usually the case in judicial review.

Standard of review in "environmental review" cases

The two-month time periods for compliance with an information notice or decision notice under cll.35 and 36 may lead to delay in enforcement procedures.[20] In any event, these periods extend a review remedy long after the usual six-week challenge period in planning. However, equally, some environmental failings may require early and urgent action. In the planning context, these longer time periods may raise the difficult issue of whether it is appropriate to quash a planning permission which (although wrongly granted) has been in place for many months; this may also create some uncertainty for developments where an OEP investigation is outstanding.

Related to this, is the wording of cl.38 which arguably changes the balance in terms of current judicial review arguments. Of course, it is well established that the grant or refusal of the remedy sought by way of judicial review is ultimately discretionary.[21] The court also has the power, where it quashes a decision, to: (i) remit the matter to the decision-maker and direct it to reconsider the matter and reach a decision in accordance with the judgment of the court; or (ii) in so far as any enactment permits, substitute its own

[20] In respect of an information notice "[t]he recipient of an information notice must comply with subsection (3) by—(a) *the end of the 2 month period* beginning with the day on which the notice was given, or (b) *such later date as may be specified in the notice*" and in respect of decision notices "[t]he recipient of a decision notice must respond in writing to that notice by— (a) *the end of the 2 month period* beginning with the day on which the notice was given, or (b) *such later date as may be specified in the notice*" (emphasis added).

[21] *R. v Inland Revenue Commissioners Ex p. National Federation of Self Employed and Small Businesses Ltd* [1982] A.C. 617; [1981] 2 W.L.R. 722.

decision for the decision to which the claim relates.[22] However, cl.38 alters the landscape. Clause 38(8) in its current wording provides that where the court makes a statement of non-compliance it may grant any remedy that could be granted by it on a judicial review other than damages "*but only if satisfied* that granting the remedy 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" (emphasis added).

The difficulty with this approach, is that at the point where a court is considering a failure to comply with environmental law under cl.38, the OEP has already considered that the failure to comply is "serious" and so that threshold has already been passed. However, the court can then only grant a remedy if it can be satisfied that there is no substantial hardship or prejudice to third parties or that it would not be "detrimental to good administration". The latter concept is not one which is well defined in the case law nor is it elaborated on in any great detail in the Explanatory Notes to the Bill. Paragraph 330 of the Explanatory Notes simply provide that: "[t]his provision recognises the need to protect the orderly implementation of properly-reached decisions and recognises that finality in decision-making is important for both public authorities and the public." This is something which is always balanced in judicial review, but it is not determinative. As such, there is scope for cl.38(8) to develop out this principle beyond its current form, for example to prevent more decisions from being quashed.

In respect of the rights of third parties, the Explanatory Notes at paras 328 and 329 effectively provide that this provision allows third parties reliant on decisions involving the application of environmental law "to have confidence that those decisions will not be quashed or other judicial review relief granted outside the normal judicial review time limits". In terms of assessing substantial prejudice or hardship, the Explanatory Notes provide that "[e]xpenditure already spent in reliance of the decision in question may be relevant to the question of substantial prejudice or hardship, along with potentially the recoverability of the sums and the financial means of the third party".

The difficulty, particularly in terms of cases that relate to planning, is that there is often (or at least the potential for) significant prejudice and hardship where parties have benefited from planning permissions or environmental permits. This understanding is reflected in the current case law. For example, in the Court of Appeal's decision in *Tata Steel UK Ltd v Newport CC*[23] in which Carnwath LJ (as he then was) stated at [14] of the judgment that: "[w]henever a planning permission is quashed, inevitably, if people have acted upon it, it affects their interest and uncertainty is created …"

It will often be the case that expenditure, often significant expenditure, will have been made on that basis—yet that loss needs to be adequately balanced against potentially serious harm to the environment. Indeed, it is often the case, broadly speaking, that the larger the project, the more substantial the environmental impact and the greater the expenditure which will have been invested.

Equally in terms of balance and fairness, cl.38 does not make equivalent provision to balance the interests and rights of those third parties who are negatively affected by an unlawful consent to a particular development (as opposed to those who benefit from and rely on the consent). Arguably, this comes within the court's assessment at cl.38(5) in considering the failure to comply with environmental law. However, it is not as explicitly stated as the assessment of those who benefit from a consent at cl.38(8). In that light, it is difficult to see the necessity for cl.38(8). Just as the court will take into account prejudice to third parties who are adversely impacted by unlawful consent, so too will the court take into account substantial hardship and prejudice to the third parties who may have invested significant time and resources on the basis of permission which has been given. The question is the stage at which those factors are considered.

[22] CPR 54.19.
[23] *Tata Steel UK Ltd v Newport CC* [2010] EWCA Civ 1626.

It is only once these issues have been resolved that it will be clear if the OEP environmental review route will reach its full potential or whether complainants continue to try use more traditional and established methods of challenge.

Other issues for the OEP

Concerns have been raised about whether the body will be sufficiently independent from the government and whether the new enforcement system will have enough "teeth"; for example, it is notable that under the current drafting of cl.38, there is no provision for an award of damages to made or to impose a fine. In terms of parity with EU law, by way of example, the Treaty on the Functioning of the European Union ("TFEU") art.260(2) provides:

> "If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. *It shall specify the amount of the lump sum or penalty payment to be paid by the Member State* concerned which it considers appropriate in the circumstances." (emphasis added)

This power has been used, for example in the case of *Commission v Greece*[24] which concerned the Waste Framework Directive 1975 and ultimately resulted in the imposition of a fine of €20,000 per day from judgment until compliance.

Concerns over independence are reflected by some of the tabled amendments.[25] For example, one of those amendments is a proposed draft cl.25 which would be a new clause titled "OEP independence".[26] This would clarify that "the OEP has complete discretion in the carrying out of its functions, including in: (a) preparing its enforcement policy; (b) exercising its enforcement functions; and (c) preparing and publishing its budget". It is difficult to see that this amendment would make any substantial practical difference; however, it does speak to a potential perception issue.

There are outstanding issues which will become clear as time goes on. For example, it is not yet clear how the OEP will go about exercising its functions. For example, whether the OEP might set up a proactive programme for reviewing certain areas of the law or whether it will instead be responsive to issues as they are raised or become relevant.

The real question in terms of enforcement is whether equivalence has been achieved and if not, what is being lost through the lack of oversight at an EU level. It is the government's intention to replace what has been lost through EU institutions; some of those features have been replaced, while others will need some further development to be equivalent.

Environmental principles

The Bill, both in its original and in its current form, provides for environmental principles. Clause 17 provides that the Secretary of State must prepare a policy statement on environmental principles. A "policy statement on environmental principles" is a statement explaining how the environmental principles "should be interpreted and proportionately applied by Ministers of the Crown when making policy". As per cl.17(4) the Secretary of State must be satisfied that the statement will, when it comes into effect, contribute to "(a) the improvement of environmental protection, and (b) sustainable development".

The five environmental principles provided for in cl.17 are as follows:

[24] *Commission v Greece* (C-387/97) EU:C:2000:356; [2000] E.C.R. I-5047.

[25] "Running list of all amendments on report tabled up to and including 22 July 2021" available at *https://bills.parliament.uk/publications/42271/documents/584* [accessed 8 October 2021].

[26] This amendment is proposed Lord Krebs Baroness Parminter , Baroness Jones of Whitchurch and Lord Mackay of Clashfern.

- the principle that environmental protection should be integrated into the making of policies;
- the principle of preventative action to avert environmental damage;
- the precautionary principle, so far as relating to the environment;
- the principle that environmental damage should as a priority be rectified at source; and
- the polluter pays principle.[27]

Several points emerge from the above:

- There are clear implications for planners with cl.17(4)(a) providing that the Secretary of State must be satisfied that the statement will, when it comes into effect, contribute to "sustainable development".
- In terms of how this objective will be realised, the principles replicate much of what was protected under EU law. However, the principles then become slightly more complicated. Clause 17((1) provides that the Secretary of State "must prepare a policy statement on environmental principles in accordance with this section and section 18". The Bill could have adopted a more straightforward option, such as elaborating more on these principles in the Bill itself. However, instead the process adopted is that Secretary of State prepares a policy statement on environmental principles which will then set out the relevant principles by way of statutory guidance (as per cl.18).
- There is therefore a certain degree of uncertainty as to how these principles might be developed in this statutory guidance at this stage. This is because the Bill goes on to define "policy statement" at cl.17(2) as a: "a statement explaining how the environmental principles should be interpreted and proportionately applied by Ministers of the Crown when making policy." There is clearly, therefore, a gulf between the principles in the Bill (and ultimately the Act) and the way in which those principles will be interpreted as a result of the yet unpublished statement.

There are a number of points to make on the above. First, under the current draft of the Bill there is no explicit guarantee of the objective of a "high level of protection". This is unlike in the TFEU art.191(2) which required Union policy on the environment to aim at a high level of protection.

Article 191 reads (in relevant part):

> "…
> 2. *Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union*. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay." (emphasis added)

In respect of environmental principles, cll.18 and 19 set out additional relevant provisions. Under cl.19(1), a Minister of the Crown must when making policy, have "due regard" to the policy statement on environmental principles currently in effect. This clause curtails the effect of the environmental principles in two key ways. First, the Minister must do so only when "making policy". Therefore, on a plain reading of the clause the principles would not apply when a minister is exercising decision-making powers, for example in determining planning appeals for example through "recovered appeals". Further, the current wording only directly affects the actions of Ministers and it will not bind all public authorities. Second,

[27] There have been those who have argued for the inclusion of an "innovation principle" to help counter the effect of the precautionary principle (Pre-legislative scrutiny of the Draft Environment (Principles and Governance) Bill: Fourteenth Report of Session 2017–19 (HC 1893), para.15.) However, it does not appear that this principle will now make its way into the Bill at this late stage.

the minister must only have "due regard". However, this is evidently different than, for example, an obligation to "act in accordance with" the principles and policy statement.[28]

Clause 19(2) would also no doubt be the basis of future litigation. Clauses 19(1) and 19(2) provide that a "Minister of the Crown must, when making policy, have due regard to the policy statement on environmental principles currently in effect" however "nothing in subsection (1) requires a Minister to do anything (or refrain from doing anything) if doing it (or refraining from doing it): (a) would have no significant environmental benefit; or (b) would be in any other way disproportionate to the environmental benefit". The Explanatory Notes provide, at para.197:

> "In this context:
> - 'Significant' is to be understood as meaning 'not negligible'. This means that the policy statement does not need to be used to change a policy direction, if the environmental impact would be negligible.
> - 'Disproportionate' indicates situations in which action would not be reflective of the benefit or costs, environmental or otherwise. Action taken must reflect the potential for environmental benefit, as well as other costs and benefits. For example, there is no need for a Minister to change a policy in light of the principles policy statement if the cost of this change would be very high and the benefit to the environment would be very low. Equally, if the potential environmental benefit is high, then it is proportionate to take a more significant action based on the policy statement."

The Explanatory Notes and the wording of the Bill do not provide any considerable level of detail on this balancing act.

Further detail in the future

At this stage, the environmental principles in the Bill are in a relatively skeletal form. This is a point which is reflected in recent commentary, including by the OEP. In July 2021 the OEP released a statement outlining that:

> "[t]he Government recently consulted on the draft legally binding statement covering five environmental principles … We welcome the statement as an important step towards implementing the Environment Bill following Royal Assent. However, we recommend the draft policy statement is strengthened in a number of areas to ensure that protecting and enhancing the environment lies at the heart of future policy across government."[29]

The key recommendations made in that statement were: (i) that the Department for the Environment, Food and Rural Affairs ("Defra") should look again at the structure of the policy statement to ensure it avoids any unintended consequences, such as avoiding "applying them too late in policy development to be effective"; (ii) Defra should revisit the proposed approach to proportionality "to promote a less restrictive approach. The weight to be afforded to environmental effects in this balancing exercise needs to be fully clear"; (iii) Defra should revisit its approach to the integration principle to ensure it "genuinely helps deliver joined-up policy-making and is consistent with the approach taken elsewhere in international and domestic law"; and (iv) the OEP also expressed the view that "the draft policy statement lacks sufficiently detailed guidance to support policy-makers across government implement it thoroughly and consistently" and that greater guidance within and alongside the policy statement is needed.

[28] Pre-legislative scrutiny of the Draft Environment (Principles and Governance) Bill: Fourteenth Report of Session 2017–19 (HC 1893), paras 27–30.

[29] OEP, "Advice on the draft environmental principles policy statement" (6 July 2021) available at *https://www.theoep.org.uk/news/advice-draft-environmental-principles-policy-statement* [accessed 8 October 2021].

In its current form, the Bill leaves open the extent to which Ministers of the Crown could depart form established EU concepts when applying these environmental principles. Indeed, the statement itself will seemingly allow broad discretion to Ministers of the Crown in terms of "how the environmental principles should be interpreted and proportionately applied by Ministers of the Crown when making policy". This is particularly important when one considers that the obligation is to have "due regard" to the principles, rather than any statutory requirement to give primacy to them. Indeed, this is reflected by the Explanatory Notes at para.195 which explains that "due regard" is taken to mean "that, when making policy, Ministers of the Crown must have *the correct level of regard* to the content of the environmental principles policy statement" (emphasis added). An obligation on Ministers to "have regard" to the policy statement, does not impose a requirement to attach any weight to that statement. It is not, for example, an obligation to "act in accordance with" the principles and policy statement.[30]

The environmental principles in EU law have considerable case law behind them which will naturally develop in the future. The guidance in the Bill on how these principles will be interpreted is sparse and much will be left to the wording of the policy statement on environmental principles and the detail provided therein.[31]

Targets

The Queen's Speech of December 2019 announced a new Environment Bill, which would "enshrine in law environmental principles and legally-binding targets".[32]

Part 1 Ch.1 provides a framework for the setting of long-term environmental targets by the Government. In broad terms, amongst other things: it establishes the power to set long-term environmental targets and establishes interim targets; it requires the Government to create and maintain an Environmental Improvement Plan ("EIP") and requires a policy statement on environmental principles to be published.

The environmental target provisions were introduced on 15 October 2019. Prior to this, the draft Bill (December 2018) did not contain legally binding targets and this therefore left a significant gap in environmental protection.

Part 1 Ch.1 of the Bill sets out the framework for legally-binding targets. The main provisions, as currently drafted are cll.1–7.

- Clause 1(2) provides that the Secretary of State must exercise the power to set a long-term target in respect of at least one matter within each priority area. The four "priority areas" are (as per cl.1(3)): (a) air quality; (b) water; (c) biodiversity; and (d) resource efficiency and waste reduction.
- Further, cl.1(6) provides that 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. In practice, what this means is that the Government has until 2037 to meet any future legally-binding targets to improve air and water quality, tackle plastic pollution and restore nature. Interim targets will be set but these are not legally binding. The question that has been asked, for example by Greenpeace, is: "what is the good of legally-binding targets if they cannot be enforced for almost 20 years?"[33]

[30] Pre-legislative scrutiny of the Draft Environment (Principles and Governance) Bill: Fourteenth Report of Session 2017–19 (HC 1893), paras 27–30.

[31] A draft for consultation has been produced by Defra available at *https://consult.defra.gov.uk/environmental-principles/draft-policy-statement/supporting_documents/draftenvironmentalprinciplespolicystatement.pdf* [accessed 8 October 2021] and *https://consult.defra.gov.uk/environmental-principles/draft-policy-statement/* [accessed 8 October 2021].

[32] A previous speech had said that "for the first time, environmental principles will be enshrined in law". The UK, of course, had environmental principles enshrined in EU law and effective through the European Communities Act 1972.

[33] Greenpeace, "Environment Bill loophole leaves nature targets in 18-year lag" available at *https://www.greenpeace.org.uk/news/environment-bill-loophole-leaves-nature-targets-in-18-year-lag/* [accessed 8 October 2021].

- Clause 2 relates to particulate matter and provides that the Secretary of State must set a target, the PM2.5 air quality target, in respect of the annual mean level of PM2.5 in the ambient air.
- Clause 3 provides for a "species abundance target". Specifically, cl.3 provides that: "(1) The Secretary of State must by regulations set a target (the 'species abundance target') in respect of a matter relating to the abundance of species. (2) The specified date for the species abundance target must be 31 December 2030." Clause 3(4) in its current form provides: "Before making regulations under subsection (1) which set or amend a target the Secretary of State must be satisfied that meeting the target, or the amended target, *would further the objective of halting a decline in the abundance of species*" (emphasis added).
- Further, cl.4 requires the Secretary of State to seek advice from persons s/he considers to be independent and to have relevant expertise; however, this requirement does not extend to necessarily following it.
- In addition cl.4(3) in its current form provides that the Secretary of State may make regulations which revoke or lower an existing target only if satisfied that "(a) meeting the existing target would have no significant benefit compared with not meeting it or with meeting a lower target, or (b) because of changes in circumstances since the existing target was set or last amended the environmental, social, economic or other costs of meeting it would be disproportionate to the benefits". The wording of cl.4(3), which allows existing targets to be revoked or lowered due to changes in circumstances where the loss in environmental, social, economic or other costs would be disproportionate to the benefits, does leave much uncertainty and allows targets to be revoked with relative ease. A "significant benefit" is required by cl.4(3)(a) and it is yet undefined what this will require in practice.
- Clause 5 provides that it is the duty of the Secretary of State to ensure that targets which are set are met.
- Clause 6 outlines reporting duties pursuant to which the Secretary of State must specify a reporting date for any target and outlines how the reporting process will work.
- Clause 7 outlines the process by which targets are reviewed.

Setting targets

A number of points arise in respect of the above. At the outset, it is worth highlighting the disappointment which has been much repeated that the Bill does not itself set legally binding targets. As such the work is left to secondary legislation.[34] An example of this is the much-discussed area of air quality targets.

In respect of the targets which will be set, in terms of air quality, the main debate has been on the level at which air quality targets should be set, in particular whether the WHO's recommended limit value for particulate matter (PM2.5) should be explicitly adopted. This debate reflects the coroner's recommendation following the Ella Kissi-Debrah inquest which stated that:

> "The national limits for Particulate Matter are set at a level far higher than the WHO guidelines. The evidence at the inquest was that there is no safe level for Particulate Matter and that the WHO guidelines should be seen as minimum requirements. Legally binding targets based on WHO guidelines would reduce the number of deaths from air pollution in the UK."[35]

[34] The Bill has also been criticised for not being as expansive to the areas it could have set targets for, e.g. Waterwise, the water efficiency campaign group, expressed concern about the lack of water efficiency targets in the Bill, given that the Government's 25 Year Environment Plan highlighted the aim to introduce personal consumption targets for water use in England. Waterwise, "Policy" available at *https://www.waterwise.org.uk/policy/* [accessed 8 October 2021].

[35] E. Kissi-Debrah, "Coroner's Concerns" 21 April 2021 available at *https://www.judiciary.uk/publications/ella-kissi-debrah/* [accessed 8 October 2021].

This concern is reflected in one of the tabled amendments which proposes (in relevant part) that clearer and more ambitious targets be set:[36]

> "(2) The PM2.5 air quality target must—
> (a) be less than or equal to 10µg/m3,
> (b) so far as practicable, follow World Health Organization guidelines, and
> (c) have an attainment deadline on or before 1 January 2030."

A further amendment proposes as follows (in relevant part):[37]

> "(3A) The review of any air quality targets set under section 1 and the PM2.5 air quality target set under section 2 must include an assessment of the targets against the latest relevant air quality guidelines published by the World Health Organization at the time of the review.
> (3B) If any air quality targets set under section 1 and the PM2.5 air quality target set under section 2 are weaker than the latest relevant air quality guidelines published by the World Health Organization at the time of the review, the report required by subsection (4) must—
> (a) set out the steps the Secretary of State intends to take to ensure that those targets are at least in line with the latest relevant World Health Organization guidelines; or
> (b) explain the public interest reasons why the Secretary of State considers that those targets should continue to diverge from the latest relevant World Health Organization guidelines."

It is hoped that the targets which are ultimately put in place do not take an excessive amount of time to set, undermining their benefit, and that they are ambitious targets.

Conservation covenants

Overview of conservation covenants

Conservation covenants are addressed in Pt 7 of the Bill. The provisions apply to England only.

The Bill adopts a recommendation by the Law Commission made in June 2014.[38] Conservation covenants will be voluntary but legally binding written agreements between a landowner and a designated "responsible body" to conserve the natural or heritage features of the land. They interact with the provisions relating to biodiversity, as outlined below.

The purpose of conversation covenants is to conserve the natural environment and heritage assets for the public good on land which is subject to the conservation covenant and to ensure these benefits can be maintained in the long-term. Importantly, therefore, conservation covenants bind successors in title and so this prevents the conservation covenant having no effect if the land is sold or passed on.

The following are important points, on the current draft provisions, to bear in mind:

- A landowner, for the purposes of the provisions, must hold a "qualifying estate" in land, i.e. freehold or a leasehold granted for a fixed term of more than seven years (and that term has not expired).

[36] "Running list of all amendments on report tabled up to and including 22 July 2021" available at *https://bills.parliament.uk/publications/42271/documents/584* [accessed 8 October 2021]. Tabled amendment by Baroness Jones of Whitchurch, Baroness Walmsley, Baroness Finlay of Llandaff and Baroness Jones of Moulsecoomb.

[37] "Running list of all amendments on report tabled up to and including 22 July 2021" available at *https://bills.parliament.uk/publications/42271/documents/584* [accessed 8 October 2021]. Tabled amendment by Baroness Jones of Whitchurch, Baroness Walmsley, Baroness Finlay of Llandaff and Baroness Jones of Moulsecoomb.

[38] Law Commission, "Conservation covenants—Final Report" Law Com No.349, 24 June 2014.

- A responsible body is the Secretary of State and any qualifying body designated by the Secretary of State upon application by that body.
- A provision will qualify as a conservation covenant if it meets the following conditions: (i) it must be of a "qualifying kind" in that it requires a landowner or responsible body to not do something on the land (a "negative obligation") or to do something on the land (a "positive obligation"); and (ii) it must have a conservation purpose, meaning its purpose is to conserve the natural environment of land or to conserve the natural resources of land or setting of land which is a place of archaeological, architectural, artistic, cultural or historic interest.
- The conservation covenant agreement must be in writing and signed by the qualifying parties and contain a provision which qualifies as a conservation covenant.

In terms of the period for which the conservation covenant applies, unless the parties agree to a shorter period, an obligation under a conservation covenant has effect for the "default period" which is: (i) indefinitely where the relevant qualifying estate is freehold; or (ii) where the qualifying estate is leasehold the remainder of the term. The conservation covenant binds the landowner who created the conservation covenant and burdens the qualifying estate in the land which enabled them to create it — the conservation covenant will therefore bind any successors.

Conversely, conservation covenants operate such that they will not bind those whose interest in the land predates the creation of the conservation covenant. Further, a qualifying interest must be, in the case of leasehold, a leasehold granted for a fixed term of more than seven years. Therefore, leases granted for periods less than this will not qualify.

Remedies and enforcement

Clause 121 of the Bill provides that in proceedings for the enforcement of an obligation under a conservation covenant, the available remedies are specific performance, an injunction, damages, and an order for payment of an amount due under the obligation:

- As per cl.122, in proceedings for breach of an obligation it would be a defence to show that the breach occurred: (a) as a result of a matter beyond the defendant's control; (b) in emergency circumstances (an example of this might be to control flood water); or (c) where the land was within an area, designated for a public purpose, and compliance with the obligation would have involved a breach of a statutory control (an example of this might be a Site of Special Scientific Interest "SSSI"). In respect of the latter point this would be provided that the designation took place after the conservation covenant was created.
- Conservation covenants can be discharged or modified by agreement in writing (cll.123–125).
- Clause 126 also provides in respect of discharge or modification of an obligation on application to the Upper Tribunal. Under cl.131, the court (meaning the High Court or county court) or Upper Tribunal may, on the application of any person interested, determine the nature of conservation covenants i.e. (a) declare whether anything purporting to be a conservation covenant is a conservation covenant; (b) whether any land is land to which an obligation under a conservation covenant relates; (c) whether any person is bound by, or entitled to the benefit of, an obligation under a conservation covenant; and (d) the true construction of any instrument under which a conservation covenant is created or modified. An application cannot be made under the Law of Property Act 1925 s.84(2), which is the means by which an "ordinary" restrictive covenant can be discharged on the grounds therein.

The future for conservation covenants

The provisions on conservation covenants are a positive addition to the Bill. The key to success of conversation covenants will lie in good and proactive practice. In many cases, some planning authorities and developers may have experience of this unlocking development on sites which have features of national or local conservation interest. However, plainly there are many authorities and developers which have not been according sufficient priority to nature conservation, regarding it as at best as an inconvenience.

It is clear that there will be a very steep learning curve involved. Rural landowners, particularly large ones, have the potential to do well financially, if the provisions are understood and utilised. The government is expected to consult on and provide guidance on conservation covenants; clear guidance to enable parties to understand how these covenants will work will be crucial for uptake and utilisation.[39] Conservation covenants also interact with another important aspect of the Bill; biodiversity gain.

Biodiversity gain

Overview of biodiversity gain

The need for development shows no signs of decreasing in the UK.[40] However, DEFRA's 2018 biodiversity net gain Impact Assessment began:

> "The current planning system does not provide a level-playing field for developers to deliver 'net gain', defined as an overall increase in habitat area or quality following a new development. While there is some adoption of net gain approaches, it is not sufficient to deliver net gain at a national level."[41]

There is, therefore, a clear need to curb the effects of development on biodiversity and the current regime cannot address the scale of the loss which has been the outcome of generations of development.

There are a number of mechanisms already available which reflect offsetting methods for biodiversity net gain. For example, the current statutory duty, pursuant to the Natural Environment and Rural Communities Act 2006 s.40, imposes a duty on public authorities to have regard to biodiversity when exercising their functions. Further, local planning authorities have been encouraged, although not required, to obtain environmental compensation from developers through developer contributions, using the Community Infrastructure Levy and planning obligations (under the Town and Country Planning Act 1990 s.106).[42] In a similar vein, the Habitats Directive art.6.4 provides as follows:

> "If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted."

[39] Defra, Policy Paper, "10 March 2020: Nature and conservation covenants (Pts 6 and 7)" available at *https://www.gov.uk/government/publications/environment-bill-2020/10-march-2020-nature-and-conservation-covenants-parts-6-and-7* [accessed 8 October 2021].

[40] e.g. the Government's press release "Plan to regenerate England's cities with new homes" available at *https://www.gov.uk/government/news/plan-to-regenerate-england-s-cities-with-new-homes* [accessed 8 October 2021].

[41] See *https://consult.defra.gov.uk/land-use/net-gain/supporting_documents/181121%20%20Biodiversity%20Net%20Gain%20Consultation%20IA%20FINAL%20for%20publication.pdf* [accessed 8 October 2021].

[42] Further details available in "PAS Developer Contributions" (February 2020) available at *https://www.local.gov.uk/sites/default/files/documents/Start%20with%20the%20Spend%20in%20Mind_Best%20Practice%20Guide%20on%20Developer%20Contributions%20%28February%202020%29.pdf* [accessed 8 October 2021].

There are further features of biodiversity off-setting under the Conservation of Habitats and Species Regulations 2017[43] and Natural England's use of "management agreements" (under the Natural Environment and Rural Communities Act 2006 s.7).

However, the current regime has evidently not been sufficient to protect against the scale of biodiversity loss in the UK.[44] Further, the various potential ways in which offsetting could be achieved risks inconsistency and there is no procedure for local planning authorities to reliably measure biodiversity value. This was also effectively accepted by the Impact Assessment prepared in 2018 by DEFRA which opened by providing: "[w]hile there is some adoption of net gain approaches, it is not sufficient to deliver net gain at a national level."

Biodiversity is addressed in Pt 6 "Nature and Biodiversity". Part 6 and its provisions are complemented by the provisions on conservations covenants, discussed above. The provisions in Pt 6 would make it a mandatory condition for most development to achieve a 10% biodiversity net gain in order to proceed.

A key objective of the Bill is that it will contribute to the recovery of our natural environment, improving biodiversity and protecting urban street trees, in line with the ambitions set out in the 25 Year Environment Plan published in 2018. The Government's objective is that by making biodiversity gain a condition of planning permission, they will ensure it is a priority for developers and planning authorities. Conservation covenants are then one of the ways in which these benefits can then be secured in the long term.

At a high-level, the Bill contains provision for the following:

i. Schedule 14 makes provision for biodiversity gain to be a condition of planning permission in England.
ii. A 10% biodiversity net gain requirement will exist in respect of new development.[45] This will apply to all development permitted under the Town and Country Planning Act 1990, subject to exceptions. Exceptions to the requirement for a 10% biodiversity net gain are included in Sch.14 para.17, as follows: "[p]aragraph 13 does not apply in relation to—(a) development for which planning permission is granted—(i) by a development order, or (ii) under section 293A (urgent Crown development), or (b) development of such other description as the Secretary of State may by regulations specify."
iii. A strengthened biodiversity duty on public authorities.
iv. A requirement that developers must submit a "biodiversity gain plan" alongside usual planning application documents and the local authority will assess whether the requirement is met. This plan must include, amongst other matters, details of how: (i) the biodiversity value has been calculated; and (ii) the way in which the net gain target will be achieved.

The biodiversity value must be calculated using the Government's biodiversity metric calculator. In broad terms, the biodiversity net gain is calculated by deducting the pre-development biodiversity value (calculated at the time of the submission of the planning application) from the estimated post-development biodiversity value (at the time the development is completed).

Of course, a habitat's full biodiversity value may increase years after the development is "completed". This future value can be used where certain conditions are satisfied. In the case of on-site improvements the requirements are satisfied if: (i) it is secured under a planning condition, planning obligation or conservation covenant; (ii) the planning authority considers that the increase is significant in relation to

[43] Conservation of Habitats and Species Regulations 2017 (SI 2017/1012).

[44] See State of Nature (2019 report) available at *https://nbn.org.uk/wp-content/uploads/2019/09/State-of-Nature-2019-UK-full-report.pdf* [accessed 8 October 2021]. That report stated that: "Our statistics demonstrate that the abundance and distribution of the UK's species has, on average, declined since 1970 and many metrics suggest this decline has continued in the most recent decade. There has been no let-up in the net loss of nature in the UK."

[45] There is provision in Sch.14 for the percentage to be altered by regulations.

the pre-development biodiversity value; and (iii) it will be maintained for at least 30 years after the development is completed.

The post-development biodiversity value can also include off-site options. Where the required biodiversity net gain cannot be achieved fully through onsite restoration, the developer has two offsetting options for adding biodiversity value. These can include enhancing a habitat registered on the government's proposed "biodiversity gain register" or purchasing "biodiversity credits" from the Government. In respect of the first option, the developer can apply for a biodiversity value allocation from a registered "biodiversity gain site" and carry out the habitat enhancement under a conservation covenant or planning obligation. The latter option establishes a biodiversity credit system where the developer can buy biodiversity credits from the Secretary of State who will in turn use those payments to secure habitat elsewhere. Similarly, guidance will need to be produced on the "mitigation hierarchy"; whether biodiversity can be effectively achieved offsite will be a value judgment made by the decision maker and so guidance will be needed to ensure consistency.

The administration of this new system will be the responsibility of local planning authorities.

The Bill also strengthens the biodiversity duty on public authorities. The Natural Environment and Rural Communities Act 2006 currently includes a duty on public authorities to have regard to the conservation of biodiversity. The Bill amends this duty so that there is an expectation on public authorities to look and act strategically; with cl.98 providing for a general duty to conserve and enhance biodiversity and cl.99 providing for biodiversity reports, in which public authorities must publish, amongst other areas, a summary of the action which the authority has taken to comply with its duties in respect of biodiversity.

Further, it is also of note that cll.100 to 104 provide for local nature recovery strategies for areas in England.[46] A local nature recovery strategy for an area ("the strategy area") is to be prepared and published by the responsible authority. Clause 101 provides that in terms of preparation the responsible authority for a local nature recovery strategy is one appointed by the Secretary of State and will be: "(a) a local authority whose area is, or is within, the strategy area; (b) the Mayor of London; (c) the mayor for the area of a combined authority established under section 103 of the Local Democracy, Economic Development and Construction Act 2009; (d) a National Park authority in England; (e) the Broads Authority; (f) Natural England." There is no time period set by the Bill for when local natural recovery strategies must be reviewed by. In terms of the content of local nature recovery strategies they are to include a statement of biodiversity priorities for the strategy area, and a local habitat map for the whole strategy area or two or more local habitat maps which together cover the whole strategy area. The Bill does not provide further detail on how local nature recovery strategies will form a part of decision making by local authorities.

However, in the consultation launched by Defra on 10 August 2021, Defra outlined that:

> "Species Conservation Strategies and Protected Sites Strategies will drive a more strategic approach to planning for the needs of our most precious species and places, whilst conservation covenants will strengthen the ability of organisations and individuals to ensure their land will be managed for nature in the longer term. Local Nature Recovery Strategies have been designed to work with all of these measures and to help link them together in a coherent and effective way."[47]

As such, it is anticipated that these strategies will assist public authorities acting as decision makers and they will inform what funding to make environmental improvements landowners and managers will be able to access.

[46] Defra has launched a consultation on local nature recovery strategies which closes on 2 November 2021 available at *https://consult.defra.gov.uk/land-use/local-nature-recovery-strategies/* [accessed 8 October 2021].

[47] See *https://consult.defra.gov.uk/land-use/local-nature-recovery-strategies/* [accessed 8 October 2021].

The future of biodiversity gain

These provisions will put the issue squarely onto the agenda for all planning applications, at a time when there may be great pressure for development to aid economic recovery and to generate much-needed housing.

Defra has been advocating for the introduction of offsetting for a number of years. For example, in the 2013 Green Paper "Biodiversity offsetting in England" which described offsetting as follows:

> "Offsetting is a simple concept. It is a measurable way to ensure we make good any residual damage caused by development which cannot be avoided or mitigated. This guarantees there is no net loss from development and supports our ambition to achieve net gain for nature."[48]

The use of offsetting is common across the world.[49] An example of this is the Wetland Mitigation Banking in the US whereby wetland or stream mitigation banks offer mitigation credits to offset ecological losses that occur in wetlands and streams. These are regulated and approved by the Army Corps of Engineers and the Environmental Protection Agency.[50]

Further guidance will be needed in addition to the detail laid out in the Bill itself. In this respect, Defra has suggested that it may update national planning policy and will provide guidance to local planning authorities.[51]

When one thinks of biodiversity net gain there are inevitable questions which flow around the extent to which it is possible to accurately ascribe a measurable value to diversity. The Bill does this by establishing a "biodiversity metric" (Sch.14) which "is a document for measuring, for the purposes of this Schedule, the biodiversity value or relative biodiversity value of habitat or habitat enhancement". This metric, is to be produced and published by the Secretary of State and is being developed by Defra with assistance from Natural England.[52]

Biodiversity Metric 2.0 has been updated and replaced by Biodiversity Metric 3.0 which was published on 7 July 2021. The metric enables practitioners to calculate the losses and gains by assessing habitat in respect of the following characteristics: (i) distinctiveness, i.e. whether the habitat is of high, medium or low value to wildlife; (ii) condition: whether the habitat is a good example of its type; and (iii) extent: the area, in hectares or kilometres (depending on habitat types), that the habitat occupies. In effect, the metric uses habitat as a marker for biodiversity. When biodiversity is understood as an ecosystem, the concept can become complex and the metric may risk being an oversimplified approach to a complex problem.

This latter point is particularly relevant where a developer buys biodiversity credits. Each ecosystem is unique and therefore offsetting must take account of this. Further, if credits are being bought for an existing site which already has a developing habitat effort will need to be made to ensure that the biodiversity gain in question would not have been achieved without the offset. There is a risk that by seeking the simplicity and ease of the biodiversity credits system, this scientific complexity will be underplayed.

Indeed, this is reflective of criticisms which have been made previously. The House of Commons Environmental Audit Committee said in 2013:

> "If the Government nevertheless decides now to introduce offsetting, the current proposals need to be improved in several ways. The metric, which the Government estimates would take only 20

[48] DEFRA, "Biodiversity offsetting in England" (Green Paper 2013) p.1.

[49] The International Union for Conservation of Nature, and the Biodiversity Consultancy global biodiversity offset policy database available at *https://www.iucn.org/news/business-and-biodiversity/201711/global-database-biodiversity-offset-policies-launched-preliminary-analysis-shows-progress-biodiversity-rich-mining-countries* [accessed 8 October 2021].

[50] US Environmental Protection Agency, "Mitigation Banks under CWA Section 404" available at *https://www.epa.gov/cwa-404/mitigation-banks-under-cwa-section-404* [accessed 8 October 2021].

[51] DEFRA, "Net gain Consultation proposals" (December 2018), p.40.

[52] Further details available at *http://nepubprod.appspot.com/publication/5850908674228224* [accessed 8 October 2021].

> minutes to apply, is overly simplistic. A proper metric needs to reflect the full complexity of habitats, including particular species and 'ecosystem networks', and recognise the special status of ancient woodlands and sites of special scientific interest. Biodiversity assessments would need to be transparent and independent to command respect from developers, local authorities, environmental groups and local people."[53]

These concerns are also reflected in Sarah Cary's paper. Therein she says:

> "I raise a strong concern about the limitations of the current practice of environmental and sustainability assessment in the face of rapidly changing environment. It seems entirely possible that the evidence bases on which the environmental and habitat assessments are done could be changing faster than the policies themselves."

This is a very real and practical problem.[54]

It will likely be the case that through future iterations of the biodiversity metric and some trial and error this balance between simplicity and complexity will need to be redressed. Similarly, this is not least because given the scientific complexity of measuring habitats and biodiversity, thinking will develop and so the biodiversity metric must be similarly developed.

Further, decision makers will have to reorientate themselves in terms of how they consider biodiversity net gain. This is not a case of the old regime being carried forward. By analogy, in April 2018, the CJEU handed down its judgment in *People Over Wind & Peter Sweetman v Coillte Teoranta*.[55] The now well-known judgment clarified that when screening decisions are being made for the purposes of deciding whether an appropriate assessment is required (i.e. whether a project or plan is likely to have significant effect on a protected habitat), competent authorities cannot take into account any mitigation measures. Consequently, a competent authority may only take account of mitigation measures intended to avoid or reduce the harmful effects of a plan or project as part of an appropriate assessment itself. This was, at the time, a departure from the approach established by domestic case law, which had permitted mitigation measures to be taken into account at the screening stage. Further, the concept best scientific knowledge and certainty "beyond all reasonable doubt" is something which has permeated the cases on appropriate assessments before the CJEU. The approach has been not to take into account the future benefits of such 'measures' if those benefits are uncertain or the available scientific knowledge does not allow them to be identified with certainty.

These latter questions will be ones which local planning authorities will need to consider when assessing biodiversity net gain proposals and they are questions which will need to be considered when various iterations of the Biodiversity Metric are developed over time.

Air quality

Overview of air quality provisions

Part 4 of the Bill deals with air quality and environmental recall. In broad terms, the provisions most relevant to planners are:

- Part 4 contains the majority of the Bill's air quality provisions, but not the entirety. Some relevant provisions also feature in Pt 1 of the Bill, as outlined above; including the power

[53] Biodiversity Offsetting—Environmental Audit Committee, "Summary" (2013) available at *https://publications.parliament.uk/pa/cm201314/cmselect/cmenvaud/750/75003.htm* [accessed 8 October 2021].

[54] By way of example, the forthcoming UN Biodiversity Conference is due to take place in Kunming, China which will discuss the new international biodiversity framework.

[55] *People Over Wind & Peter Sweetman v Coillte Teoranta* (C-323/17) EU:C:2018:244; [2018] P.T.S.R. 1668.

to set environmental long-term targets through secondary legislation, with air quality identified as a priority area. Furthermore, cl.2 would introduce a duty on the Government to set a legally-binding target for fine particulate matter (PM2.5), discussed above.

- As per cl.72, Sch.11 contains amendments to the Environment Act 1995 ("the 1995 Act") Pt 4. These changes include amendments to s.80 of the 1995 Act which obliges the Secretary of State to publish a policy statement on air quality assessment and management. Amongst other changes it would introduce a new subs.(4A), which would require the strategy to be reviewed, and, following that review, amended if necessary. Minimum review periods are also set which would require a review initially within 12 months of the schedule coming into force, and then subsequent reviews at least once every five years after that. This remedies the omission of a review mechanism in s.80 of the 1995 Act.
- Schedule 11 para.3 introduces a new s.80A. This would require the Secretary of State to lay an annual statement before Parliament setting out an assessment of progress made towards meeting air quality objectives and standards in England, as well as the steps the Secretary of State has taken in support of meeting those standards and objectives.
- Schedule 11 para.4 adds a new s.81A. This would impose a requirement on certain relevant public authorities to co-operate with local authority air quality action planning, once the relevant public authority has been designated by the Secretary of State. It would also provide for a duty to have regard to the National Air Quality Strategy when carrying out functions and services which might affect air quality to additional bodies who may be relevant to meeting air quality standards and objectives.
- Paragraph 5(3) provides that s.82 of the 1995 Act (which deals with local authority reviews of air quality) would read:

> "(4) Where subsection (3) applies to a local authority, it must identify any parts of its area in which it appears that air quality standards or objectives are not likely to be achieved within the relevant period.
>
> (5) Where subsection (3) applies to a local authority in England, it must also—
>
> (a) identify relevant sources of emissions that it considers are, or will be, responsible (in whole or in part) for any failure to achieve air quality standards or objectives in its area,
>
> (b) in the case of a relevant source within the area of a neighbouring authority, identify that authority, and
>
> (c) in the case of a relevant source within an area in relation to which a relevant public authority or the Agency has functions of a public nature, identify that person in relation to that source."

- Therefore para.5(3) would amend s.82 such that local authorities in England must identify which sources of emissions they believe are responsible for failure to achieve air quality standards or objectives; identify neighbouring authorities who may be responsible for emissions; and identify other relevant public authorities or the Environment Agency who may be responsible for emissions. This would establish a more comprehensive review process.
- Schedule 11 para.6 would create a new s.83A; the effect of which would to require local authorities to prepare an action plan to ensure air quality standards and objectives are achieved in the Air Quality Management Area it has designated. Action plans may be revised, and must be revised by relevant local authorities, if new or different measures are required. There

is also a mechanism for resolving any disputes as to the content of an action plan between a county and district council by making a referral to the Secretary of State.

- Schedule 11 para.8 introduces new ss.85A and 85B, aimed at increasing cooperation at a local level, and sharing responsibility for tackling local air pollution between relevant public bodies ("air quality partners"). An "air quality partner" is a body responsible for emissions contributing to exceedance of local air quality objectives, and they are under a duty to assist a local authority, upon request, in meeting air quality standards and objectives, where there is an exceedance. However, the effectiveness of this requirement is undermined by subs.3 of the new s.85A which provides: "[a]n air quality partner may refuse a request under subsection (2) to the extent it considers the request unreasonable."
- Pursuant to the new s.85B, a local authority in England that intends to prepare an action plan must notify each of its air quality partners that it intends to do so. Air quality partners are under a duty to propose measures for inclusion in the plan they will take to contribute to achievement or maintenance of air quality standards. They must also specify a date for each particular measure by which it will be carried out and carry out those measures "as far as is reasonably practicable" by those dates.
- Paragraph 10, the new s.86A would require a local authority in London intending to prepare an action plan to notify the Mayor of London. The Mayor of London must then provide the authority with proposals for particular measures the Mayor will take to contribute to the achievement, and maintenance, of air quality standards and objectives in the area to which the plan relates before the end of the relevant period. In turn, an action plan prepared by a local authority in London must set out any proposals provided to it by the Mayor.
- Finally, paras 11 and 12 amend ss.87 and 88 of the 1995 Act to broaden the range of bodies subject to these regulating powers for air quality, so as to include relevant county councils, relevant public authorities and the Environment Agency.

The future of the air quality provisions

At this stage, the Bill primarily facilitates the making of air quality plans rather than setting anything in stone. The risk of course is that air quality limit values and targets could slip behind those required within the EU after Brexit. A proposed amendment was made to the Bill which would have set the target for PM2.5 at 10μg/m^3 as an annual average, the level advised by the World Health Organisation.[56] This would have provided a stricter target than the 25μg/m^3 currently prescribed by the EU's Air Quality Directive. However, that amendment was rejected. It is hoped that the targets ultimately set are ambitious.

It is positive that a review mechanism has been introduced for air quality assessment and management. However, the difficulty is that following a 12-month initial review the next review may occur as infrequently as every 5 years.

These provisions would introduce a more focused framework for air quality. However, much will depend on the co-operation which is achieved between the relevant bodies and the content of the action plans created.

Conclusion

The Bill introduces many changes, some more or less relevant to planners. It is worth mentioning that important changes which will be made in respect of: (i) waste and resource efficiency; (ii) water; (iii) the

[56] WHO, Ambient (outdoor) air pollution (2 May 2018) available at *https://www.who.int/news-room/fact-sheets/detail/ambient-(outdoor)-air-quality-and-health* [accessed 8 October 2021].

regulation of chemicals; and (iv) the recall of products. All of these will need to be considered by practitioners and planners, where relevant, as part of the package of measures the Bill brings into being.

The Government has referred to the Bill as a "landmark and world-leading legislation which will transform how we protect and enhance our environment" and said that it "sets out a comprehensive and world-leading vision to allow our environment to prosper for future generations and ensure that we maintain and enhance our environmental protections".[57] That is the challenge that the Bill has set itself; to both maintain and enhance our environmental protections.

Picking some of the overarching points in respect of the Bill:

- There is a potential governance left from Brexit which the OEP, as this stage, may not adequately fill. Those involved in the planning and environmental world will need to stay agile in the months to come as it becomes clearer the way in which the OEP intends to use decision notices, enforcement notices and environmental review.
- Arguably the evidence which will be put forward in the litigation arising from the above will differ to that which would have been put forward before the CJEU. The CJEU's assessment of whether the national authorities made a "manifest error of assessment" is evidently different and so cases will have to be appropriately reformulated.
- So too will those involved in the planning world need to be mindful of the way in which the two month time periods in respect of decision notices and information notices risk altering the established and understood six-week challenge period in planning. There is the risk that these two different time periods will create some uncertainty in respect of developments where decision notices or information notices are outstanding.
- Planners will need to closely watch the future development of policy statement on environmental principles; the impact of this statement will be in the detail.
- Conservation covenants and biodiversity net gain offers some of the most exciting development in the Bill; real benefits can be achieved if these measures are utilised effectively.
- Finally, an area of development before the Bill is published will likely be whether specific environmental targets are included or not; it is hoped that there will be. This would offer greater certainty, as well as greater protection.

When one looks at the Bill as a whole the question that emerges is whether it truly is the "transformation" promised by Government and whether it fulfils the Government's "world leading" ambitions. Along with the points made above, it would be a welcome addition to the Bill and ultimately the Act if some of this language could be reflected as an overriding environmental objective in the Bill.

Intense debate has surrounded the Bill's provisions, and this will no doubt continue in the autumn. In terms of when the Bill might achieve Royal Assent, this is hoped to be before the 26th UN Climate Change Conference of the Parties (COP26) starts in Glasgow on 31 October.[58] The Bill is both necessary and welcome; being the first Environment Bill for over 20 years. Against this backdrop, the world is facing a reckoning with climate change and planning has a major role to play in that challenge. It is hoped that the Bill's final provisions and secondary legislation arising from it will reflect that challenge and "ensure that we maintain and enhance our environmental protections" at this crucial point in time.

[57] Statement available at *https://www.gov.uk/government/news/environment-bill-resumes-passage-through-parliament* [accessed 8 October 2021].
[58] Response from Lord Goldsmith to a Lords oral question, 10 June 2021 available at *https://hansard.parliament.uk/Lords/2021-06-10/debates/A1E7F695-3076-4496-B934-264676E21628/details* [accessed 8 October 2021].