

Briefing for Second Reading of the Environment Bill

October 2019

The Aldersgate Group is an alliance of major businesses, academic institutions and civil society organisations, which drives action for a sustainable economy. Our corporate members, who come from across the economy and have a collective global turnover of over £550bn, believe that ambitious environmental policies make clear economic sense for the UK.¹ When well-designed and properly enforced, ambitious environmental regulations provide a stable environment for businesses to invest in, support innovation in new green solutions and products and provide a level playing field across the economy, thereby delivering both environmental improvements and economic growth.²

The Environment Bill is a crucial opportunity to create a governance framework that is as robust, long-term and world-leading as the Climate Change Act and has as its clear objective the reversal of the decline of our natural environment. Our engagement with business during the development of the Bill shows that there is strong support for a framework that robustly enforces environmental law after the UK leaves the European Union. Businesses have also publicly backed the introduction of a framework that includes a comprehensive range of legally binding environmental improvement targets to support investment in the natural environment over the long term.³ The inclusion of a process to set such targets in the Environment Bill is hugely welcome. Business and civil society look forward to continuing to work with government to develop these targets and ensure they drive immediate action.

Work is still needed to strengthen the Bill – with areas such as the applicability of environmental principles and the Office for Environmental Protection’s (OEP) independence remaining a cause for concern. We hope that Members of Parliament will be able to raise the following points during the Environment Bill’s Second Reading debate and allow the government to provide further clarification.

This briefing is focused on improvements that need to be made to the overall governance regime being introduced under Part 1 of the Bill.

TARGETS (clauses 1-6)

Businesses have repeatedly welcomed the environmental improvement ambition shown in the government’s 25 Year Environment Plan. However, without the clarity provided by underpinning legislation and long-term targets, this ambition will have limited impact on business investment decisions. The inclusion of a target-setting process in the Environment Bill is a crucial step forward. Once in legislation, these targets can then genuinely shape environmental policies in the next couple of decades, provide much needed long-term policy direction to business and help drive private investment in the natural environment.

There are a number of areas where this chapter of the Bill could be strengthened.

¹ Recommendations made in this briefing cannot be attributed to any single organisation and the Aldersgate Group takes full responsibility for the views expressed.

² BuroHappold Engineering (December 2017) *Help or Hindrance? Environmental regulations and competitiveness*

³ Letter to the editor of the Sunday Telegraph “Greener business” published 4 November 2018 and signed by 19 businesses <https://bit.ly/2DlwPwm>

Process: The Bill states that in the setting of targets, the Secretary of State must seek advice from persons considered independent and to have relevant expertise (**clause 3(1)**). Whilst receiving advice from existing bodies will be important, an expert body should be formed prior to the creation of the OEP to provide the Secretary of State with advice on targets. This advice must be published. It is also crucial that there is wide stakeholder engagement and public consultation prior to the targets being set and it would be helpful to see ministers confirm that this will be the case. Finally, as these will be first of a kind targets, some pre-legislative scrutiny will be needed.

Significant environmental improvement test: The Secretary of State must review whether the targets set “would significantly improve the natural environment in England” (**clause 6(3)**). There are two concerns here. First, the wording of the Bill means that the test would be undertaken three months after the first targets are set. We believe that is inefficient and that targets should be set with the ‘significant environmental improvement test’ in mind in the first place. Second, it is not clear how the significant environmental improvement test would be defined – and particularly against what. We would argue that the test should be applied on a target specific basis rather than on a cumulative assessment basis. This is because a cumulative assessment could mean that unambitious targets in one area are hidden by more ambitious targets in other areas.

Driving action to meet the targets: As the Bill is currently drafted, action to meet the targets could potentially be backloaded. As Professor Maria Lee of UCL has pointed out: “the minimum fifteen-year time span (**clause 1(6)**) pushes legal compliance far into the future”.⁴ The five-yearly interim targets do come with a framework of monitoring and review but they are not legally binding. In order to ensure that future governments are required to take early action towards meeting the targets, it is important that Environmental Improvement Plans set out steps that enable the targets to be met and that interim targets are made legally binding. In terms of a precedent for legally binding interim targets, it is worth noting that the Climate Change Act places a duty on the Secretary of State to ensure that the UK’s net carbon account for a budgetary period does not exceed the carbon budget.

Revoking or lowering targets: Building on the concern above, the Bill allows the Secretary of State to revoke or lower a target if changes in circumstances mean “the environmental, social, economic or other costs of meeting it would be disproportionate to the benefits” (**clause 3(3)(b)**). This will become more likely if early action is not taken to deliver interim targets. This power is therefore a concern. We are also concerned by the lack of scrutiny surrounding the Secretary of State’s power to revoke or lower a target. In order to ensure that targets are seen as credible by the business community, the power to dilute such a target should take into account expert advice, be subject to consultation and be approved by Parliament through the affirmative procedure (again, there is a useful precedent in the Climate Change Act).

Initial range of targets to be set: The Secretary of State must initially set one target in each of the four priority areas – air quality, water, biodiversity and resource efficiency and waste reduction (**clause 1(3)**). However, it is likely that a number of interdependent targets should be set in each area in order to deliver significant and meaningful environmental improvement. For instance, resources and waste could see the production of a resource

⁴ Professor Maria Lee (18 October 2018) “The Environment Bill: A framework for progressive environmental law?”

productivity and a waste minimisation target. The biodiversity target should recognise the complexity of the issue at hand and cover aspects including habitat extent, condition and connectivity, and species abundance.

ENVIRONMENTAL PRINCIPLES (clauses 16-18)

Businesses would like to see continued robustness and consistent application of the environmental principles in future policy and decision-making.⁵ Therefore, although the government has amended the Bill so that ministers must have “due regard” to the environmental principles policy statement (instead of “have regard”), more work to provide equivalence with current arrangements is still required here as this duty still only applies to Ministers of the Crown and is not in relation to the principles themselves (**clause 18(1)**). As the Environment, Food and Rural Affairs Committee and Environmental Audit Committee recommended in their pre-legislative scrutiny, this duty should be changed to “act in accordance with” and apply to all public authorities.

Furthermore, despite efforts to reduce the number of exemptions to the application of the environmental principles policy statement, we note that decisions around taxation, spending or allocation of resources within government are still exempt (**clause 18(3)(b)**). Given the importance of taxation policies and departmental budgets in delivering environmental targets on the ground, this will limit the real-life effectiveness of the principles. We therefore suggest that this exemption should be removed or, failing that, be restricted to a clearly specified and material set of circumstances.

On the formulation of the environmental principles policy statement, we note that there is opportunity for parliamentary scrutiny but not approval. As with the Draft Environment Bill, the wording in **clause 17** of the Bill remains insufficient as it restricts Parliament’s scrutiny and approval powers to passing a resolution or making recommendations that could be ignored in the final policy statement laid by the Secretary of State.

OFFICE FOR ENVIRONMENTAL PROTECTION (clauses 19-38)

The government has made some important and welcome changes since the publication of the draft bill – particularly to allow the OEP to enforce all of environmental law including climate legislation and the carbon budgets, which will see it holding the government to account on its commitment to reach net zero emissions by 2050. However, further strengthening is required to this section of the Bill.

Independence

The importance of the OEP being set up and operating in a truly independent way of government will be fundamental to the success of the Environment Bill. Clear government accountability to the OEP will provide businesses with confidence in the robustness of the UK’s environmental regulatory regime.⁶ We welcome that there is a new duty on the Secretary of State when exercising functions in respect of the OEP to “have regard to the need to protect its independence” (**Schedule 1, paragraph 16**) although would point out that the government has acted to strengthen this duty in relation to the environmental principles policy statement. Furthermore, we welcome the government’s clarification in its response to

⁵ Aldersgate Group event “What does business want from the Environment Bill?” held on 29 November 2018 <https://bit.ly/2S9cCrO>

⁶ Ibid.

the pre-legislative scrutiny that the OEP will be “provided with a five year indicative budget to be agreed with HM Treasury (HMT) and it will be able to submit an additional Estimate Memorandum to Parliament alongside the Defra Estimate Memorandum”.⁷ The adequacy of the OEP’s budgetary arrangements would be improved if these funding commitments were explicitly included in the Environment Bill.

However, the appointments process is still a large cause for concern (**Schedule 1, paragraph 2(1)**) and Parliament must play a role in the appointment process of the OEP’s chair, as recommended by both the Environment, Food and Rural Affairs Committee and the Environmental Audit Committee in their pre-legislative scrutiny. We suggest that these committees should play a key role in the appointment of the chair of the OEP, similar to that played by the Treasury Committee in the process to appoint the chair of the Office for Budget Responsibility. This would require that a pre-appointment hearing be held by these committees and that both committees give their consent to the appointment of the proposed chair of the OEP.

Enforcement powers

It is welcome to see that the OEP will have a more bespoke arrangement for enforcement, with the ability to apply to the Upper Tribunal for an environmental review. However, we note that when determining whether a public authority has failed to comply with environmental law and deciding whether to grant a remedy, the Upper Tribunal must apply the principles applicable on an application for judicial review (**clause 33(5) and (9)**). Replicating the process of a judicial review, which is narrow in nature, appears to nullify the opportunity provided by a more bespoke arrangement. We suggest that this restriction is removed.

⁷ House of Commons Environment, Food and Rural Affairs Committee (16 October 2016) *Pre-legislative scrutiny of the Draft Environment (Principles and Governance) Bill: Government Response to the Committee’s Fourteenth Report of Session 2017–19*