

THE ENVIRONMENT (PRINCIPLES AND GOVERNANCE) BILL: ENVIRONMENTAL STANDARDS AFTER BREXIT

On 19 December 2018 the government published draft Clauses on Environmental Principles and Governance. These are supposed to address the arrangements for the effective enforcement of environmental laws in England after Brexit, when enforcement by the European Commission and the Court of Justice of the European Union will no longer be available.

Publication of the Clauses followed a [consultation](#) which [produced over 175,000 responses](#). The Clauses, published as a [draft Environment \(Principles and Governance\) Bill](#) are intended to be part of a wider Environment Bill to be introduced in 2019, covering air quality, protection and enhancement of landscapes, wildlife and habitats, more efficient handling of resources and waste and better management of surface, ground and waste water.

The government now summarises its legislative proposals, made in pursuance of section 16 of the [European Union \(Withdrawal\) Act 2018](#), as follows –

“The draft Environment (Principles and Governance) Bill sets out how the government will maintain environmental standards as we leave the EU. It also details how we will build on the vision of the [25 Year Environment Plan](#).

This includes creating an independent body - the Office for Environmental Protection (OEP) – which will-

- scrutinise environmental law and the government’s environmental improvement plan (EIP)
- investigate complaints on environmental law
- take enforcement action on environmental law.

The draft Bill commits the government to publishing a policy statement which will set out how ministers should interpret and apply environmental principles. It also commits government to have a plan for environmental improvement.

The broader [Environment Bill](#) will also include measures on air quality, nature recovery, waste and resource efficiency and water management.”

By Brexit, the UK will lose -

- Treaty obligations reinforcing environmental laws;
- Enforcement by the European Commission;
- Enforcement by the Court of Justice of the European Union;
- The ultimate sanction of EU Member States risking fines for continuing breaches of EU law;
- Legal requirements on government to secure that penalties for breaches are “effective, proportionate and dissuasive” (see e.g. Water, Waste, Air Quality Framework Directives, REACH Regulation etc); and
- Rights of individuals to activate enforcement of environmental laws, at no cost, through complaints to the Commission

In May 2018, Secretary of State EFRA, Michael Gove MP, declared that –

“Our new Environmental Principles and Governance Bill is designed to create a new, world-leading, independent watchdog to hold government to account on our environmental ambitions once we have left the EU. The role which has been played in the past by the EU Commission and courts should be filled now by a UK body embedded in the UK’s parliamentary democracy.”

The May 2018 consultation considered (para 137-8) that –

“Subject to the outcome of this consultation, we believe the most appropriate approach may be to create an independent body that will be accountable to Parliament...”

However in place of the robustly independent body, accountable to Parliament, that was proposed, the Office of Environmental Protection would under these clauses be appointed, and funded, by the same Secretary of State.

The Office of Environmental Protection would be able to issue an Information Notice, a Decision Notice, and eventually to make a “review application” to the High Court or Court of Session, and maybe to make a public statement about breaches of environmental law, but all mention of the powers of the European Commission to seek and the Court of Justice of the European Union to impose, a fine for non-compliance with environmental laws has been omitted.

The draft Clauses apply the environmental principles to the actions of Ministers and public authorities through the Secretary of State’s Policy Statement. It is the Policy Statement to which Ministers must have regard. This allows much scope for Ministerial lobbying against enforcement action, and for re-interpretation of which principles should apply and how, instead of applying the principles directly to the discharge of functions by public bodies.

Three wide exemptions are driven through the scope and application of the [Policy Statement](#) on the application of Environmental Principles -

“The statement may not deal with policies relating to—

- (a) the armed forces, defence or national security,
- (b) taxation, spending or the allocation of resources within government, or
- (c) any other matter specified in regulations made by the Secretary of State.

These exemptions appear unjustified, inconsistent with EU environmental law which the government has promised to transpose into national law, and inconsistent with the express ambition of the Secretary of State to have a “world-leading, independent watchdog to hold government to account on our environmental ambitions once we have left the EU”. There is a long way to go in amending these Draft Clauses before they can be said to deliver anything equivalent to the force and enforcement of EU environmental laws.

William Wilson
Prospect Law Ltd

About the Author

William Wilson is a specialist environmental, regulatory and nuclear lawyer with over 25 years experience in government, private practice and consultancy. He worked as a senior lawyer at the UK Department of the Environment/DETR/Defra, and helped to build up the environmental and nuclear practices at another major law firm, as well as running his own environmental policy consultancies. William has experience of all aspects of environmental law, including water, waste, air quality and industrial emissions, REACH and chemicals regulation, environmental protection, environmental permitting, litigation, legislative drafting, managing primary legislation, negotiating EU Directives and drafting secondary legislation.

Prospect Law is a multi-disciplinary practice with specialist expertise in the energy and environmental sectors with particular experience in the low carbon energy sector. The firm is made up of lawyers, engineers, surveyors and finance experts.

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For more information or assistance with a particular query, please in the first instance contact Adam Mikula on 020 7947 5354 or by email on adm@prospectlaw.co.uk.