COUNTRYSIDE ALLIANCE BRIEFING NOTE

ENVIRONMENT BILL

HOUSE OF LORDS

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Introduction

- The Countryside welcomes the Environment Bill and supports the Government's aims and ambitions set out in the legislation. We have limited our comments to areas which we believe are of direct interest to our members.

- Nevertheless, we believe that in certain key areas the Bill could be substantially improved, and our position is set out below. We would like to see the Bill strengthened in terms of:

    1. The environmental principles, including the policy statement.
    2. Greater independence for the Office of Environmental Protection.
    3. Stronger enforcement powers.
    4. Greater powers to tackle fly-tipping and protection for landowners.
    5. Recognition that revoking abstraction licences without compensation could have very serious consequences for farmers.

Environmental Governance – Part 1

- The Bill sets out measures needed to ensure that there is no environmental governance gap following our withdrawal from the EU. Indeed it goes further. It will allow: the setting of long-term, legally binding and joined-up targets; embed consideration of environmental principles in future policy making; and establish the Office for Environmental Protection.

- Part 1 places a statutory duty on the Government to prepare and maintain an Environmental Improvement Plan (EIP); the first being the 25 Year Environment Plan published in January 2018, and creates a new statutory cycle of monitoring, planning and reporting to ensure continuing improvement of the environment.

Improving the Natural Environment – Chapter 1

- Chapter 1 provides the Secretary of State with a power to set long-term targets in relation to the natural environment and people's enjoyment of it. The definition of Natural Environment includes living and non-living elements of the environment, such as plants, wildlife, their habitats, air, water and land.

- Clause 7 Introduces a duty on the Secretary of State to prepare an EIP for significantly improving the natural environment. The 25 Year Environment Plan, as published on 11 January 2018, will become the first EIP.

- Clause 16 requires the Secretary of State to prepare a policy statement on the environmental principles and provides clarity on what the statement must address in relation to those principles, as well as how it defines them. A draft Environmental Principles Policy Statement was published on 10 March 2021 and put out to public consultation. That consultation closed on 2 June 2021.

Countryside Alliance Position

- In any discussion on the natural environment, wildlife management must be part of the discussion and not overlooked. The legislation references much that needs to be determined such as, what metrics it will use to measure enjoyment and how it will educate on, and raise awareness of, the natural environment.

- In relation to measuring and increasing enjoyment, the Government must exercise caution on how it does this. Indeed, it is unclear what the process will be when it comes to measuring public views about the environment. Any measurement of public views must take into consideration the views of those who live in the countryside, and not allow the process to be unduly influenced by those who may have ulterior motives. Equally it is unclear how useful it will be to measure enjoyment from the natural environment's 'use'. People will enjoy the environment in different ways, and it is unclear how the Government will attribute metrics to the various ways in which the environment is enjoyed, will one use be deemed more enjoyable than another, indeed will one person's use make it less enjoyable for others? Furthermore, education on the natural environment has a key role to play and must recognise the intrinsic role of farming and wildlife management play.

- The Government must take into consideration the efforts of those who look after the land that others enjoy. For example, upland farmers have for centuries looked after land which is some of our most iconic and loved. It is therefore only right that those farmers that manage the land are remunerated appropriately post-Brexit. Without a continuation of farming in the uplands, many of these unique landscapes would be lost with negative consequences for rural communities, the environment and wildlife. The tourist industry which depends on the beauty of these areas, and which is a vital part of the rural economy, would be jeopardised.

- EIPs must be properly scrutinised and consulted on before introduction. For example, the 25 Year Plan, the first to be introduced, still requires work in key policy areas such as agriculture and fishing, which as drafted are ignored. Any EIP must recognise the importance of rural communities to help the Government achieve its plans. The countryside is a place of great beauty and a habitat for wildlife, but it is also a place of work and home to millions of people. Rural communities will be key to delivering much of this Plan, or indeed any EIP, and they must therefore be fully engaged, which has not been the case so far. As part of Environmental Land Management Schemes (ELMs) must be fully integrated with the EIPs, as we believe is the Government's intention.

- The principles which underpinned our environmental law as a member state of the EU, and those in international treaties to which the UK is a signatory, should all be maintained. As such we welcome the principles included in the Bill but believe there are other important principles which should have been included. We also believe our new independence from the EU is an opportunity to clarify the understanding and application of key principles, notably the precautionary principle which has become a weapon of protectionism, an approach which is often damaging to the environment and communities and is not how the principle is supposed to be deployed (See Additional Note below).

- Despite the environmental principles being on the face of the Bill their scope and application are largely undefined in the Bill, relying instead on a subsequent policy statement on environmental principles to define the principles. Having seen the draft environmental principles statement we believe further work is needed especially in relation to the precautionary principle. The emphasis of a proportionate use of the principles is welcome but there is a concern that in practice the environmental principles and policies are too vaguely understood and therefore it will be hard to enforce them and ensure their overall effectiveness. It is also unclear whether there is a hierarchy of principles and how any conflict between them is to be resolved as part of making policy. There is a risk that the courts are increasingly dragged into policy making, taking on a role that more properly belongs to government and Parliament.

- The approach taken in this Bill is in contrast to that of other legislation which puts into law a number of principles and creates a definitive duty on public authorities to apply them. For example, the Well-being of Future Generations (Wales) Act 2015 clearly defines sustainable development (s.2), creates a duty (s.3) and then sets out and describes each of the goals. We would suggest that this approach is preferable. Indeed, when scrutinising the previous Environment Bill, the Environmental Audit Committee Report of 18 July 2018, notes that "The original policy statement should be included as a schedule to the Bill itself – allowing it to be scrutinised fully by Parliament. Substantive amendments to the statements should only be made following a debate on the floor of the House."

- The Bill does not include principles that would benefit the environment. Principles that we believe should have been included are:

  - Innovation Principle: It would encourage a positive policymaking framework and ensure that policy makers are able to use innovation as a way of protecting and improving the health of the environment.
  - Non-Regression Principle: Essential if we are to leave the environment in a better place than we found it and this should, along with the other principles, apply across all levels of government.
  - Net-Gain Principle: One of the key objectives of the 25 Year Environment Plan, the first EIP, is to embed an 'environmental net gain' principle which is why it is important for it to be included in the environmental principles set out in relation to the new governance body.
  - Appropriate Scale Principle: Many of the environmental challenges are not limited to particular places and therefore should be managed at the most appropriate scale. This would ensure a proper landscape-scale approach was taken; recognising the interconnectedness of areas such as water catchment areas, wildlife corridors and the marine environment where an ecosystem-based approach is essential.

- In short, this section of the Bill must take into consideration those who and live and work in the countryside. EIPs and secondary legislation must be properly scrutinised and not inadvertently place extra costs on those in the countryside without remuneration or ignore parts of the countryside. We must also avoid environmental principles being weaponised in a way which is counterproductive and driven by ideology.

- Finally, we have concerns that the Government seems to have given itself until 2037 to meet any future legally binding targets to improve air and water quality, tackle plastic pollution, and restore nature. The Environment Bill states that targets for the four priority target areas must be laid before Parliament by 31 October 2022. But the date for actually meeting these targets must then be set "no less than 15 years after the date on which the target is initially set" (definition of long-term target) - giving the Government until 2037 at the earliest to meet the targets. Interim targets could be set, but these do not appear to be legally binding, which raises the question as to enforcement.

Office of Environmental Protection (OEP) – Chapter 2 and Schedule 1

- Chapter 2 and Schedule 1 make provision for the creation of the OEP, which will be responsible for monitoring and reporting on environmental improvement plans in England.

- The Bill sets out the constitution of the OEP and its powers for enforcing environmental law in relation to public authorities.

Countryside Alliance Position - Constitution of the OEP

- The Countryside Alliance continues to be concerned that the proposed constitution of the Office for Environmental Protection (OEP) is not sufficiently independent to scrutinise and hold the Government to account. Much has been made of its independence from the Government and the Bill does state that the Secretary of State must "have regard to the need to protect its independence". However, the reality, as set out in the Bill, is very different. The Secretary of State has the power to appoint the non-executive members of the OEP, from whom the Chair is chosen and who in turn appoints the first CEO, with the statutory obligation to consult the Secretary of State, including when subsequent CEOs are appointed by the OEP. The Secretary of State can also appoint an interim CEO until the Chair appoints the first CEO.

- The Secretary of State decides the terms on which non-executive members should be appointed, only having to consult the Chair (who is appointed by the Secretary of State as a non-executive member in the first place). Non-executive members, whom the Secretary of State must ensure, so far as practicable, are greater in number than executive members, can be removed by notice given by the Secretary of State on grounds, amongst others, that "in the opinion of the Secretary they are unable or unfit to carry out the member's functions".

- The OEP is open to being controlled and manipulated by the Government. Looking at other Non-departmental Government Bodies (NDGBs) which are supposed to be independent illustrates the lack of real independence these bodies enjoy. Both the Parole Board and Legal Services have seen their Chairs forced out in clashes with the government of the day. Their constitutions are in stark contrast to the real independence enjoyed by a body like the Press Recognition Panel, established as it is by Royal Charter, without the need for ministerial approval of appointments. There have been instances where the Government has made appointments despite the clear opposition of the relevant select committee. the Digital, Culture, Media and Sport Select Committee's less than favourable report following the proposed new Chair of the Charity Commission, indicating that the Committee was unanimous that they could not support the Government's candidate, was ignored and their candidate was appointed regardless. The Select Committee was also concerned by the lack of transparency in the process. The Committee's letter to the secretary of State is instructive of why there are grounds for concern about the proposed constitution of the OEP and the role of the Secretary of State in the appointments process.

- Concern about the OEP's independence is not limited to the appointment and dismissal of its members, but also to its financial independence. The Bill simply requires the Secretary of State to pay such sums as they consider "are reasonably sufficient to enable the OEP to carry out its functions". The saying "he who pays the piper calls the tune" comes to mind. We would draw attention to the Environmental Audit Select Committee's Report in the last Parliament into the Government's 25 Year Plan for the Environment which proposed a body called The Environmental Enforcement and Audit Office with a role equivalent to the proposed OEP. However, unlike the OEP the Committee recommended that the setting of its budget, scrutiny of its performance and oversight of its governance should be by a "statutory body of parliamentarians, modelled on the Public Accounts Commission." While we offer no comment as to whether this is the best model, we do believe that the OEP would benefit from an independence from Government which is largely lacking in the current proposals.

- What is proposed for the OEP does not replicate the independence resulting from the arrangements under existing EU law, with the Commission and European Court of Justice,

it does not even come close to equivalence. Far from being "world leading" as the Government would claim, the regulatory regime in the Bill falls short of that ambition.

- Without this independence being established in law the provision in Schedule 1, paragraph 8 that the OEP "may do anything …it thinks appropriate for the purposes of, or in connection with, its functions" does not as the Explanatory Notes have suggested, provide the OEP with sufficient independence from Government when carrying out its functions.

Countryside Alliance Position - Enforcement Powers of the OEP

- The Countryside Alliance welcomes the fact that the OEP is required to monitor the implementation of environmental law and may report on any matter related to the implementation of environmental law. It is also welcome that any reports must be published and also laid before Parliament.

- The Countryside Alliance welcomes the fact that the Bill reflects the Government's acceptance that the OEP must have the power to take public authorities, including the Government to court, where public authority is defined as "any person carrying out any function of a public nature".

- However, we would note with concern that the OEP may carry out an investigation if it receives a complaint under clause that a public body has failed to comply with environmental law, and "the failure is serious". There is no indication as to what is to be considered "serious". Given the various enforcement powers open to them and that action must be proportionate there is no necessity to restrict the OEP to investigating only "serious" failures.

- Indeed, what is regarded as 'serious' is to be determined in the OEP's strategy which the OEP itself must prepare (clause 22). It is also notable that this strategy is also where the OEP is to resolve the potential conflict of roles between it and other statutory regimes, the ombudsman set out in the Bill, and the Climate Change Committee. It would seem more desirable to have clarified those relationships before the Bill is passed and not afterwards.

- The inclusion of the power for the OEP to apply to the courts for an "environmental review" where the OEP has given a decision notice to a public authority, is a useful addition to the OEPs powers, not found in the earlier draft legislation. It is a useful alternative to judicial review and may allow for some investigation of the facts in a way which judicial review does not usually allow. However, the Government has specifically given the court the power to grant any remedy available to a court on a judicial review, except damages.

- The Bill is an improvement on the draft version in terms of enforcement but, despite the Government's repeated assurances that the new oversight body will have powers that are at least equivalent to those enjoyed by the EU institutions in enforcing environmental law, the Bill does not empower the OEP to issue fines. Under the current EU arrangements, the power to issue fines has proved remarkably effective in bringing about compliance where a breach of environmental law has been established, and in deterring governments from ignoring or breaching environmental law.

- The Bill sets out an enforcement process in stages involving Information Notices, Decision and Linked Notices and then either Environmental Review by the courts or Judicial or statutory Review. However, access to judicial review by the OEP seems limited by clause 38(2) and the 'urgency condition'. Further clarity as to the impact of this restriction would be welcome, although we recognise that the restriction must be understood in the context

of the provision for recourse to an environmental review, which we understand is seen as the 'ordinary' route for enforcement, where notices etc have failed.

- We welcome this staged approach but repeat that both the OEP and the courts must be able to issue fines. Fines by the OEP may need to be limited to a form of fixed penalties, but this penalty should be available. We believe that any fines resulting from enforcement action should, as the Environmental Audit Committee has suggested, "be ring-fenced and used for an environmental fund for remediation works" overseen by the OEP.

- We would also draw attention to the Law Society's comments in response to the consultation before the draft Bill was published. The Society noted that the court must be able to "determine matters in a fair, equitable, timely and cost-efficient manner" and that the "possible orders the court may make should reflect the sanctions available under s.31(1) of the Senior Courts Act 1981 i.e. a mandatory, prohibiting or quashing order, a declaration or an injunction and the options to impose a fines, award damages if appropriate…the scope and remit of the new body should not be limited by restricting access to the courts and or limiting the scope of the judicial remedy available".

- There is also a wider question around judicial review as a mechanism in this area. Throughout the consultation process leading to the Environment Bill a wide variety of organisations have expressed concern at the shortcomings of the current judicial review process. The introduction of the review stage may address some of these concerns, but judicial review will remain an import route for enforcement and as it currently operates is problematic in terms of enforcing environmental law.

- Whether it is the OEP, a private individual or an NGO bringing a judicial review the fact remains that judicial review looks largely at process rather than the merits of a decision, and the remedies under judicial review are less dissuasive than those under the existing EU procedure. It is also a costly process. In contrast the EU process has minimal costs, dissuasive remedies, is not based on an adversarial process and works on the basis of the proportionality principle. It also looks at the merits of a decision rather than simply process (was the decision lawfully made). If judicial review is to be a key means of enforcement, then the use and operation of the judicial review process in this area needs to be reconsidered, incorporating some of the distinctive features of the Court of Justice of the European Union (CJEU). The Aarhus Convention Art. 9(4) states that procedures for environmental cases must be "fair, equitable, timely and not prohibitively expensive".

Waste and Resource Efficiency – Part 3

Fly-Tipping and Littering

- Previously the domestic courts could also refer to the CJEU for a preliminary interpretive ruling where an interpretation or validity of an EU law is in question. It is not clear whether the courts, OEP or others can seek clarity of interpretation of the law to assist in their enforcement function. Whether such a request would be to the Supreme Court or some other body, some thought should be given to replicating this helpful feature of the current EU process.

- The Bill makes provision to reduce the occurrence of fly-tipping and littering, by the introduction of deposit schemes and powers for secondary legislation to tackle waste crime and the scourge of littering. The Bill would:

    - establish a deposit return scheme for drinks containers
    - enable charges to be applied to specified single-use plastic items
    - introduce new measures for regulators including local authorities to tackle waste crime and illegal activity
    - enable the Secretary of State to make regulations to amend the permitted range of penalties for existing Fixed Penalty Notices

- The detail will, however, be determined by Defra in secondary legislation and we look forward to working with them Defra to tackle this blight. Furthermore, the legislation only includes the role of the Secretary of State and not other partners, such as local authorities and police, who will have a vital role to play in reducing fly-tipping and enforcing this legislation. Fly-tipping has been a serious issue in the countryside, and there is no quick fix but it is an issue many people feel strongly about and they want to see stronger enforcement action taken by the police and local authorities.

Countryside Alliance Position

- The UK has a fly-tipping and litter problem. In 2019-2020 there were just under 1 million incidents of fly-tipping in England, the equivalent of nearly 114 every hour, and at a cost to local authorities of millions. It is having a significant impact on our rural areas and wildlife, with the RSPCA receiving 7,000 calls a year about litter-related incidents affecting wild animals

- The Countryside Alliance has long campaigned on the problem of fly-tipping in the countryside. Evidence suggests that it affects 67 per cent of farmers and costs them upwards of £47 million a year clearing up fly-tipped waste.

- Private landowners are liable for any waste dumped on their land and are responsible for clearing it away and paying for the cost of disposal. If they do not act or inform the local authorities about the fly-tipped waste, they risk prosecution for illegal storage of waste in a “double jeopardy” situation which is simply not fair. Therefore, there must be greater support for the legal protection of landowners.

- Primary legislation must include reference to local authorities in recognition of the particular problems caused by waste fly-tipped on private land. It should also recognise the role education can play in raising awareness of responsibility amongst individuals and businesses, as well as tougher penalties on perpetrators, such as imposing and enforcing penalties which better reflect the seriousness of the crime, for example seizing, vehicles used to fly-tip.

- Local Authorities must also make it easier for people to dispose of their waste legally at recycling centres. Inconsistent, unclear and nonsensical rules must be scrapped and replaced with common sense and practical measures, which enable people to recycle or dispose of their waste legally.

Water - Part 5

- The Bill sets out measures to provide for policy outcomes for water resources, drainage and flood management.

- However, there are concerns about some of the measures and how they will impact on landowners and the angling community.

- We have raised concerns with this part of the Bill, such as: the failure to place an environmental duty on the Office of Water Services; the 2028 delay in delivering abstraction reform; and the watering down of vital measures for our rivers such as the Water Framework Directive (WFD). The WFD requirement to achieve Good Ecological Status for 75% of all waterbodies by 2027 seems to have been downgraded from a statutory requirement to what is effectively a matter of ministerial discretion.

- The Government have announced that it will be bringing forward amendments to the Bill to create a duty on government to publish a plan by September 2022 to reduce sewage discharges from storm overflows; a duty on government to report to Parliament on progress on implementing the plan; and a duty on water companies to publish data on storm overflow operation on an annual basis are welcome additions to the Bill. Storm overflow is a particular problem which has so far gone largely unaddressed.

Countryside Alliance Position

- Long term planning for water supplies is urgently required and we fully support measures which protect our rivers and waterways contained in this legislation.

- The chalk streams in the South are in particular crisis and we must put in place an action plan which not only protects them but also enables our farmers to continue with food production.

- The Bill enables the Environment Agency to propose the variation or revocation of abstraction licences without liability for compensation. This is subject to two conditions:

    1. If they are causing, or risk causing, considerable damage and/or
    2. If they consistently abstract less than their licensed volume.

- However, while we must protect our waterways these proposals could see farmers who abstract water for food production left without any compensation if the proposed variation of licences in the Bill goes ahead. We believe there are several things that should be put in place first, such as greater efficiencies by water companies and consumers, and for farmers to trade water and invest in winter storage facilities, before there is a change in the licences. Revoking licences without compensation should only be a last resort.

- We welcome the additional requirements for water companies to plan for future water supply and wastewater and drainage networks, enabling more resilient solutions to drought and flooding. To ensure the South East has the water supply it needs, while the reservoirs and lakes in the north of the country are full, perhaps plans for a national grid should be revisited and opportunities for desalination of sea water powered by renewable energy.

- There is of course much more work to do to clean-up our waterways, and secure our water needs. It is important that the Government continues to remain open to suggestions on how best that can be achieved through this and other pieces of legislation.

Additional Note on the Precautionary Principle

- The opportunity of Brexit, as the introduction to the draft policy statement on the environmental principles says, “opens the door to new opportunity; the chance to strengthen environmental protection and enhancement and to ensure that environmental principles are used consistently across government to guide policy making whilst supporting innovation and growth”. We would suggest that part of the process is to ensure that the principles are understood and applied in a way which enhances both the environment and communities. That they are not ‘gold plated’ and that they are applied proportionately. The precautionary principle has increasingly been applied in a way that is counterproductive. The threat of legal challenge using the precautionary principle is increasingly driving environmental policy, which properly rests with ministers and Parliament. As the European Commission’s guidance on the principle makes clear, “what is an acceptable level of risk for the EU is a political responsibility.” The Alliance does not want to see a reduction in environmental protection, but also believes that the precautionary principle should once again be understood and applied based on realistic assessment of risk and not become a weapon of protectionism.

- The UK needs to adopt an understanding of the precautionary principle which includes the element of risk assessment. The debate surrounding the precautionary principle and how it should be understood and applied is of long standing. There has never been a single agreed view, although various court judgements, especially in some more recent European courts judgements have moved towards a view of the principle which seems not to recognise relationship of the principle to risk. Some suggest that the precautionary principle is purely risk prevention (avoiding the possibility of harm) and does not include risk assessment (quantifying the risk of harm). Other definitions include both risk prevention and risk assessment.

- We need an understanding of the ‘precautionary principle’ that recognises the prevention of harm and the need to evaluate risk, which will help prevent it being exploited by those who are opposed to a particular activity. It is important to note that the European Commission’s guidance on the principle states that we should “avoid unwarranted recourse to the precautionary principle, as a disguised form of protectionism”. The precautionary principle “is neither a politicisation of science or the acceptance of zero risk”. The level of risk “is a political responsibility. It provides a reasoned and structured framework for action in the face of scientific uncertainty and shows that the precautionary principle is not a justification for ignoring scientific evidence and taking protectionist decisions.”

- Over the years the risk assessment element of the application of the precautionary principle has been eroded so that the level of risk which is acceptable is increasingly low. This enables the principle to be invoked to ban or restrict activities, even where there is no evidence of existing harm. For example, those opposed to shooting have to do little more than suggest that there may be some harm caused by shooting activity to protected sites and invoke the precautionary principle and the regulator, Natural England, feels obliged to stop the activity, or heavily restrict it. The burden then falls not on those opposed to an activity to show serious irreversible damage but on those who have carried out an activity over many years to show that the activity does not cause any harm, not just “serious or irreversible” harm. This ‘reverse burden’ is unfair and disproportionate. There also seems to be no need to assess whether the intervention could cause more harm than it is aimed to prevent. Natural England and government apply the precautionary principle based on its most restrictive interpretation because they fear that if they do not they will face legal action from well-funded groups such as Wild Justice.

- It is also notable that while the principle is applied to activities such as shooting, largely due to anti-shooting activists and threats of legal action, it is not applied to other activities which can cause harm, even greater harm, such as rambling or dog walking on protected sites.

- We also understand that it has been applied to prevent scientific research being conducted. This makes it hard, or impossible, to obtain the evidence that there is no serious or irreversible harm. Those who wish to end shooting on sites simply suggest there may be damage; Natural England applies the precautionary principle (understood in it most restrictive version), and the research to demonstrate that no serious or reversal harm is being caused cannot take place.

- We would suggest that the Statement provides an opportunity to clarify how the precautionary principle is applied and we would note the EU Commission's guidance that:

  "In addition, the general principles of risk management remain applicable when the precautionary principle is invoked. These are the following five principles:

  - proportionality between the measures taken and the chosen level of protection;
  - non-discrimination in application of the measures;
  - consistency of the measures with similar measures already taken in similar situations or using similar approaches;
  - examination of the benefits and costs of action or lack of action;
  - review of the measures in the light of scientific developments."

- If the precautionary principle is not to continue to be weaponised in the courts and not to frustrate development, innovation, research and wildlife management, it needs to be clarified not simply in relation to policy making, but also by those who are responsible for its application as part of their regulatory role in environmental protection.

- The environmental principles statement needs to make clear that the risk must relate to 'serious and irreversible' damage and define this; that the burden of proof in general rests on those alleging harm, unless the seriousness of the threat warrants a reversed burden; that the risk of harm caused by any intervention is assessed as well as risks from no intervention; and that an assessment of risk is an integral part of applying the precautionary principle in a fair, consistent and proportionate way.

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