COUNTRYSIDE ALLIANCE BRIEFING NOTE

Environment Bill

House of Commons, Westminster Hall Debate

Monday 26 February 2020

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Introduction

- The Countryside welcomes the Environment Bill and supports the Government's aims and ambitions set out in the legislation.

- 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
  2. The ability to hold the Government to the environmental targets set.
  3. Greater independence for the Office of Environmental Protection and 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 intends to set out measures needed to ensure that there is no environmental governance gap on withdrawal from the EU. It will allow: 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.

- 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. The Bill states that 'enjoyment may relate to its use, access to natural areas or a measure of public views about the environment', and can be 'increased through education and public awareness of the natural environment.'

- 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.

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 must acknowledge the role farming and wildlife management play.

- The Government must also 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.

- The principles currently underpinning our environmental law whether enshrined in EU law or those international treaties to which the UK is a signatory either individually or as a member of the EU, should all be maintained following our departure from the EU. As such we welcome the principles included in the Bill.

- 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 and the policies to which the principles are to apply. As such we are concerned that in practice the environmental principles and policies are defined too narrowly and therefore are limited in both the ability to enforce them and their overall effectiveness.

- The approach taken in this Bill could not be in starker contrast to that in 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 to the current draft legislation. 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." At the very least the process of producing the policy statement must require full and public consultation and should require parliamentary approval, as should subsequent changes.

- Furthermore, the Bill does not include principles that would benefit the environment. Principles that we believe should be 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.

- The environmental principles policy statement should not only outline the principles, and set out clearly their meaning and application, but should also be publicly consulted on and scrutinised by Parliament.

- 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.

- Finally, we have grave concerns that the Government has given itself till 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 these four priority areas must be published 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" - giving the Government until 2037 at the earliest to meet the targets. Interim targets will be set, but these would not be set out until 2022, and these will not be legally binding, according to the Bill. This will make enforcement impossible for many years and the Government cannot be held to account in law.

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.

Constitution of the OEP - Countryside Alliance Position

- The Countryside Alliance does not believe that the proposed constitution of the Office for Environmental Protection (OEP) is sufficiently independent to scrutinise and hold the government to account. Much has been made of its independence from the Government. 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, including the Chair who in turn appoints the CEO with the statutory obligation to consult the Secretary of State. 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 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. It should also be noted that despite the Digital, Culture, Media and Sport Select Committee's less than favourable report following the proposed new Chair of the Charity Commission and indicating that the Committee was unanimous that they could not support the Government's candidate, the Government was free to ignore the report and their candidate was appointed regardless. The Select Committee was also concerned by the lack of transparency in the process. The letter sent 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 whatever model is adopted it must give the OEP an independence from Government which is largely lacking in the current proposals in the Bill.

- 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 7 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 state, provide "the OEP with sufficient independence from Government when carrying out its functions".

Enforcement Powers of the OEP - Countryside Alliance Position

- 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.

- The inclusion of the power for the OEP to apply to the Upper Tribunal 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 Tribunal 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 or Upper Tribunal 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 Upper Tribunal or Judicial or Statutory Review. However, access to Judicial Review by the OEP seems limited by clause 34(2). 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 new provisions for recourse to the Upper Tribunal as the ordinary route for enforcement.

- We welcome this staged approach but repeat that both the OEP and the Upper Tribunal 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 to the Tribunal and courts. 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".

- 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 tribunal 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 current 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 i.e. was the decision lawfully made. If judicial review is to remain an important 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".

- Currently the domestic courts can 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 a similar judicial mechanism will exist after Brexit and whether the lower 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.

Waste and Resource Efficiency – Part 3

Fly-Tipping and Littering

- 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 2018-2019 there were over 1 million incidents of fly-tipping in England, an increase of 8 per cent from the previous year, 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.

The Angling Trust has 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 is now to be downgraded from a statutory requirement to what is effectively a matter of ministerial discretion.

Countryside Alliance Position

- Long term planning for water supplies in the South East 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 crisis and we must put in place an action plan which not only protects them but 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.

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