

HOUSE OF LORDS

Select Committee on the Constitution

4th Report of Session 2021–22

Environment Bill

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Select Committee on the Constitution

The Constitution Committee is appointed by the House of Lords in each session “to examine the constitutional implications of public bills coming before the House; and to keep under review the operation of the constitution and constitutional aspects of devolution.”

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[Baroness Corston](#)

[Baroness Fookes](#)

[Lord Sherbourne of Didsbury](#)

[Baroness Doocey](#)

[Lord Hennessy of Nympsfield](#)

[Baroness Suttie](#)

[Baroness Drake](#)

[Lord Hope of Craighead](#)

[Baroness Taylor of Bolton](#) (Chair)

[Lord Dunlop](#)

[Lord Howarth of Newport](#)

[Lord Faulks](#)

[Lord Howell of Guildford](#)

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Committee staff

The current staff of the committee are Michael Torrance (Clerk), and Rita Cohen (Committee Operations Officer). Professor Stephen Tierney and Professor Jeff King are the legal advisers to the Committee.

Contact details

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Environment Bill

Introduction

1. The Environment Bill was introduced in the House of Commons on 30 January 2020 and, having been carried over into the current session, completed its passage on 26 May 2021. It was brought to the House of Lords on 26 May and had its second reading on 7 June. Committee stage began on 21 June.
2. The Bill has two main effects: it establishes a new regulatory regime for environmental governance, including the establishment of an Office for Environmental Protection (OEP), and it provides for environmental protections in a number of specific areas.
3. The Bill's constitutional significance lies mainly in the creation of the OEP and in the extensive powers the Bill gives to the Secretary of State.
4. The Delegated Powers and Regulatory Reform Committee (DPRRC) has reported on the Bill.¹ We draw on its conclusions in considering the constitutional issues raised by the Bill.

The Office for Environmental Protection

5. Clause 21 establishes the OEP. The principal objective of the OEP is to contribute to environmental protection and the improvement of the natural environment.
6. One immediate point of constitutional significance is the purpose of this body. It is essential that such an important public body be independent of the government. Since the Bill was first published this provision has been inserted: "In exercising functions in respect of the OEP, the Secretary of State must have regard to the need to protect its independence."²
7. Schedule 1 sets out how the OEP is to be established and organised. The OEP is to consist of a Chair and at least two, but not more than five, other non-executive members, a chief executive and at least one, but not more than three, other executive members. Non-executive members, including the Chair, are to be appointed by the Secretary of State who has largely unlimited discretion in this regard.³ The number of non-executive members must be greater than the number of executive members.⁴ Non-executive members may be appointed for a fixed term of no more than five years but may be re-appointed.⁵ The non-executive members have the power to appoint the chief executive, but the Secretary of State must be consulted; other executive members "are to be appointed by the OEP"⁶ and are employees of the OEP. It is not clear how executive members are to be appointed by the OEP and whether the Secretary of State will have a role in this process.

1 Delegated Powers and Regulatory Reform Committee, *Environment Bill* (3rd Report, Session 2021–22, HL Paper 16), paras 1–24

2 Schedule 1, para 17

3 Schedule 1, paras 1–3

4 Schedule 1, para 1(3)

5 Schedule 1, para 5

6 Schedule 1, para 3(2)

8. **The House may wish to consider if the provisions for appointing members to the Office for Environmental Protection appropriately ensure its independence. The House may also wish to ask the Government for further information about how non-executive members are to be appointed and whether, in particular, this will take place at arm’s-length from the Government or with the involvement of the Secretary of State.**

Guidance

9. Clause 24 gives the Secretary of State power to issue guidance on the drawing up of the OEP’s enforcement policy under clause 22(6). The OEP must have regard to the guidance in preparing its enforcement policy and exercising its enforcement functions. Such guidance must be laid before Parliament—clause 24(4).
10. Guidance is a poor substitute for clear rules. The recipient of guidance, in this case the OEP, may be unclear as to the nature of any obligation this guidance seeks to impose. Guidance can be changed by the Secretary of State “at any time”, a power which, depending on the frequency of its use, can exacerbate uncertainty. The power to issue guidance on the OEP’s enforcement powers could call into question how independent it will be.
11. **The House may wish to examine the appropriateness of guidance in the context of the Office for Environmental Protection’s purported independence.**
12. The power to issue guidance appears in various clauses. The Delegated Powers and Regulatory Reform Committee (DPRRC) recommended that the requirement to lay guidance before Parliament should be extended to other guidance provisions in the Bill, particularly clause 67 on littering enforcement.⁷ **We agree with the DPRRC.**

Delegated powers

13. The Bill provides a wide range of delegated powers, including to allow ministers to make provision relating to the recall of motor vehicles, certain engines and their components.⁸ This is a wide-ranging power with a potentially extensive enforcement dimension. At present its use is subject to negative procedure. Another power in clause 88 (which inserts new sections into the Land Drainage Act 1991 (“the 1991 Act”)) allows the Secretary of State by regulations to make provision for the value of non-agricultural land in an English internal drainage district. The new sections contain a Henry VIII power to amend any Act of Parliament, including the 1991 Act.
14. The DPRRC recommended that powers exercised under clause 73 should be subject to the affirmative procedure,⁹ and that in the absence of a clear justification why the new sections of the 1991 Act should be able to amend any Act of Parliament, the scope of the clause 88 power should be confined to amending the 1991 Act only.¹⁰ **We agree with the DPRRC.**

7 Delegated Powers and Regulatory Reform Committee, *Environment Bill* (3rd Report, Session 2021–22, HL Paper 16), para 10

8 Clause 73

9 Delegated Powers and Regulatory Reform Committee, *Environment Bill* (3rd Report, Session 2021–22, HL Paper 16), para 13

10 *Ibid.*, paras 16 and 18

Devolution

15. In general, the Bill forms part of the law of England and Wales only and applies only to England. Clause 138 details the clauses which apply to other parts of the UK: for example, certain matters involving environmental governance apply to Wales; certain matters relating to waste and resource efficiency, air quality and environmental recall and water apply throughout the United Kingdom; while provision for the Solway Tweed river basin extends to England and Wales and Scotland. Legislative consent of the devolved legislatures has been sought.
16. The process of legislative consent for the Bill is incomplete. The Scottish Parliament passed a legislative consent motion on 12 November 2020. The Welsh Government has submitted two legislative consent motions to the Welsh Parliament.¹¹ In respect of the Northern Ireland Assembly, a legislative consent motion was lodged by the Minister of Agriculture, Environment and Rural Affairs on 19 March 2020.¹²
17. The OEP enters an already heavily regulated field, including the Environment Agency in England and the Scottish Environment Protection Agency in Scotland.
18. Good relations between the Government and the devolved administrations are essential to the successful operation of the Bill. The Bill builds in several consultation requirements. For example, the OEP has a duty to consult “devolved environmental governance” if it “considers that a particular exercise of its functions may be relevant to the exercise of a devolved environmental governance function”—clause 26(4); while regulations under clause 83 concerning water quality may not contain provision applying to any part of a Scottish cross-border river basin district which is in Scotland without the consent of Scottish Ministers.
19. **The House may wish to ask the Government to explain further how it envisages the Office for Environmental Protection working with existing bodies in England, including the Environment Agency, and existing devolved bodies such as the Scottish Environment Protection Agency. Close co-operation between the UK Government and the devolved administrations, including a requirement to consult where policies are being developed relating to reserved matters that affect Scotland, will be important in improving environmental protection across the UK.**

11 Welsh Parliament Legislation, Justice and Constitution Committee, *The Welsh Government’s Supplementary Legislative Consent Memorandum (Memorandum No.2) on the Environment Bill* (February 2021): <https://senedd.wales/media/ppmdozus/cr-ld14121-e.pdf>

12 Northern Ireland Assembly, *Legislative Consent Memorandum* (19 March 2021): <http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/agriculture-environment-and-rural-affairs/legislative-consent-motions/environment-bill/environment-bill---legislative-consent-memorandum.pdf>

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

Members

Baroness Corston
Baroness Doocey
Baroness Drake
Lord Dunlop
Lord Faulks
Baroness Fookes
Lord Hennessy of Nympsfield
Lord Hope of Craighead
Lord Howarth of Newport
Lord Howell of Guildford
Lord Sherbourne of Didsbury
Baroness Suttie
Baroness Taylor of Bolton (Chair)

Declarations of interest

Baroness Corston
No relevant interests
Baroness Doocey
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Baroness Drake
No relevant interests
Lord Dunlop
No relevant interests
Lord Faulks
No relevant interests
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No relevant interests
Lord Howell of Guildford
No relevant interests
Lord Sherbourne of Didsbury
No relevant interests
Baroness Suttie
No relevant interests
Baroness Taylor of Bolton (Chair)
No relevant interests

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Professor Jeff King, University College London, and Professor Stephen Tierney, University of Edinburgh, acted as legal advisers to the Committee. They both declared no relevant interests.