

The Future of Environmental Law

The new Environment Bill is a massively influential piece of legislation, and a definitive statement of Government policy on the environment. Much needs to be done.

Environment Agency and Natural England have been disempowered by severe personnel and budget cuts. Although a legal target to hit net zero carbon by 2050 is in place, there is no policy machinery to implement it, and the UK is off course in terms of hitting existing carbon budgets. Further, Brexit will imminently remove the appellate jurisdiction of the European Court of Justice (ECJ), which acted as the final arbiter on claims that the UK Government had failed to comply with environmental law.

Governance and enforcement

The Bill establishes the Office for Environmental Protection (OEP) to act as a nominally independent watchdog to fill this governance gap. All climate change legislation, including carbon budgets, will also be brought within the OEP's enforcement remit. The OEP will monitor progress towards achieving national environmental improvement targets and advise Government on proposed changes to environmental law.

The OEP cannot replicate the international experience and clout of the ECJ, and is not designed to do so. But will it be sufficient to maintain, or improve, the levels of protection afforded to environmental law by EU institutions? To be successful and effective the OEP will need to be truly independent and have sufficient teeth to hold the Government to account when necessary. The current OEP proposals have been criticised as being inadequate. In stark contrast to the ECJ, the Government is unlikely to lose much sleep over OEP action, having designed the OEP as its own bespoke watchdog, to which the Secretary of State may even issue guidance regarding its enforcement policy! The scope for dilution of OEP power and function is readily apparent.

Targets

Theresa May's government introduced the legally binding target of net zero carbon emissions by 2050. The Environment Bill will set further targets in the areas of air quality, clean water, waste reduction and biodiversity. The air quality focus will be on reducing the human health impact of fine particulates (PM2.5), while water-related targets will include reductions in waste water pollution and abstraction volumes. There will be at least one long-term, binding target in each area, supplemented with non-binding interim

targets, and the OEP will report annually. The targets will be set after consultation, probably by late 2022.

Waste

Amongst the proposed changes in the waste sphere are powers to revise and extend the packaging producer responsibility scheme and provisions concerning the regulation of waste imports/exports and recycling. The intention is eventually to make producers responsible for the full net costs of managing their products at end of life, and to stop the export of waste to developing countries.

REACH

The REACH regime is entirely EU-derived and has been resourced by all Member States. The Environment Bill's provisions in respect of chemical regulation are receiving close attention from industry and environmentalists alike. At the time of writing it is still possible that the UK will reach an agreement with the EU that will enable it to remain within REACH, but otherwise a national body will have to take over the functions of the European Chemicals Agency (ECHA). There are concerns that a UK regulator would lack the ECHA's resources and expertise and would be severely hampered by its inability to access the EU's chemical safety database. Any future divergence between the EU and UK regimes on chemicals regulation will damage UK export trade unless some sort of level playing field is agreed.

Timing

The Secretary of State at Defra recently admitted that the Bill will not receive Royal Assent until July 2021. Thus the OEP will be set up "in embryonic form" only. There may therefore, be a yawning governance gap of several months duration.

Time will tell as to whether the provisions of the Bill represent an improvement in terms of environmental protections or not. The OEP is unlikely to be as formidable as the EU institutions it replaces, although it could still be effective if it is appropriately staffed and resourced, with strong independent leadership.

However, neither the resource starved condition of the current bodies that regulate the environment, nor the apparent acceptance of a 7 month time gap between Brexit and Royal Assent, bode well in that regard.

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