

Written Evidence submitted by the Office for Environmental Protection (OEP) to the House of Commons Public Bill Committee for the Retained EU Law (Revocation and Reform) Bill (REULB46)

Executive summary

- Effective environmental laws that are well implemented are needed to enable UK and devolved governments to meet their stated ambitions to improve the environment. A large proportion of the UK's environmental laws are retained EU law. These laws provide a critical framework for achieving UK and devolved governments' environmental commitments. We see opportunity for the review of these laws to drive improvements to both the law itself and how it works in practice but change needs to be managed well.
- There is scope to improve environmental retained EU laws. This review should be undertaken carefully, however, and with enough time and resource to ensure maximum benefit in strengthening environmental protections and to avoid unintended consequences.
- Our main concern about the Retained EU Law (Revocation and Reform) Bill is the short timescales for the automatic revocation of retained EU law in the Bill's sunset clauses. These create material risks that law-making becomes rushed and that it is then not conducive to fully addressing environmental problems. It could lead to poor prioritisation and poor decision-making. When resources are finite, this work also risks detracting from other urgent work to protect and restore the environment. We recommend these timescales are reconsidered and extended.
- There is also a particular risk in Northern Ireland, where, as it stands, there is no potential for the devolved authority to extend the sunset date and no Northern Ireland Executive in place. Devolved authorities, as well as the UK Government, should be able to extend timescales.
- We are also concerned by the absence of a requirement in the Bill to maintain or improve existing levels of environmental protection and meet the UK's international environmental law obligations. We recommend adding an environmental non-regression safeguard to the Bill as a minimum measure. In line with governments' ambitions to improve the natural environment, and given such pressing need, we would urge UK and devolved governments going further than this minimum to achieve an overall improvement in the level of environmental protection.
- The Bill will make it easier for ministers and devolved authorities to amend and replace retained EU law through secondary legislation with reduced Parliamentary or Assembly scrutiny. This could result in a less stable and coherent body of environmental law and less effective laws resulting from the lack of scrutiny.
- The Bill provides for the removal of retained general principles of EU law, including the environmental precautionary principle. This could weaken environmental protection. This impact could be partly mitigated in respect of UK Government and Northern Ireland Executive decision-making by each implementing their legally required environmental principles policy statements. This should be done as soon as possible so that the review of retained EU law is undertaken in accordance with those policy statements.
- In making it easier for courts to depart from environmental retained case law, the Bill is likely to lead to uncertainty around whether long-established precedents will continue to be followed. This could result in costly legal proceedings, as well as delay and disruption for business and national and local government.
- For the review of environmental retained EU laws to be done well, there is an urgent need for governments to publish a comprehensive, publicly available list of this body of law. Government should also provide transparency over the process to be adopted for this review.

1. Introduction and background

- 1.1. The OEP is an independent, statutory body established under the Environment Act 2021. Our principal objective in law is to contribute to environmental protection and the improvement of the natural environment. We do this by holding government and other public bodies to account against their environmental commitments.
- 1.2. Our remit covers environmental law in England, Northern Ireland and across the UK where matters have been reserved to Parliament. Environmental law will be one of the areas most affected by the Retained EU Law (Revocation and Reform) Bill (REUL Bill) given the large proportion of environmental laws that are retained EU law (REUL). Our evidence concentrates on the provisions of the Bill that could affect environmental protection and improvement.
- 1.3. The natural environment is under serious threat. We are experiencing worrying and persistent trends of environmental decline. More than half of the indicators used to monitor progress on the UK Government's 25 Year Environment Plan show the situation has not improved or else it is deteriorating.¹ The abundance of our species, a good measure of the state of the environment, has declined by 17% over five years.² Public concern about the state of the environment – for example about the condition of our rivers, the air in our cities or the loss of our wildlife – is evident, and persistent despite pressing economic and social challenges. Despite its endeavours, government is not making sufficient progress.
- 1.4. The large body of environmental REUL provides not just environmental protections but also a critical framework to achieve national commitments to improve the state of the environment. These include the UK Government's 25 Year Environment Plan pledge for this to be the first generation to leave the environment in a better state than that in which it found it³ and the environmental targets to be set under the Environment Act 2021.⁴ Any weakening of current environmental laws is likely to hinder progress in meeting these goals.
- 1.5. Instead, if there are to be changes to environmental legislation, these should take the chance to provide better environmental protection and improve the environment where needed. Government has stated its ambition to leave the natural environment in a better state than it found it. It is therefore no longer enough to maintain environmental protections as they are today. Improvement is now urgently required.

¹ Defra, *25 Year Environment Plan Annual Progress Report April 2021 to March 2022* (2022) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1092495/25yep-annual-progress-report-2022.pdf accessed 11 November 2022.

² Defra, *Indicator D6: Relative abundance and distribution of priority species in England* (19 May 2022) <https://oifdata.defra.gov.uk/4-6-1/> accessed 11 November 2022.

³ HM Government, *A Green Future: Our 25 Year Plan to Improve the Environment* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/693158/25-year-environment-plan.pdf accessed 11 November 2022.

⁴ Sections 1 to 7, Environment Act 2021.

- 1.6. We recognise that it has long been the UK Government's intention to review REUL. Environmental laws should be regularly reviewed to ensure they are effective. We consider that there is scope to improve environmental REUL in several areas. If done well, this review is an opportunity to make environmental law better. If done badly, it could lead to ineffective laws that compound environmental problems and create new uncertainties and burdens. These costs will fall on all those who must comply with environmental law including businesses, hindering growth and investment.
- 1.7. We are concerned that the current provisions of the REUL Bill may result in this opportunity being missed. Furthermore, we consider that it could lead to the unintended consequence of environmental laws that are less fit for purpose. We detail our concerns below.

2. Timescales

- 2.1. Our main concern is the short timescales set out for the automatic revocation of REUL in the Bill's sunset clauses. We believe there is a compelling case for these to be reconsidered. Our view is that the sunset date of the end of 2023 in the REUL Bill allows insufficient time to complete the considerable task of reviewing and reforming REUL in a considered way whilst maintaining, let alone improving, levels of environmental protection.
- 2.2. The timescales in the REUL Bill create a risk of incomplete or rushed assessments, legislation being revoked without any substantive assessment, missed opportunities for improvement (including by reducing unnecessary regulatory burdens), or mistakes being made giving rise to gaps, conflicts, or errors on the statute book.
- 2.3. Good environmental law making requires time to gather evidence of environmental problems and to consider how they can best be solved. This requires scientific evidence, analysis, consultation, and scrutiny including from Parliament. Rushed law-making is not conducive to addressing environmental problems that are difficult, complex, inter-connected and long-term. It runs the risk of compounding, rather than addressing, environmental problems and in doing so undermining the UK Government's own environmental ambitions and international standing. It risks mistakes being made.⁵
- 2.4. The sunset clauses proposed will place large resource demands – notably on Defra⁶ and, in Northern Ireland, DAERA, as well as on other UK and Northern Ireland government departments responsible for environmental laws. Defra is already under pressure: it is in the process of implementing three major recent Acts of Parliament (the Environment, Agriculture and Fisheries Acts). It has missed several existing statutory deadlines

⁵ For example, during legislating to enable the UK's departure from the EU a restriction on the use of environmentally harmful pesticides was accidentally deleted. See Chloe Anthony, Ffion Thomas, and Dr Emily Lydgate 'A look at new UK pesticides regulation: Part 2' *UK Trade Policy Observatory Blog* (16 July 2019) <https://blogs.sussex.ac.uk/uktpo/2019/07/16/a-look-at-new-uk-pesticides-regulation-part-2/> accessed 11 November 2022.

⁶ Defra is responsible for the largest number of REUL according to the Cabinet Office's REUL Dashboard.

(including that relating to legally binding targets⁷) and there have been delays to other commitments in areas such as the environmental principles policy statement, the deposit return scheme, pesticides and protected land and seascapes. The time pressure caused by the sunset clauses and the scale of the task to review hundreds of environmental laws will likely exacerbate these delays, hindering the achievement of the UK Government's environmental ambitions. The significant time that will be spent reviewing environmental REUL will come at a cost to other pressing issues for the environment, for example, the detailed work necessary to ensure effective implementation of the next Environmental Improvement Plan.

- 2.5. As an alternative to setting sunset clauses, the Bill could enable the UK Government and devolved authorities to make positive choices to reform specific areas of environmental REUL where they identify room for improvement. Environmental laws could then be reviewed in a more considered fashion based on prioritisation, evidence, consultation, and analysis, without the risks created by a sunset clauses. This could focus on broad areas of environmental law, to allow for the development of a better, more coherent body of legislation. In allowing for evidence-based prioritisation, this would allow UK and devolved governments to address the most pressing matters first.
- 2.6. If the approach of setting sunset clauses is retained in the Bill, the ability to extend timeframes should in our view apply to the devolved authorities as well as the UK government. Consideration should also be given to how to avoid or manage the risk of mistakes being made by default. For example, the Bill could be amended to clarify that the only laws that will be revoked automatically under the sunset clauses are those that have been positively identified as in scope of REUL by UK or devolved governments, for example those listed in the Cabinet Office's REUL Dashboard⁸ or similar.

We recommend that the sunset date of the end of 2023 is reconsidered and extended. Any timescales for the revocation of retained EU law should be based on a clear implementation plan that sets out how this body of law can be properly reviewed within the timescales.

3. Maintaining and improving levels of environmental protection

- 3.1. We are concerned by the absence of any commitment in the Bill to maintain or improve upon existing levels of environmental protection and meet the UK's existing international environmental law obligations. This is in contrast to other draft legislation before Parliament (such as the Levelling-up and Regeneration Bill) and to Government

⁷ Section 4(9), Environment Act 2021. See the Update on the progress of Environment Act Targets: Statement made by the Secretary of State for Environment, Food and Rural Affairs on 28 October 2022 <https://questions-statements.parliament.uk/written-statements/detail/2022-10-28/hcws347> accessed 11 November 2022.

statements of ambition including during the Bill's second reading.⁹ Ensuring there is no reduction in levels of environmental protection would have wider benefits such as in providing certainty for business and helping to promote trade.

3.2. A safeguard should be added in respect of any changes to environmental law. This could require that changes cannot be made unless the Secretary of State or Northern Ireland department (as the case may be) is satisfied that this will not have the effect of reducing the level of environmental protection and be consistent with the UK's international obligations. The Secretary of State or Northern Ireland department should be required to publish an assessment setting out the basis upon which they have reached that view. This would ensure that the REUL Bill is consistent with governments' ambitions for protecting the environment and their international environmental law obligations.

3.3. It is apparent that existing levels of protection have not been enough to halt or reverse environmental decline. The UK Government and Northern Ireland Executive are committed to improving the environment. Both are required by law to prepare plans "for significantly improving the natural environment".¹⁰ Legislative reforms made under the REUL Bill present an opportunity not just for maintaining environmental protections but to deliver a significant overall improvement. These opportunities should be seized, in our view.

We recommend adding an environmental non-regression safeguard to the Bill as a minimum measure. In order to meet its stated ambitions, we consider that UK and devolved governments should go further than this minimum to achieve an overall improvement in the level of environmental protection.

4. The evidence-base for reviewing REUL

4.1. We recognise the UK Government's desire to ensure REUL is fit for purpose and that the legislation on our domestic statute book is there out of conscious choice rather than simply inheritance. In our view, the fate of any particular law should be determined based on an objective assessment of its quality and effectiveness. Effective laws should be preserved. Redundant laws should be revoked. Poor laws should be improved. The exercise should aim to deliver a more coherent and effective framework rather than a series of individual, disjointed measures. It should demonstrably support the achievement of commitments to significantly improve the environment and address known environmental failings.

4.2. When individual laws are reviewed, the evidence considered by the UK Government and devolved authorities should include reports on their implementation. We are concerned, however, that the UK Government is not producing such reports as it is legally required to do, for example for environmental impact assessment. This means that the publicly

⁹ Statement by the Minister for Climate (Graham Stuart MP) concluding the second reading debate; HC Deb 25 October 2022, vol 721, col 251.

¹⁰ Sections 7 and 8, and paragraph 1 of Schedule 2, Environment Act 2021.

available evidence base is regrettably incomplete. Legally required reports on the implementation of environmental laws should be published as soon as possible.

- 4.3. The review of environmental REUL should be based on effective prioritisation and should follow a process that is settled and made transparent as soon as possible.
- 4.4. A key and immediate requirement is a reliable list that is publicly available of environmental REUL that is within the scope of the Bill. Cabinet Office's REUL Dashboard contains 570 laws that are allocated to Defra, not all of which will be environmental law. However, this list is incomplete and appears to contain major omissions. For example, it excludes significant environmental REUL on air quality, water quality and biodiversity. There have been reports of many additional items of REUL being recently identified.¹¹ This figure also does not include environmental law for which other UK government departments are responsible, or the laws DAERA and other departments are responsible for in Northern Ireland. There are hundreds of pieces of environmental REUL that currently fall within the scope of the Bill, many of which will be long and contain complex provisions.

Governments should produce a comprehensive list of the environmental REUL that falls under the Bill's scope as soon as possible. Wherever practical, government should in our view provide the evidence for any proposed change or revocation of environmental REUL.

5. The process for reviewing REUL

- 5.1. The Bill raises the prospect of changes to hundreds of environmental laws. The lack of a published programme or plan of how the full body of law will be assessed, or how decisions will be made or enhanced through stakeholder engagement, will create uncertainty for those who are subject to environmental law.
- 5.2. The UK and devolved governments should each clarify when, how and to what timeline they intend environmental laws to change. There should be regular progress reports against those intentions so that, as decisions are made, people know about them.
- 5.3. Any changes to the law should be accompanied by appropriate transition and resourcing plans.
- 5.4. Consultation with stakeholders helps to improve environmental laws. It allows for the provision of expert views, evidence, and experience to inform law-making. This should happen for example if the legislation authorising the original regulations included a requirement to consult or if there are any proposed changes to significant environment REUL. The UK Government and devolved authorities should be mindful of the UK's obligations under international law to promote effective public participation during the

¹¹ George Parker, 'UK plan to scrap all EU laws suffers new setback: Discovery of 1,400 more pieces of legislation makes huge bureaucratic task even harder' *Financial Times* (8 November 2022).

preparation of environmental regulations. Government should adequately plan for and resource this.¹²

The UK and devolved governments should clarify, at the earliest opportunity, the process they intend to follow to implement the REUL Bill and provide clear timelines.

6. Powers to make secondary legislation

6.1. The Bill will make it easier for ministers and devolved authorities to amend and replace REUL through secondary legislation, with reduced Parliamentary or Assembly scrutiny. We are concerned that this could result in a less stable and coherent body of environmental law and less effective laws resulting from the lack of opportunity for Parliament or devolved legislatures such as the Northern Ireland Assembly to scrutinise, debate and amend laws.

7. Regulation

7.1. The Bill prevents any replacement of REUL from increasing overall regulatory burdens. Regulation protects our environment and provides certainty for business and investment. Almost all regulation imposes some burden, but this should be proportionate to the goal being pursued. The restriction in the Bill risks preventing government taking the opportunity to improve environmental protection in areas where it is sorely needed. This could result in the review of environmental REUL being an administrative exercise to little real-world effect.

7.2. This restriction on adding to the regulatory burden infers that a conclusion has been made that the amount of existing regulation is sufficient. Yet the effectiveness of regulation cannot be 'weighed' as these provisions infer. For many decades, regulatory regimes for the environment have been heavily influenced by our membership of the EU. While there have been notable successes, these regimes have not always worked to protect the environment sufficiently or improve it. What is more, they were not designed to meet governments' new expectations and ambitions for the environment now that we have left the EU.

7.3. The regulatory regimes inherited from the EU's Common Agricultural Policy (CAP) will fall away over time, reducing the regulatory burden. Around 70% of land in England is said to be in agricultural use. New regimes are needed for Environmental Land Management Schemes, but we anticipate they would be less complicated and burdensome than those for CAP. Any assessment of overall burden should in our view take into account this wider context.

¹² Article 8, *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, Aarhus, Denmark, 25 June 1998 (the Aarhus Convention).

7.4. The UK Government and Northern Ireland Executive must now be free to improve regulation and to apply the full gamut of regulatory approaches, to better meet their environmental ambitions, enhancing existing levels of protection and meeting international environmental law obligations.

8. General principles of EU law

8.1. The abolition of the retained general principles of EU law includes the abolition of the EU precautionary principle. This principle is an important and well-established part of domestic environmental protections and the UK's international environmental law obligations. Its abolition could weaken environmental protection. However, the UK Government has committed that "environmental protections will be enhanced, not diminished".¹³

8.2. Under the Environment Act 2021 the UK Government and Northern Ireland Executive must prepare policy statements on environmental principles that should be applied when making policy.¹⁴ These statements should in our view be finalised and implemented as soon as possible so that they can guide work on reviewing environmental REUL. Further, given that environmental principles are an established part of the UK's international obligations, the UK Government should in any event be applying them in work on this Bill and in its review of REUL.

9. Case law

9.1. In making it easier for courts to depart from environmental retained case law, the Bill is likely to lead to uncertainty as it will be unclear whether long-established precedents will continue to be followed. This could result in unnecessary, costly legal proceedings. Consideration should also be given to whether this could also result in a reduction in environmental protection (where protections have been established through case law) and how this will be addressed.

10. Northern Ireland

10.1. In Northern Ireland there are currently no ministers in post within the devolved authority to make choices over the review of REUL envisaged by the Bill. We question whether it would be appropriate for such a major programme of environmental law reform to be delivered without a functioning Executive in place.

10.2. We expect that devolved authorities, including the Northern Ireland Executive, will have less capacity than the UK Government to review their environmental REUL.

¹³ Statement made by the Minister for Climate (Graham Stuart MP) concluding the second reading debate; HC Deb 25 October 2022, vol 721, col 251.

¹⁴ Section 17 and paragraph 6 of Schedule 2, Environment Act 2021.

10.3. In facilitating a potentially significant move away from existing laws, the REUL Bill also has the potential to create difficulties in how transboundary environmental issues will be dealt with along the border between Northern Ireland and the Republic of Ireland, which will need urgent consideration. For example, there are areas of high environmental importance that straddle the border. Similar issues should also be considered within Great Britain.

14 November 2022