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Invited written submission to Stormont's AERA Committee on the Environment Bill

Dobbs, M., Gravey, V., & Burns, C. (2020, Feb 1). Invited written submission to Stormont's AERA Committee on the Environment Bill: Submitted as part of the Brexit & Environment Network.

Document Version:
Peer reviewed version

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Evidence on the UK Environment Bill for the Committee on Environment, Agriculture and Rural Affairs of the Northern Ireland Assembly

Brief prepared by Prof. Charlotte Burns (University of Sheffield, Department of Politics and International Relations), Dr. Viviane Gravey (Queen's University Belfast, School of HAPP) and Dr. Mary Dobbs (Queen's University Belfast, School of Law) for the Committee on Environment, Agriculture and Rural Affairs of the Northern Ireland Assembly. This brief builds on the authors' work on post-Brexit environmental policies as part of the Brexit & Environment network, an academic network investigating the impacts of Brexit on UK and EU environmental policies and governance (brexitenvironment.co.uk). This brief outlines the Bill's main provisions, the environmental governance challenges posed by Brexit and the questions the Bill raises for the future of environmental governance in Northern Ireland.

Executive Summary

The Environment Bill goes some way towards addressing the environmental governance gaps that the United Kingdom's (UK) exit from the European Union (EU) opens and is designed as part of a suite of measures to deliver upon the Prime Minister's stated desire to make the UK the cleanest, greenest, country on earth, with the most far-reaching environmental programme (Johnson 2019). To the extent that the Bill seeks to deliver on the Prime Minister's admirable ambition, it is welcome.

However, there are a number of issues that remain to be addressed. These include, the mechanisms for ensuring that planned environmental improvement plans are sufficiently ambitious and deliver meaningful improvement; the independence of the OEP; and the extent to which the Bill is appropriate for Northern Ireland (NI) to address the specific environmental governance challenges faced by NI in view of its legacy of existing environmental problems and its status as the only part of the UK that shares a land border with an EU state.

As a matter of urgency we call for: -

- i) The publication of Northern Ireland's environmental improvement plan.
- ii) Northern Ireland's participation in the proposed OEP as provided for under the Bill. DAERA will need to commence the relevant provisions as soon as possible. In doing so, Northern Ireland must also address the concerns noted below, whether in influencing the development of the Bill or in how the provisions are implemented.
- iii) The immediate creation of an independent environment agency for Northern Ireland, highlighted in the recent negotiations in the reformation of Stormont and the subsequent climate change vote.
- iv) Clarity regarding the financing and resourcing of the OEP, the new independent environment agency and DAERA in order to deliver improved environmental governance in Northern Ireland.

Introduction

1. The Environment Bill (the Bill) was introduced to the House of Commons on the 30th January 2020. The current iteration builds upon the draft Environment (Governance and Principles) Bill proposed in December 2018, which laid the ground for the Environment Bill, proposed on 15th October 2019, which fell due to the calling of a General Election in December 2019.

2. The Bill grants the UK and devolved governments powers to develop post-Brexit environmental law and governance mechanisms.
 - It seeks to establish long term targets for England and Wales for four priority areas: air quality, water, biodiversity and resource efficiency and waste reduction.
 - Those targets must specify a standard that can be measured and a date by which the target will be achieved. Target-setting is to be underpinned by advice from experts that the Secretary of State (SoS) considers to be independent and have relevant expertise. The SoS must also be satisfied that a target can be met and can weaken it under specific circumstances.
 - It requires the SoS and DAERA to develop environmental improvement plans for significantly improving the natural environment. The Twenty-Five Year Environment Plan, which applies to England, is treated as an EIP.
 - The Bill requires the SoS to prepare a policy statement on five environmental principles (the integration, prevention, precautionary, rectification at source, and polluter pays principles) that are to be applied proportionately by Ministers in the development of policy.
 - It requires Ministers to make statements on Bills containing new environmental laws to the Houses of Parliament (vis-à-vis England and Wales).
 - It also requires the SoS to report on developments in international environmental protection legislation which appear to the SoS to be significant.
 - It establishes an Office for Environmental Protection (OEP).
 - It provides powers to the SoS to amend approaches to resource efficiency and waste reduction, water, and air quality.
 - It extends provisions for environmental governance in NI.
3. The Bill applies to England and Wales, especially Chapter One, but a significant number of provisions also encompass Great Britain, UK (for non-devolved areas), and Northern Ireland.
4. This evidence submission comments upon the overall purpose of the Bill before turning to comment upon some of the provisions that relate to Northern Ireland, specifically the requirements to provide Environmental Improvement Plans (EIPs), environmental principles and the Office for Environmental Protection.
5. Besides the more obvious direct impacts on NI environmental governance, it should be borne in mind that the Bill may also impact on NI environmental governance indirectly, e.g. due to transboundary effects, internal level playing fields and knock-on effects on the currently shared regulatory frameworks. We provide a case study that highlights some of these effects in paras 42 to 50 below, which discuss water policy (Clause 83 of the Bill).

Brexit and environmental governance challenges

6. Brexit Governance gaps will emerge in those places where European Union (EU) institutions have exercised governance functions – such as preparing legislation, conducting evaluations, sharing data or overseeing enforcement. These gaps will arise and impact in varying manners across the UK, reflecting existing variations in environmental governance and contextual differences – but variations in response have also arisen (Burns et al, 2018).

7. The Bill suggests that the Government will address some of these governance functions - but it does so only in a partial and limited way (Lee, 2019). The Office for Environmental Protection (OEP) is proposed to address the gaps that will emerge in relation to enforcing EU law, although as detailed below the provisions do not do so in a complete fashion. Other gaps, such as sharing environmental information via membership of the European Environmental Agency remain unaddressed.
8. The Bill has undergone some significant changes since the 2018 Bill, responding in part to criticisms received and committee recommendations (e.g. Environmental Audit Committee, 2019). For instance, as discussed below the Aarhus principles/rights are no longer in the Bill, the duty is to 'have *due* regard' rather than simply 'regard' to the policy statement on principles, an over-arching objective is included vis-à-vis the policy statement, and the independence of the OEP is somewhat buffered. Interestingly, there is little change that responds directly to the new Withdrawal Agreement.
9. In the original May Withdrawal Agreement, the agreed Single Customs Territory had consequences in terms of level playing fields, both with regards to regulatory alignment but also ambitious environmental governance requirements, respect of key environmental principles and the establishment of 'an independent and adequately resourced body or bodies ("the independent body")'. (Art 3.2¹) The original Bill was therefore not merely a response to some of the governance gaps posed by Brexit, but also to the legal requirements being proposed under May's Withdrawal Agreement.
10. The new Withdrawal Agreement² brings significant changes: reference to level playing fields is shifted to the Political Declaration;³ the environmental principles, including non-regression, Aarhus principles/rights and the core environmental principles are no longer present (although some elements of non-regression are arguably reflected in the Political Declaration); no obligation is included regarding independent bodies; and even the EU laws that NI must remain compliant with under the NI Protocol are extremely limited in relation to environmental protection, e.g. omitting key water, waste and air laws. There is consequently an increased risk of environmental regulatory divergence within the UK and with the EU, as well as a potential weakening of environmental governance (Moore, 2019). However, the watering down of the Agreement from an environmental perspective has had little direct impact upon this new Bill (although it did affect Section 16 of the EU Withdrawal Act 2018) – either positive or negative. The Bill also does not address any of the new environmental governance challenges raised by the changes to the Withdrawal Agreement.

¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759019/25_November_Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf

²https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840655/Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf.

³https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840656/Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_European_Union_and_the_United_Kingdom.pdf.

11. The Bill gives an extraordinary degree of latitude to the SoS to determine the independence of experts, the feasibility and ambition of targets and the extent to which changes in international law are significant. On all these issues some degree of parliamentary oversight would provide additional democratic checks and balances to the system of environmental governance. Moreover, regarding international law it would make sense for the Secretary of State to be obliged to report on core international environmental legal developments, beyond 'legislation', which can have a narrow interpretation, and also be given the power to report on significant legal developments in other jurisdictions/countries.
12. It should be noted that: the UK remains party to international environmental conventions, e.g. the Basel Convention on the Transboundary Shipment of Hazardous Waste or the Aarhus Convention; it is also a party to the Good Friday/Belfast Agreement, which provides for North/South cooperation in environmental protection (Hough, 2019); and customary international law applies, including the principle of non-transboundary harm.

Northern Ireland Provisions in the Bill

13. Part 2 of the Bill entails the main provisions directly relevant to Northern Ireland, with Clauses 45 and 46 incorporating Schedules 2 and 3 respectively regarding 'improving the natural environment' and the OEP. However, there are a number of differences in the concerns these provisions raise as (i) Northern Ireland's existing environmental governance system, challenges and needs are not identical to England's (Brennan, Dobbs, Gravey & Uí Bhroin, 2018) and (ii) the approach for NI is not identical to that for England.

Part 2 (Clause 45) (Improving the natural environment: Northern Ireland)

14. Clause 45 and Schedule 2 contain provisions on environmental improvement plans (EIPs) and requires DAERA to bring forward a policy statement on environmental principles.
15. Unlike England, Northern Ireland does not have a 'current environmental improvement plan'. Schedule 2, Clause 1 provides for an EIP to be created within 12 months of the coming into force of the Schedule, with the proviso that until then the 'current plan' will be the default. However, as NI does not have a current plan, this clause risks an immediate governance gap. A NI EIP must be created as soon as feasible. The draft NI Environment Strategy, which recently went through a consultation process, could be developed into a NI EIP – if it contained clear targets and addressed some other core concerns highlighted in the consultation.
16. The Bill (Clause 7) states that an EIP 'is a plan for significantly improving the natural environment'. This wording is regrettably ambiguous as the Bill fails to define either what significance means or how improvement will be measured and against what benchmark. The lack of specificity in the wording to 'significantly improve the natural environment' allows scope to trade-off weakening or poorer performance in some sectors against better performance elsewhere to deliver against the vague goal to 'significantly improve' the natural environment.

17. Improvement from a low benchmark would satisfy the requirements of the Bill but arguably fail to deliver the environmental improvement that is required to meet the governments' commitment to net zero by 2050, amongst others. This is problematic in particular for Northern Ireland, with its poor environmental history and considerable environmental issues reflected in the Mobouy 'superdump' or the poor status of the quality of the water in Northern Ireland.⁴ Northern Ireland needs to improve, but it needs to be ambitious in its environmental aims and not restrict itself to slight and vague improvements.
18. Moreover, and crucially, no specific targets are provided in the provisions on NI, and nor are any timelines specified. Without targets and timelines, the system of environmental governance proposed for NI will be significantly weaker than that for England, leaving the NI environmental governance architecture incomplete and potentially ineffective.
19. Northern Ireland should therefore seek to introduce specific targets. However, in doing so, it should not simply copy-paste from the Bill's approach for England, but should address a number of core issues. For instance, whilst the priority areas listed in Clause 1 including that of biodiversity are valuable generally and for Northern Ireland, there is a notable absence: soil quality (physical, chemical, nutritional etc). Soil health is an essential element of our environment and should be included in the environmental targets. It is a significant issue within the UK that has fallen below the radar at times. The lack of EU-derived legislation on this issue (in part because the UK objected to a Soil Directive on the basis of subsidiarity), makes the role of targets here even more important. It should be noted that sections on contaminated land in the Waste and Contaminated Land Order 1997 have yet to be commenced in NI.
20. Northern Ireland should therefore identify a range of suitable priority areas, building upon those in the Bill for England and extending them to include for instance soil quality. It should then, at a minimum, set legally binding environmental targets for these priority areas.
21. Further concerns to consider include that the Bill only requires that 'at least one matter within each priority area' (Clause 1(2)) be addressed – leaving open the possibility of piecemeal approaches. Moreover, while the SoS is responsible for ensuring the targets are met, (s)he may revoke or lower these targets where the costs are deemed disproportionate. Yet failing to meet the targets may indicate environmental degradation, which may in itself increase the costs of meeting the targets in future – leading to cyclical problems and a gatekeeper/poacher scenario. If a similar approach were taken in Northern Ireland, the already weak approach to environmental protection, would not improve, especially if political will in favour of environmental protection declines in the future (Barry, 2009). Greater reference should be made to international standards based on expertise, with for instance both minimum standards and more aspirational targets, such as the UN Sustainable Development Goals.
22. Schedule 2 Part 1 (5) covers provisions on environmental monitoring requiring that:

'The Department must make arrangements for obtaining such data about the natural environment as the Department considers appropriate for the purpose of monitoring whether the natural

⁴ <https://www.daera-ni.gov.uk/news/northern-ireland-water-framework-directive-statistics-2018-released>.

environment is, or particular aspects of it are, improving in accordance with the current environmental improvement plan.’

23. It is regrettable that it is left to the Department to decide which data are appropriate without requiring coordination with other parts of the UK, the Republic of Ireland and/or the European Environment Agency (EEA). Environmental pollution is invariably transboundary and negative environmental effects can be felt at landscape and eco-systemic levels that cut across national borders. Consequently, it is desirable to have consistent approaches to data use and collection so that changes can be accurately measured and addressed where necessary. It is strongly advisable that the Assembly advise DAERA to work with the UK government, the Republic of Ireland and the EEA to ensure a common approach to data is adopted to enable effective cross-cutting solutions to be devised on the basis of a shared understanding of the problem and consistent measurement approaches. On this note, it is also worth noting that the Good Friday Agreement/Belfast Agreement provides for cross-border cooperation in the field of environmental protection.

Policy Statement on Environmental Principles

24. Schedule 2, Part 2 also provides for a policy statement on environmental principles in NI. It mirrors much of what was contained in the main Bill for England, but applied to Northern Ireland’s public authorities and Ministers of the Crown when making policy relevant to Northern Ireland. Although the same principles are to be addressed, the statements are to play similar roles, and the Secretary of State is to be consulted in the drafting of the NI statement, this does raise the interesting possibility that Ministers of the Crown could have to interpret environmental principles differently regarding Northern Irish policy compared to English policy.
25. The new Bill amends the principles to be addressed for England and mirrors that approach for Northern Ireland. Originally, 9 principles and no over-arching objectives were included in the draft 2018 Bill. The current rendition shifts sustainable development from a principle alongside 8 others, to an objective along with environmental improvement that is to guide the creation of the policy statement itself. Whilst useful to have an over-arching objective, it would be valuable to have included a high level of environmental protection as the goal in conjunction with improvement (as improvement by itself could still be from and at a low level).
26. Furthermore, the Bill now excludes the Aarhus principles that were originally listed in the 2018 Bill. The motivation for this is positive, in so much as the Government recognised that these are individual rights derived from the Aarhus Convention and that the UK remains committed to upholding these.⁵ However, we would still recommend the creation of new legislation that incorporates and provides for these rights within a single piece of legislation. Further, the UK Government’s reasoning in itself implicitly recognises the weak status of the principles situated in the policy statement.
27. The remaining principles are also curtailed in content. They are narrower than the existing versions of the same principles (e.g. without reference to human health) and fail to address new challenges, such as the need for an environmental improvement principle or crucially in the NI context the

⁵ <https://publications.parliament.uk/pa/cm201919/cmselect/cmenvaud/238/238.pdf>.

need for cross-border principles. Northern Ireland should reflect on which principles would be particularly valuable to include in its own context (Brennan, Dobbs, Gravey and Uí Bhroin, 2018).

28. The policy statement suffers from many of the same limitations as that for England and as were present in the original Bill. For instance, the policy statement does not comprise legislation, it can be amended by the Minister at any time and it is only targeted at Ministers rather than public authorities in general. This compares poorly with the environmental principles in EU law located in the Treaty and applicable wherever relevant - including in the interpretation of all EU and EU-derived legislation.
29. A key point to note is that the Ministers are only to have 'due regard to' the policy statement on principles. Whilst the UK Government has improved the text from 'have regard to' due to the considerable criticism received, the wording may still allow the principles to be effectively bypassed. Moreover, this wording provides a very weak foundation for enforcement and represents a backward step from the current scenario in which the principles are binding (Lee, 2019). It is worth noting that the Government specifically decided not to include a binding obligation for instance that all 'public authorities act in accordance with the policy statement...'⁶
30. One final concern that we would flag regarding the policy statement is that (as with the SoS in England) the Department would be able to decide who should be consulted on draft policy statements (beyond the other NI Departments and the SoS) (Schedule 2, Clause 7). Northern Ireland remains bound by the Aarhus Convention, irrespective of Brexit, and any such policy statement would be of public interest and should enable wide and open consultation with the public – as well as engaging with experts and targeting specific stakeholders. This also reflects what the UK Government promised in its response to the EAC's report on the 2018 Bill, where it promised a 'full consultation process'.⁷

The Office for Environmental Protection

31. The Bill provides for the creation of an OEP for England initially – a body that is 'to contribute to environmental protection and the improvement of the natural environment' (Clause 22), via its scrutiny, advice and enforcement functions. The new Bill seeks to address concerns over the OEP's independence, e.g. by requiring that the Secretary of State have regard to the need to protect the OEP's independence (Schedule 1, Clause 17) (that duty can be very limited) and through an initial 5-year indicative budget.⁸
32. However, without very careful steps to ensure the OEP's independence it risks being eroded in practice, e.g. the HoC Environmental Audit Committee notes that 'Martin Nesbit told us that it is inevitable that the new body will be at risk of abolition as "history is littered with the corpses of environmental watchdogs and sustainable development watchdogs", which have been created and then killed off by subsequent Administrations.'⁹ Under the Bill, the Secretary of State still plays

⁶ <https://publications.parliament.uk/pa/cm201919/cmselect/cmenvaud/238/238.pdf>, p.3.

⁷ <https://publications.parliament.uk/pa/cm201919/cmselect/cmenvaud/238/238.pdf>, p.5.

⁸ <https://publications.parliament.uk/pa/cm201919/cmselect/cmenvaud/238/238.pdf>, pp.1-2.

⁹ <https://publications.parliament.uk/pa/cm201719/cmselect/cmenvaud/803/80307.htm>, [53].

a major role in the appointment of members (the Secretary will appoint the non-executive members and they then appoint the executive members) and funding (the OEP will receive ‘such sums as the SoS considers are reasonably sufficient to enable the OEP to carry out its functions’ under Schedule 1, Clause 12). The 5-year indicative budget is not expressly provided for and no objective criteria are provided.

33. Clause 45 and Schedule 3 makes provisions about the functions the OEP in, or as in regard to, Northern Ireland; and amends Clauses 21-28 within this Act to reflect those specific functions. It essentially provides for the extension of the OEP to Northern Ireland. In doing so, the provisions on the OEP allow for an NI member to sit on the OEP (Schedule 3, Clause 2, 27[2]). But no provision is made for this appointment to involve or allow involvement and oversight from the NIA.
34. Schedule 3 Part 1 provides for the OEP to report on EIPs, and Part 2 provides for the OEP to report on monitoring and reporting of environmental law. In both cases reports are to be laid before the NIA – although the reports on environmental law are optional. In both cases it is worth noting that the reports are on implementation rather than on creation, development or enforcement.
35. Schedule 3 Part 1 Clause 3(6) makes provisions for the OEP to offer DAERA advice on changes to environmental law, but there is no automatic requirement that this advice be communicated to the NIA. Rather DAERA may ‘if it thinks fit’ lay the advice before the NIA. Members may wish to amend these provisions to require that the OEP advice to DAERA on changes to environmental law is also laid before the NIA.
36. There is a lack of clarity in the current provisions about the resourcing, staffing and expertise needed for the body to operate effectively in Northern Ireland. Having a token member on the OEP will not suffice. An office based in NI would be required, with appropriate staff and resources to ensure effectiveness. To this end, it should be noted that the law, practices and culture in NI are distinct and may vary further in future without the EU providing regulatory floors.
37. Further, there is a lack of clarity on the timescale for when the OEP is expected to become operational in Northern Ireland. As no interim environmental governance arrangements are proposed within the Bill, the OEP must be operational by 1st January 2021 to avoid a gap in environmental governance.
38. A crucial element in environmental enforcement is the ability of ordinary individuals to be able to provide information and help initiate actions by enforcement bodies. This process is facilitated currently by a complaints procedure to the European Commission, as well as for instance in water pollution hotlines. The Bill provides for complaints by individuals to the OEP, but includes an unnecessary restriction through excluding individuals who exercise ‘functions of a public nature’ (Clause 29).
39. The Bill provides for a range of enforcement mechanisms, but these are still quite limited. Investigations are permitted (but, significantly, not required) where the OEP considers that there may be a ‘serious failure’ of compliance. The OEP should have the option of action where there is some evidence of non-compliance and be mandated to investigate in the case of some evidence/suspicions of a serious failure.

40. Information and decision notices are possible, as softer tools. At the supposed harder end for Northern Ireland, the OEP has the option of review applications and judicial review. Respondent public authorities are expected to publish the steps which they contemplate in light of any findings. Judicial review is only an option where there may be 'serious damage' to the environment and/or human health (relevant once more), yet even judicial review has been heavily criticised¹⁰ and is the subject of a current complaint to the Aarhus Compliance Committee, which found the UK to be in breach of its Treaty obligations¹¹. This remains the strongest tool for the OEP and it is insufficient. An alternative enforcement tool that could be included would be administrative fines. Beyond actions by individuals or the OEP, one significant option to consider would be the possibility for actions by the other devolved administrations.
41. It is also essential to note that the OEP would be complementary to the NIEA and not replace it. Similarly, a core objective for environmental governance in NI (reflected in the recent Assembly vote) should be establishing an *independent* environmental agency in NI that would complement the OEP – the former would be the day-to-day regulator and enforcer vis-à-vis ordinary individuals and companies, whereas the latter would play those roles vis-à-vis public authorities.

Water Quality: powers of Northern Ireland Department

42. A key issue to be considered is the implications of the Bill and new exercise of powers in NI for environmental quality. To illustrate potential issues, we drill down to focus upon water quality, which is covered in Part 5 of the Bill, and particularly Clause 83.
43. Clause 83 of the Bill gives powers to the NI Department to change key regulations overseeing the protection of water in Northern Ireland.¹² These powers cover inter alia:
- Changing the objectives to be met, and the way waterbodies are classified;
 - Changing the substances about which provisions are made – i.e. changing the numbers and types of pollutants measured in water;
 - Changing the way water quality is being monitored – i.e. the frequency of checks, but also how isolated negative checks impact the overall classification of the waterbody.
44. These powers mirror those of the DEFRA SoS for England in the Bill. They raise three distinct types of concerns: (1) the potential for weakening water quality protection (2) lack of stakeholder engagement/consultation in undertaking major governance changes (3) issues for cross-border cooperation linked to the three transboundary river basins shared between Ireland and Northern Ireland. In contrast, as no water directives are listed in the Ireland/NI Protocol to the Withdrawal Agreement, these powers do not raise specific concerns of domestic policy development conflicting with obligations under the protocol.

¹⁰ House of Lords EU Subcommittee Energy & Environment (2017) Brexit : environment and climate change report <https://www.publications.parliament.uk/pa/ld201617/ldselect/ldeucom/109/109.pdf>

¹¹ <https://www.brexitenvironment.co.uk/2019/04/03/aarhus-convention-eu-and-international-law/>

¹² (a) the Groundwater Regulations (Northern Ireland) 2009 (S.R. (N.I.) 2009 No. 254); (b) the Water Framework Directive (Classification, Priority Substances and Shellfish Waters) Regulations (Northern Ireland) 2015 (S.R. (N.I.) 2015 No. 351); (c) the Water Environment (Water Framework Directive) Regulations (Northern Ireland) 2017 (S.R. (N.I.) 2017 No. 81); (d) any regulations modifying that legislation made under or by virtue of the European Union (Withdrawal) Act 2018.

45. Being able to change objectives, substances, monitoring rules can all be positive – for example, changes to all three are planned under the Water Framework Directive so they can be ‘adapted to scientific and technical progress’. No such justifications are included or required here – opening a door to changes which could weaken the ambition of water policy.
46. The 25 Year Environment Plan (YEP) gives us an insight into how DEFRA will deploy these powers and provides a cautionary tale of the ways in which small, apparently technical, changes can affect water policy ambition. The 25 YEP sets out as an objective ‘improving at least three quarters of our waters to be close to their natural state as soon as is practicable’ – the Environment Bill allows DEFRA to define what ‘close to their natural state’ and the inclusion of ‘practicability’ provides an immediate limitation on ambition. By contrast the Water Framework Directive requires good ecological status with no limitations. Hence, this difference in wording in the YEP opens the door to weakening quality standards.
47. Moreover, weakening can take place not only via standards but also via monitoring or evaluation practices. Water quality monitoring offers a good example for how different monitoring approaches yield very different results. Hence, in 2018, in a report by the Environmental Agency demonstrating that England is generally underperforming, water quality is presented in two ways: e.g. Rivers are at ‘14% (76%)’. The 14% reflects the grade of water quality under the EU WFD monitoring rules (the percentage of water bodies at good or better ecological status over a year), whilst the 76% ‘number in brackets show % of individual tests achieving good or better status and may give a better indication of water body condition’.¹³
48. Poor consultation requirements: ‘the Department must consult any persons or bodies appearing to the Department to represent the interests of those likely to be affected by the regulations’ – is standard in the Bill, but is particularly egregious when compared to the Water Framework Directive, which fosters wide ranging and frequent public engagement with water governance. See e.g. Art 14 Directive 2000/60/EC ‘Member States shall encourage the active involvement of all interested parties in the implementation of this Directive, in particular in the production, review and updating of the river basin management plans’. Again, it should be borne in mind that the Aarhus Convention remains binding on the UK post-Brexit and widespread engagement should be fostered.
49. In Northern Ireland, engagement with the WFD, and its River Basin Management Plans (to be revised for 2021) is extensive: ‘Northern Ireland has a layered approach to public involvement. The NI Water Framework Directive Stakeholder Forum will be invited to join the DAERA WFD Strategic Planning and Resources Group to review progress on an annual basis. River basin planning also involves anyone who is interested in, or may be affected by, the water environment and the way in which it is managed. Catchment Officers continually work with groups of stakeholders across the River Basin Districts.’¹⁴

¹³https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/709493/State_of_the_environment_water_quality_report.pdf

¹⁴<https://www.daera-ni.gov.uk/articles/delivery-and-public-participation>

50. If Northern Ireland changes the pollutants measured, or the method measured – for example, following England in moving to an, as yet to be determined, ‘close to natural state’ approach, this would raise challenges for continued N/S cooperation on water quality and especially on the implementation of the Water Framework Directive, for example in relation to providing comparable data between the two jurisdictions, and creating added barriers to practical cooperation between the governments and agencies in Northern Ireland and the Republic of Ireland. This cooperation is currently mandated and enabled under EU law, encouraged and facilitated by the Good Friday Agreement, and simply required by logic.

Conclusion

51. The Environment Bill offers opportunities to address some environmental governance gaps in Northern Ireland in the wake of Brexit. However, the Bill is no panacea for environmental governance irrespective of the context. There are a number of limitations and flaws contained within it regarding the limitations on the EIPs, the duties on public authorities, and the question of the independence of the OEP. These limitations need to be resolved irrespective of the jurisdiction where they apply.
52. Most importantly, this Bill is not sufficiently tailored for Northern Ireland: it was developed for a very different setting and does nothing to address pre-existing environmental governance issues in Northern Ireland (such as the absence of an independent Environment Agency). It further raises concerns about the direction of travel for change to environmental policy after Brexit.
53. Developed for England, the Bill’s architecture of EIP, OEP and Principles does not fully fit the NI context, fuelling concerns of legislation made ‘common by default’, fine-tuned for England but not tailored to the needs of NI.¹⁵ In this evidence we have drawn attention to, for example, the lack of a NI EIP and questions about whether the NI Environmental Strategy could become a NI EIP; continuing concerns about the independence of the OEP, but also about the OEP’s NI expertise; and whether NI’s environment requires different principles, such as cross-border cooperation and an overarching objective of high environmental protection.
54. Nevertheless, the soon approaching end of the transition period creates an environmental governance cliff edge: it is critical that NI does not become the only part of the UK without an OEP or a body with OEP-like powers on 1 January 2021. Commencing the NI sections on the OEP would remove the cliff edge – and doing so instead of developing a different, NI approach would allow DAERA to prioritise the development of an (essential) independent Environment Agency. However, if doing so, NI must push for a NI office of the OEP to be established, with local knowledge and expertise and for long-term, ring-fenced guaranteed funding for the office.
55. Similarly, a Northern Irish EIP is required and urgently. In drawing up this plan NI draw upon best practice from the proposals for England – expanding the priority areas, imposing duties on the

¹⁵ <https://www.brexitenvironment.co.uk/2019/04/10/environment-bill-northern-ireland/>

Minister regarding setting of targets, and providing for effective accountability and oversight mechanisms.

56. Finally, a policy statement is better than nothing, but the proposals here are far weaker and narrower than those that currently apply. Northern Ireland should develop its own legislation to preserve and develop environmental principles, in furtherance of the overarching objectives of a high level of environmental protection. As we have discussed at length elsewhere, this would entail a wider range of principles, legally binding on all public authorities and preferably stretching beyond Northern Ireland (Brennan, Dobbs, Gravey and Uí Bhroin, 2018).

References

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