

Brexit and Environmental Law in England: Where are we now?

Dr Catherine Ann Caine, Senior Lecturer in Law, Law School, University of Exeter, Faculty of Humanities, Arts and Social Sciences, Amory Building, Rennes Drive, Exeter, UK EX4 4RJ.

Email: c.caine@exeter.ac.uk

Funding/grant body award received: None.

The authors report there are no competing interests to declare.

Brexit and Environmental Law in England: Where are we now?

Abstract

Maintaining strong standards of environmental protection was used as arguments by both the leave and remain campaign during the Brexit referendum. Some argued that Brexit would lead to the decimation of environmental protection in the UK, whereas others argued that it would be an excellent opportunity to improve upon the environmental standards upheld in the European Union. This commentary focusses on the progress made in England surrounding environmental principles, the introduction of the Office for Environmental Protection, and plans to remove retained EU environmental law with the aim of answering whether environmental protection has improved in the UK since Brexit.

Key Words

Brexit, environmental protection, environmental principles, Environmental Impact Assessment, Strategic Environmental Assessment, Retained EU Law, Office for Environmental Protection

1. Introduction

Over three years have passed since the UK left the European Union and it's safe to say that certain events that have taken place since the 31st January 2020 have realised some of the worst nightmares of even the hardiest of politicians. From the devastating impact of the Covid-19 pandemic, to the Russian invasion of Ukraine and the subsequent cost-of-living crisis, those living in the UK have gone from a position where the greatest topic of public debate was Brexit to a time where it has almost become a forgotten event of the past. For those who are tasked with keeping abreast of the way in which Brexit has impacted upon environmental law, the job is relentless. Recently, some have predicted a 'bonfire' of existing environmental protections in the UK,¹ whereas others have argued that Brexit is the ultimate opportunity for the UK to significantly improve its offering on environmental protection.² However, putting aside personal feelings that are for or against Brexit, an objective viewpoint would ultimately argue that it remains too early to definitively determine whether Brexit has either improved or weakened environmental protection in the UK. That said, some of the developments that have taken place post-Brexit can be viewed as positive and promising, whereas other developments have been regarded as an opportunity missed.

¹ 'REUL Act Creates Uncertainty for UK Environmental Protections' (*ClientEarth*, 6 July 2023) <<https://www.clientearth.org/latest/latest-updates/news/uk-setting-bonfire-of-environmental-regulations-alight-with-new-bill/>> accessed 12 July 2023; Leonie Cater 'A Post-Brexit Regulatory 'Bonfire' could Scorch UK Environmental Protections' (*Politico*, 1 February 2023) <<https://www.politico.eu/article/post-brexit-regulation-uk-environmental-protection-eu/>> accessed 12 July 2023.

² 'New Environmental Protections to Deliver a Green Brexit' (*Department for Environment, Food & Rural Affairs*, 12 November 2017) <<https://www.gov.uk/government/news/new-environmental-protections-to-deliver-a-green-brexit>> accessed 12 July 2023.

This commentary will provide a review of the latest developments in three key areas which are fundamental to improving English environmental protection post-Brexit. The commentary will first review the way in which environmental principles have been retained post-Brexit through the Environmental Principles Policy Statement. The enforcement of environmental protection and advice given to public bodies will then be analysed to determine the extent to which the newly introduced Office for Environmental Protection is capable of filling the shoes of the European Commission with respect to its advisory and enforcement powers post-Brexit. Finally, the commentary will turn to the retention of EU environmental law and will analyse the extent to which Brexit has resulted in the predicted ‘bonfire’ of environmental legislation. Due to the devolved nature of the United Kingdom, various laws and bodies have been introduced in England, Wales, Scotland and Northern Ireland to tackle environmental protection outside of the EU. This commentary is focussed primarily on the situation in England, however the equivalent measures taken in Wales, Scotland and Northern Ireland have been noted where relevant throughout.³

2. Environmental Principles Post-Brexit

One of the most unique elements of environmental law in comparison to other legal disciplines, is that principles form an invaluable basis for the discipline. Integral principles, such as the preventative principle, the precautionary principle and the polluter pays principle boast a history almost as long as the discipline itself and have become a fundamental part of the subject. However, whilst many of these principles originated in international law, the European Union has consciously integrated them throughout its entire existence – the Treaty on the Functioning of the European Union has enshrined these principles,⁴ and subsequently they appear in a multitude of environmental Treaties and Regulations from the European Union. As a result of the intrinsic integration of environmental principles in the European Union, law that was transposed in the UK during its membership conformed with these principles, and if the UK, or a public body within, was not conforming with these principles then the Court of Justice of the European Union could enforce them accordingly.⁵ The UK’s exit from the European Union had the potential to leave a gap with respect to the application and enforcement of environmental principles.

³ For specific commentary focussed on the impact of Brexit on environmental protection in the devolved nations, see Colin Reid, ‘Brexit: a view from Scotland’ (2018) 30(2/3) ELM 67; Colin Reid, ‘Brexit and the environment: what next?’ (2018) 190 SPEL 128; Sarah Hendry, ‘The Continuity (Scotland) Bill 2020’ (2019) 31(4) ELM 173; Sean Whittaker, ‘Environmental principles and governance in Scotland – an analysis of the consultation’ (2019) 192 SPEL 30; Ciara Brennan, Mary Dobbs, Viviane Gravey, ‘Out of the frying pan, into the fire? Environmental governance vulnerabilities in post-Brexit Northern Ireland’ (2019) 21(1) Env L Rev 84; Cowell, R. et al. ‘Wales: Challenges and opportunities for post-Brexit environmental governance’ (*Brexit & Environment*) <<https://www.brexitenvironment.co.uk/wp-content/uploads/2018/10/BrexitEnvWalesReport.pdf>> accessed 21 July 2023.

⁴ Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47, art 11; arts 191-193 (‘The Treaty on the Functioning of the European Union’).

⁵ For example, conformity with the precautionary principle was assessed in the following two cases: Case C-341/95 *Bettati v Safety Hi-Tech Srl* [1998] ECR I-4355; Case T-13/99 *Pfizer v European Commission* [2002] ECR II-3305.

To ensure that environmental principles were not lost after Brexit, s 17 Environment Act 2021, required the Secretary of State to create a policy statement which explains how environmental principles should be interpreted and applied by policymakers. The selected principles to be incorporated into the policy are the integration principle, the preventative principle, the precautionary principle, the rectified at source principle and the polluter pays principle. In May 2022, a draft environmental principles policy statement was produced, with the final version of the policy being published in January 2023.⁶ Despite the policy statement showing a willingness to integrate these environmental principles into UK policy and law making, some have argued that the policy document does not go far enough. Criticisms were levelled against the draft policy statement for various reasons, from the fact that there have been significant unexplained delays in producing the policy document through to criticisms of the definitions that have been used along with the weak wording using in the policy statement.⁷

With respect to the use of the principles, Greener UK argued that the draft statement represented a diminution of the integration principle as policy makers are advised to ‘*look for opportunities to embed* environmental protection in fields of policy that have environmental effects’ rather than being required to embed it.⁸ Despite these concerns raised during the drafting stage, the same wording has been used in the final policy statement. In addition to this, concern has also been raised regarding the definition used for the precautionary principle. It has been noted that the 1992 Rio Declaration definition of precautionary principle is used in the policy statement which states that ‘where there are threats of serious or irreversible environmental damage, a lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation’.⁹ Lee notes how the high thresholds for action (i.e. serious or irreversible damage, and cost-effective measures) have long been criticised and that whilst the definition is frequently used, a ‘far more ambitious’ definition could have been used in the Environmental Principles Policy Statement in order to strengthen environmental protection in the UK post-Brexit.¹⁰

In the Government’s preamble to the release of the environmental principles policy statement, it is stated that ‘the government has committed that we will be the first generation to leave the

⁶ ‘Environmental Principles Policy Statement’ (*Department for Environment, Food & Rural Affairs*, 12 May 2022) <<https://www.gov.uk/government/publications/environmental-principles-policy-statement>> accessed 19 July 2023.

⁷ Maria Lee, ‘The Environment Bill: A Framework for Progressive Environmental Law?’ (*Brexit & Environment*, 18 October 2019) <<https://www.brexitenvironment.co.uk/2019/10/18/framework-progressive-environmental-law/#:~:text=Matters%20Environment%20Bill-,The%20Environment%20Bill%20%3A%20A%20framework%20for%20progressive%20environmental%20law%3Fits%20scale%20and%20its%20scope>> accessed 12 July 2023; ‘The Environmental Principles Policy Statement’ (*Greener UK*, June 2022) <https://greeneruk.org/sites/default/files/download/2022-06/Greener_UK_note_on_the_environmental_principles_policy_statement_June_2022.pdf> accessed 12 July 2023.

⁸ ‘The Environmental Principles Policy Statement’ (n 6) 2-3.

⁹ United Nations Rio Declaration on the Protection of the Ozone Layer (2 May 1989), 31 I.L.M. 874 (1992).

¹⁰ Maria Lee, ‘DEFRA’s Draft Environmental Principles Policy Statement’ (*SSRN*, 26 April 2021) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3827270> accessed 12 July 2023.

environment in a better state than that in which we found it’.¹¹ However, the contents of the environmental principles policy statement fail to convince that there will be an improvement upon the level of environmental protection that was offered during membership of the European Union. On the contrary, the weak language adopted, combined with the strict interpretation of the precautionary principle, suggests that environmental principles may, in fact, be less effective in the UK post-Brexit. The status of the “legally-binding” nature of the environmental principles policy statement has also been questioned.¹² In the European Union, environmental principles *are* legally binding as they are weaved into the foundational treaties of the EU with strong wording such as ‘Union policy on the environment *shall* be based on the precautionary principle...’.¹³ These legally binding principles have been relied upon in Court.¹⁴ However, despite the Government’s claims that the Environmental principles policy statement is legally binding in the UK, s 19 Environment Act 2021 simply states that Ministers must ‘have due regard to the policy statement’ when making policy. This is a far diminished version of the requirements that existed under EU law and contradicts the grand statements that have been made by the UK Government when it comes to improving environmental protection outside of the EU. Whilst the test of time will shed light on the way in which these principles are being used in UK law post-Brexit, it does appear that progress on the application and enforcement of environmental principles in the UK to date is not as strong as it was when the UK was a member of the European Union, and it does not look likely to deliver a stronger level of environmental protection.

3. The Creation of the Office for Environmental Protection

The second key concern relating to environmental protection post-Brexit was that the UK is losing an independent regulator/watchdog when it comes to environmental law. During the UK’s membership of the European Union, the European Commission had the power to initiate a formal infringement procedure against the UK if it was failing to apply EU law. This could then result in the matter being referred to the Court of Justice of the European Union and could ultimately result in financial sanctions being issued.¹⁵ Without the continued pressure of an external watchdog ensuring that the UK applies and implements environmental law, certain environmental groups and academics have come to the conclusion that the standard of environmental protection in the UK could significantly drop.¹⁶ However, Macrory notes how

¹¹ ‘Environmental Principles Policy Statement’ (*department for Environment, Food & Rural Affairs*, 31 January 2023) <<https://www.gov.uk/government/publications/environmental-principles-policy-statement/environmental-principles-policy-statement#general-application-options>> accessed 12 July 2023.

¹² Maria Lee (n 10) 6.

¹³ ‘The Treaty on the Functioning of the European Union’ (n 3) art 11; arts 191-193.

¹⁴ In her article, Maria Lee details various EU case law examples where environmental principles have been relied upon. For example Case C-616/17 *Criminal Proceedings against Blaise* ECLI: EU:C:2019:800; Case T-229/04 *Sweden v Commission (Paraquat)* ECLI:EU:T:2007:217; *R (on the application of Mynydd y Gwynt) v Secretary of State for BEIS* [2018] Env L R 22; and [2017] Env LR 14; Case C-236/01 *Monsanto Agricoltura Italia SpA v Presidenza del Consiglio dei Ministri* [2003] ECR I-8105. For Lee’s commentary on this, see Maria Lee (n 10) 2.

¹⁵ ‘Implementing EU Law’ (*The European Commission*) <https://commission.europa.eu/law/application-eu-law/implementing-eu-law_en> accessed 13 July 2023.

¹⁶ Anne Perkins, ‘Campaigners Attack Plan for New Watchdog to Protect Environment After Brexit’ (*The Guardian*, 10 May 2018) <<https://www.theguardian.com/environment/2018/may/10/new-watchdog-to-protect->

an ‘unpredictable’ result of Brexit has been the creation of the Office for Environmental Protection (OEP) in 2021,¹⁷ which he argues provides ‘a significant addition to the British system of environmental governance’.¹⁸ The OEP has jurisdiction in England and Northern Ireland, and two separate organisations have been set up in Wales and Scotland. These are the Interim Environmental Protection Assessor for Wales, and Environmental Standards Scotland.¹⁹ This section will focus predominantly on the OEP; however it is noted that all three organisations have agreed common grounds for working together, whilst simultaneously respecting their devolved powers.²⁰

The OEP is somewhat of a unique addition to environmental enforcement and governance in England and Northern Ireland. It is a non-departmental public body which differs from the other environmental facing non-departmental public bodies in England, such as the Environment Agency and Natural England. Macrory notes that the OEP is different for a number of reasons, such as the fact that its staff are employees not civil servants, that the OEP does not take legally binding directions from Government, and that it has its own separate website from the main Government website.²¹ These unique features of the OEP are essential in order to ensure that it is independent from Government.²² The role of the OEP is multifaceted. This includes a monitoring role of Government progress on the long-term environmental targets required by the Environment Act,²³ an advisory role as the OEP is legally bound to provide advice to Ministers upon request,²⁴ and finally an enforcement role whereby the OEP is tasked with ensuring that public authorities in England and Northern Ireland are adhering to their obligations under environmental law.²⁵

The unique nature of the OEP in comparison to other non-departmental public bodies is a very promising outcome post Brexit which goes some way to quell the fears that public authorities would be unaccountable on environmental matters after the European Commission ends its role. Like a precocial baby, the OEP has hit the ground running immediately after its inception

environment-after-brexit-gove-announces> accessed 13 July 2023; Colin Reid, ‘Mapping Post-Brexit Environmental Law’ (2021) 21 *ERA Forum* 655, 661-663.

¹⁷ ‘The Office for Environmental Protection’ (*Office for Environmental Protection*) <<https://www.theoep.org.uk/office-environmental-protection>> accessed 13 July 2023.

¹⁸ Richard Macrory, ‘Breaking the Mould—Britain’s New Office for Environmental Protection’ (2023) 35 *Journal of Environmental Law* 33. 33

¹⁹ ‘The Interim Environmental Protection Assessor for Wales: What we do’ (*Welsh Government*) <<https://www.gov.wales/interim-environmental-protection-assessor-wales#:~:text=The%20Interim%20Environmental%20Protection%20Assessor,Ministers%20to%20improve%20environmental%20outcomes>> accessed 19 July 2023; ‘Environmental Standards Scotland is here to ensure Scotland has high environmental standards and strong systems which maintain them’ (*Environmental Standards Scotland*) <<https://www.environmentalstandards.scot/>> accessed 19 July 2023.

²⁰ ‘Memorandum of Understanding between the Office for Environmental Protection, Environmental Standards Scotland, and Interim Environmental Protection Assessor for Wales’ (*Environmental Standards Scotland*) <<https://www.environmentalstandards.scot/wp-content/uploads/2022/10/Memorandum-of-Understanding-between-the-Office-for-Environmental-Protection-20221011.pdf>> accessed 19 July 2023.

²¹ Macrory (n 18) 36-37.

²² Environment Act 2021, sch 1, para 17.

²³ Environment Act 2021, ss 28-29.

²⁴ Environment Act 2021, s 30.

²⁵ Environment Act 2021, s 31.

and during its first year of existence, to date, it has provided 16 reports detailing advice to Government on changes to environmental law on topics including the draft Air Quality Strategy, the draft Ammonia Strategy for Northern Ireland and the Nature Recovery Green Paper and proposals to reform the Habitats Regulations Assessment.²⁶ A review of these reports shows that the OEP is not shying away from informing Government of where their proposals should be improved to ensure environmental protection. For example, the OEP has recommended a further six areas for improvement that can be made to the draft Air Quality Strategy,²⁷ has warned of the risks of altering the processes of environmental impact assessment and strategic environmental assessment,²⁸ and has warned against the timelines for the removal of Retained EU Law.²⁹ With respect to the latter, the OEP asserted that “if done well, this review could make environmental law better. But done badly, or rushed unduly, it could compound environmental problems and create new uncertainties and burdens”.³⁰ The action taken in the first year of the OEP’s existence demonstrates that, with respect to its advisory functions, it is certainly an independent actor from Government and is not holding back when it comes to disagreeing with Government proposals.

Whilst the actions of the OEP to date, and the manner in which it has been set up, are all incredibly positive additions to environmental protection in England and Northern Ireland, it is not yet clear whether the OEP’s existence will actually force Government to improve environmental protection. It is important to note that the OEP’s advice is not binding on the Government and the Government is not required to respond.³¹ It is also important to note that, in comparison to the Environment Agency (around 10,600 employees) and Natural England (around 2,000 employees), the Office for Environmental Protection has comparatively low staff numbers of under 70.³² The OEP is currently recruiting 50 unpaid academic and industry experts to join its “College of Experts” which can be called upon for its expertise. However, despite this, it is fair to say that the OEP has finite resources available to them, and therefore will have to choose carefully which areas of environmental protection that they decide to

²⁶ To see all of the advice given by the OEP to Government to date see, ‘Advice to Government’ (*Office for Environmental Protection*) <<https://www.theoep.org.uk/advice-government>> accessed 20 July 2023.

²⁷ ‘Draft Air Quality Strategy a step forwards by more work needed to ensure that targets are hit’ (*Office for Environmental Protection*, 4 May 2023) <<https://www.theoep.org.uk/report/draft-air-quality-strategy-step-forwards-more-work-needed-ensure-targets-are-hit>> accessed 20 July 2023.

²⁸ ‘New assessment approach for developments must lead to environmental improvements, says OEP’ (*Office for Environmental Protection*, 15 June 2023) <<https://www.theoep.org.uk/report/new-assessment-approach-developments-must-lead-environmental-improvements-says-oep>> accessed 20 July 2023.

²⁹ ‘OEP submission to the Retained EU Law Bill Committee’ (*Office for Environmental Protection*, 22 November 2022) <<https://www.theoep.org.uk/report/oep-submission-retained-eu-law-bill-committee>> accessed 20 July 2023.

³⁰ *ibid.*

³¹ Environment Act 2021, s 30.

³² ‘About Us’ (*Environment Agency*) <<https://www.gov.uk/government/organisations/environment-agency/about>> accessed 20 July 2023; ‘About Us’ (*Natural England*) <<https://www.gov.uk/government/organisations/natural-england/about#:~:text=We%20have%20%2C000%20staff%20in,a%20map%20of%20our%20offices.>> accessed 20 July 2023; The Office for Environmental Protection, ‘College of Experts Information Webinar Recording’ (12 July 2023) 13:12 <<https://www.youtube.com/watch?v=gh7EOb5VEvM>> accessed 20 July 2023.

investigate. Macrory notes that the key to effective management of the OEP would consist of ‘sound strategies and priorities, but with the flexibility to react quickly where needed’.³³

With respect to the enforcement powers of the OEP, it is too early at this stage to pass judgement on whether the OEP is an effective enforcement body for environmental protection. A complaints mechanism has been established to receive complaints from the public which is clearly accessible on the OEP’s website. In addition to acting upon complaints received, the OEP also has an obligation to monitor the implementation of environmental law and report any matter concerned with its implementation under s 29 Environment Act 2021. The Environment Act also provides the OEP with the powers to investigate complaints and issue decision notices accordingly which set out the failure of the public authority along with the steps that the authority should be taking in relation to the failure.³⁴ S 39 Environment Act 2021 also provides the OEP with powers to apply for judicial review if they regard the behaviour of a public authority to constitute a serious failure to comply with environmental law and the urgency condition is met. The addition of the ‘urgency condition’ to the power to use judicial review shows that the enforcement relationship of the OEP should be one where, in the first instance, poor practice should be stopped using decision notices, with judicial proceedings being saved for the most serious and urgent of offences. One potential enforcement gap where the OEP will have no power relates to public body decisions made under legislation which is not mainly concerned with environmental protection, but which could still have damaging environmental impacts.³⁵ The OEP only has enforcement powers with respect to ‘environmental law’ as defined in s 46 Environment Act 2021. Macrory provides the example that large-scale planning decisions could escape the definition unless they fall within specialist environmental law.³⁶

Ultimately the OEP’s introduction can be summarised as a positive addition to environmental protection which goes some way towards filling the role of the European Commission. It has hit the ground running with respect to its advisory role and has proven itself to be an independent body from Government which is unafraid of informing the Government when it believes that their proposed actions will hinder environmental protection. Only time will tell if the OEP will fill the shoes of the European Commission when it comes to enforcement. There is a possibility that staff resources could result in the need for selective enforcement and that the OEP could be powerless to prevent serious environmental damage conducted by public authorities if it falls outside the definition of ‘environmental law’.

4. Retention of EU Environmental Law

It is widely recognised and acknowledged that the vast majority of environmental law in the UK is derived from its membership of the European Union. Some have even attributed the UK joining the European Union as one of the foundational events that kickstarted environmental law as a discipline in its own right in the UK. This has led to the justifiable fears that the

³³ Macrory (n 18). 43

³⁴ Environment Act 2021, s 36.

³⁵ Macrory (n 18). 40

³⁶ *ibid.*

devolved Governments in the UK could cause a bonfire of environmental legislation, particularly if such legislation stands in the way of economic development. Following the withdrawal period, the EU and UK signed the EU-UK Trade and Cooperation Agreement which includes an undertaking from both parties stating that

‘a Party shall not weaken or reduce, in a manner affecting trade or investment between the Parties, its environmental levels of protection or its climate level of protection below the levels that are in place at the end of the transition period, including by failing to effectively enforce its environmental law or climate level of protection.’³⁷

In addition to this, both Parties have agreed to ‘continue to strive to increase their respective environmental levels of protection or their respective climate level of protection referred to in this Chapter’.³⁸ However, it is important to note that the non-regression clause is limited to ‘a manner affecting trade or investment between the Parties’ which means that certain environmental legislation could be altered or removed in compliance with this Agreement if it does not affect trade or investment.

Under the original Retained EU Law (Revocation and Reform) Bill it was proposed that all EU law that had been retained under the European Union (Withdrawal) Act 2018 would be removed from the statute books under the sunset clause by the end of 2023, unless otherwise stated.³⁹ This proposal received backlash from those arguing that standards would significantly drop if all retained law were to be suddenly removed, and those who argued that the timeframe to assess which laws needed to be kept were far too short to do the job properly. This proposal was ultimately altered from a process whereby all retained law was removed by default except for specified laws which were to be kept, to one where everything was retained by default except for specified laws outlined for removal under the Retained EU Law (Revocation and Reform) Act 2023. An amendment was introduced in May 2023 which provides a list of the laws which will be revoked at the end of 2023.⁴⁰ This list contains 586 pieces of legislation, 342 of which have selected by the Department for Environment, Food and Rural Affairs (DEFRA). The list of retained EU law which is to be revoked at the end of 2023 details the purpose of each piece of legislation, followed by the reason for its revocation. For the vast majority of pieces of legislation, the reason for revocation is that the ‘regulation relates to a requirement/scheme/agreement which is no longer in operation, or is no longer relevant in the UK’.⁴¹ Whilst it has not been possible to analyse the entire contents of the list in preparation

³⁷ Trade and Cooperation Agreement Between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [2021] OJ L 149/10, art 391(2).

³⁸ *ibid* art 391(5).

³⁹ Retained EU Law (Revocation and Reform) Bill (2022-23) 156.

⁴⁰ ‘Schedule of Retained EU Law’ (*Gov.uk*, 15 May 2023) <<https://www.gov.uk/government/publications/schedule-of-retained-eu-law#:~:text=On%2010%20May%20an%20amendment,at%20the%20end%20of%202023>> accessed 19 July 2023.

⁴¹ *ibid*.

for this commentary, the exercise to date does seem to have been largely a housekeeping exercise which has resulted in the removal of law that is either outdated, or that provides the EU with powers which it no longer has post Brexit. For example, the Council Regulation establishing the fishing opportunities for anchovy in the Bay of Biscay for the 2012/13 fishing season⁴² is included on the list because it is both outdated and also irrelevant to the UK.

Given the Government backtrack on the way in which retained EU law is to be removed, the approach taken so far appears to one of cleaning the house of unnecessary clutter rather than burning it down entirely. At the time of writing, the Government has *not yet* trashed any meaningful protection that was introduced by the EU. However, one of the first major threats to retained EU environmental law is on the horizon with the Levelling-up and Regeneration Bill which, if enacted,⁴³ will lead to the replacement of Environmental Impact Assessment (EIA) and Strategic Environmental Assessment (SEA) with new procedure called Environmental Outcome Reports (EORs). EIA is one of the hallmarks of EU environmental protection, boasting a long history after its introduction in 1985. In its most basic form, EIA requires a developer to assess and consult upon the negative environmental impacts of their proposed development before development consent is awarded. It has been regarded by some as a barrier to development, and can lead to a costly and lengthy procedure which needs to be followed by developers. The public consultation element of EIA has also been criticised at both ends of the spectrum from those who feel that it is merely a ‘tick box exercise’ which needs to be improved, through to those who believe that it is an unnecessary exercise which allows unqualified NIMBYs to have a say in planning matters. However, regardless of the respective praise and criticism that has been levelled against EIA, it is fair to say that the process has formed a solid basis for environmental assessment in UK planning law for many years. The EIA process has led to the realisation of a multitude of environmental impacts that may otherwise have gone undetected and has resulted in both the rejection of developments which would have a significant impact the environment, and the introduction of mitigation methods for other developments.

Despite the solid foundation that EIA and SEA has established in EU law over the years, it seems that they are soon to be replaced in the UK by a new procedure called Environmental Outcome Reports. Part 6 of the Levelling-up and Regeneration Bill provides the power to produce secondary legislation to introduce EORs in order to replace the current EIA and SEA processes. At this stage, it is difficult to definitively argue whether the introduction of EORs would reduce environmental protection that is currently in place from EIA and SEA as so much of the finer detail is yet to be produced in secondary legislation. However, a wide array of environmental groups have argued that the move could be highly damaging to environmental protection. Particular dissatisfaction has been shown towards the fact that, if enacted, the Bill would provide the Secretary of State with so-called ‘Henry VIII’ powers which would allow them to amend or repeal provisions of an Act of Parliament using secondary legislation. This

⁴² Council Regulation (EU) No 394/2012 of 27 July 2012 establishing the fishing opportunities for anchovy in the Bay of Biscay for the 2012/13 fishing season [2012] OJ L 203/26.

⁴³ Levelling-up and Regeneration Bill (2022-23) 142. It is looking likely that the Bill will be enacted as it is currently at the Report Stage in the House of Lords.

is highly controversial because it leads to the potential threat that any environmental law could be removed without having to seek the approval of Parliament.⁴⁴

It is important to note that a non-regression clause has been included in the Bill in s 147(1) which states that ‘the Secretary of State may make EOR regulations only if satisfied that making the regulations will not result in environmental law providing an overall level of environmental protection that is less than that provided by environmental law at the time this Act is passed’.⁴⁵ However, in their written response to the EOR proposals in the Bill, the OEP have shared their concern regarding the non-regression clause and its limiting nature. The OEP argue that the clause is based on not making environmental protection any worse, however ideally a major legislative reform of this nature should be aiming to improve environmental protection from the status quo.⁴⁶ In addition to the concern regarding the limited ambition of the proposed legislation, the OEP have also expressed their concern regarding the potential implications on the Habitats Regulations.⁴⁷ The OEP note that whilst the Government have expressly stated that it is not their intention to replace the Habitats Regulation Assessment,⁴⁸ the Bill contradicts this intention by providing powers which would allow for this to happen.⁴⁹ Under clause 154 of the Bill, ‘EOR regulations...may... include provision... disapplying or otherwise modifying any provision of existing environmental assessment legislation or the Habitats Regulations where preparation of an environmental outcomes report is required under this Part’.⁵⁰

In addition to the concerns that have been expressed with respect to the potential reduction in environmental protection, there are also fears that the proposed powers in the Levelling-up and Regeneration Bill could also have an unwanted impact on the devolved nations in the UK. The Henry VIII powers in the Bill mean that, through the use of secondary legislation, it is possible to not only alter the environmental impact assessment processes currently in place in England, but also those in the devolved nations in Wales, Scotland and Northern Ireland. Under Clause 143, regulations made by the Secretary of State relating to Environmental Outcome Reports ‘may specify outcomes relating to environmental protection in the United Kingdom’.⁵¹ Whilst it is noted under Clause 148 that the Secretary of State may only make EOR regulations containing provisions relating to Scottish, Welsh and Northern Ireland devolved competence *after* consulting with the Scottish Ministers, Welsh Ministers and a Northern Ireland

⁴⁴ ‘Better Planning Coalition – Briefing for the Commons Second Reading of the Levelling Up and Regeneration Bill’ (*Wildlife and Countryside Link*, 1 June 2022) <<https://www.wcl.org.uk/docs/Better%20Planning%20Coalition%20briefing%20for%20the%20Commons%20second%20reading%20of%20the%20Levelling%20Up%20and%20Regeneration%20Bill.pdf>> accessed 19 July 2023.

⁴⁵ Levelling-up and Regeneration Bill (2022-23) 142, cl 147(1).

⁴⁶ ‘OEP Written Evidence to the Levelling Up and Regeneration Bill Committee’ (*Office for Environmental Protection*, 8 September 2022) <<https://www.theoep.org.uk/report/oep-written-evidence-levelling-and-regeneration-bill-committee>> accessed 19 July 2023, paras 5.4-5.7.

⁴⁷ *ibid* s 6.

⁴⁸ *ibid* para 6.1.

⁴⁹ Clause 127 is now found in Clause 154 of the latest reading of the Bill, Levelling-up and Regeneration Bill (2022-23) 142.

⁵⁰ Levelling-up and Regeneration Bill (2022-23) 142 cl 154.

⁵¹ Levelling-up and Regeneration Bill (2022-23) 142 cl 143.

department respectively, it is important to note that the obligation is only one of consultation rather than agreement. The extent to which these powers would be used to alter environmental assessment in the devolved nations is not yet clear, however under Clause 157 of the Bill, ‘existing environmental assessment legislation’ does not include EIA law that applies to Wales, Scotland or Northern Ireland, thus suggesting that it is not the intention of the Government to replace EIA in the devolved nations. This, however, has not prevented concern from being voiced surrounding the level of power that a UK Minister will be given over devolved matters.⁵²

The Government’s plans to replace the long-standing procedures of EIA and SEA demonstrates that no environmental protection derived from the EU is safe from amendment, replacement or removal. Whilst there is a degree of protection provided under the EU-UK Trade and Cooperation Agreement stating that the UK will not weaken or reduce its environmental levels of protection or climate level of protection below the levels that were in place at the end of the transition period, this only applies to actions that affect trade or investment between the UK and the EU. It is also noted in the Levelling-up and Regeneration Bill that the Secretary of State is under an obligation not to *weaken* environmental protection, however this is arguably a standard that is very difficult to measure, and noticeably one whereby the Secretary of State is not obligated to *improve* environmental protection. Whilst it still remains too early to judge the impact of Brexit on environmental laws in the UK, the Government has shown that it is unafraid of replacing long-standing environmental protection laws. Only time will tell whether these bold replacement actions will improve or harm environmental protection.

5. Conclusions

The question of whether environmental protection has been improved upon or weakened since Brexit remains unanswerable. The UK was part of the European Union for 47 years during which time, countless laws were passed and transposed into UK law. The vast majority of environmental law in the UK passed during this time originated from the EU. Therefore, it’s going to take a lot longer than three years for the devolved nations of the UK to forge their own independent path to environmental protection. The rhetoric from Government has been extremely promising throughout – with claims that we will be the first generation to leave the environment in a better state than that in which we inherited it, and that Brexit is the ultimate opportunity for the UK to improve upon the standards of environmental protection that were in place during its membership of the EU. However, some of the actions that have taken place post-Brexit suggest a failure to live up to these promises. The transposition of environmental principles leaves one with the feeling that the “bare minimum” has been done – a far cry from improving upon the standards that were in place during membership of the EU. The retention of EU laws is also an area for continued concern. The Government’s initial proposal to retire all retained EU law by the end of 2023 except for a designated list of “safe” law demonstrates

⁵² ‘Levelling Up Bill and Impact on Devolved Environmental Protections’ (*Scottish Environment LINK*, August 2022) <<https://www.scotlink.org/wp-content/uploads/2022/08/Levelling-Up-Bill-Briefing-FINAL.pdf>> accessed 19 July 2023; ‘Better Planning Coalition – Briefing for the Commons Second Reading of the Levelling Up and Regeneration Bill’ (n 44).

either a total disregard for the important environmental protection that retained EU environmental law is currently providing, or a gross underestimation of just how long it would take to assess the list of 4,000 laws. Whilst the Government has scaled back from its original position and will only retire outdated and irrelevant laws by the end of the year, the proposed replacement of EIA and SEA represents the slaying of the first EU giant of environmental protection. Given that the proposed Bill also provides powers to alter and amend the Habitats Regulation Assessment, one of the landmark and arguably most successful pieces of nature conservation law that the UK has in existence, the fears of a bleak future for environmental protection do not seem unfounded.

One very bright glimmer of light at the end of the tunnel, however, can be seen with the foundation of the Office for Environmental Protection. Once again, the true test of the efficacy of the OEP in improving environmental protection will only come with time, however the OEP has had a fantastic first year of providing independent advice on proposed environmental reform from Government. It certainly has its work cut out over the next few years while the Government works to make its mark on creating its own environmental protection laws.

Over ten years have passed since the then Prime Minister David Cameron announced that he would offer the UK people a choice on whether to remain in the European Union. The time that has since followed has been incredibly divisive, with extremely strong-held views on both sides of the leave/remain debate. But the war, global pandemic and cost-of-living crisis have all put Brexit in the background. This could be an ideal time for the Government to use their newly returned powers to quietly reduce environmental protection in the name of economic improvement. With the next election in the UK due by no later than the 28th January 2025, politicians are continually vying to find the issue of greatest interest to voters. Currently, one of the greatest issues on the public's mind is the cost-of-living crisis and what actions politicians are taking on this. This has led to the Prime Minister recently stating that reaching the UK's net-zero targets should not 'unnecessarily give people more hassle and more costs in their lives'.⁵³ Those who are following the developments in environmental protection in the UK will continue to have their work cut out in the lead-up to the next election as it seems that no cards are off the table for legal reform now that the UK is no longer restrained by the European Commission.

⁵³ Pippa Crerar, Helena Horton, 'Rishi Sunak signals he could abandon green policies that cost consumers' (*The Guardian*, 24 July 2023) <<https://www.theguardian.com/politics/2023/jul/24/rishi-sunak-suggests-delay-or-abandon-green-net-zero-pledges>> accessed 25 July 2023.